

IN THE INCOME TAX APPELLATE TRIBUNAL  
Mumbai "A" Bench, Mumbai.

Before Shri B.R. Baskaran (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 2330/Mum/2022 (A.Y. 2007-08)  
I.T.A. No. 2619/Mum/2018 (A.Y. 2008-09)  
I.T.A. No. 2620/Mum/2018 (A.Y. 2009-10)  
I.T.A. No. 2621/Mum/2018 (A.Y. 2010-11)  
I.T.A. No. 2622/Mum/2018 (A.Y. 2011-12)  
I.T.A. No. 1329/Mum/2022 (A.Y. 2012-13)

AJR Infra and Tolling Limited Vs. DCIT, CC-7(2) (Formerly Gammon Infrastructure Projects Ltd.) 3 <sup>rd</sup> Floor, Plot No. 3/8 Hamilton House, J.N. Heradia Marg, Ballard Estate, Mumbai-400 038.  PAN : AABCG8641H (Appellant)	Room No. 655 6 <sup>th</sup> Floor Aayakar Bhavan M.K. Road Mumbai-40 020.  (Respondent)
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Assessee by	Shri F.V. Irani & Shri Madhur Agrawal
Department by	Shri Manoj Kumar Sinha
Date of Hearing	01.11.2023
Date of Pronouncement	31.01.2024

ORDER

Per B.R.Baskaran (AM) :-

The assessee has filed these appeals challenging the orders passed by Ld CIT(A) for assessment years 2007-08 to 2012-13. Since the issue urged in all these appeals are identical in nature, these appeals were heard together and are being disposed of by this common order, for the sake of convenience.

2. The only issue agitated in all these appeals related to the eligibility of the assessee to claim deduction u/s 80IA of the Act. Since both the tax authorities have held that the assessee is not eligible for deduction u/s 80IA

of the Act, the assessee has filed these appeals for the years mentioned above.

3. The facts relating to the case are stated in brief. The assessee was earlier known as M/s Gammon Infrastructure Projects Ltd. It belongs to Gammon India group. In all these years, the assessee has provided Project Advisory Services to the following three companies:-

- (a) Mumbai Nasik Expressway Ltd
- (b) Kosi Bridge Infrastructure Company Ltd
- (c) Gorakhpur Infrastructure Company Ltd

The assessee claimed deduction u/s 80IA of the Act in respect of fees received by it from the above said three companies.

4. The above said three companies are Special Purpose Vehicles (SPV) formed to execute the contract obtained from National Highways Authority of India Ltd (NHAI). The assessee has explained as to how the above said three SPVs came into existence as under:-

**(a) Mumbai Nasik Expressway Ltd:-**

The above said company was formed by M/s Gammon India Ltd, Sadbhav Engineering Ltd and B E Billimoria & Company Ltd. These three companies have formed consortium in order to bid the tender of a project floated by NHAI, viz., Improvement, Operation and Maintenance, Rehabilitation and Strengthening of existing two lane road and widening it to 4 lane divided Highway of Vadape to Gonde section of National Highway 3 (NH3) from 539.500 to 440.000 in the State of Maharashtra on Build, Operate and Transfer (BOT) basis. The consortium was awarded the project and it also submitted its Letter of Acceptance (LOA) to NHAI. Thereafter, in order to execute the project, the consortium formed this SPV, which actually executed the project. The assessee herein has provided Project Advisory Services to this SPV and has received fees.

**(b) Kosi Bridge Infrastructure Company Ltd:-**

M/s Gammon India Ltd and the assessee herein formed consortium. The contract consisted of implementing a project envisaging Design, construction, finance, operation and maintenance of 4 lane Bridge across river Kosi including its approaches and Guide Bund & Afflux Bund from Km 155.00 to 165.00 on NH 57 in the State of Bihar on Annuity basis. This SPV was formed as 100% subsidiary of the assessee herein. Further, it is pertinent to note that the assessee herein is subsidiary of M/s Gammon India Ltd. The assessee herein has provided Project Advisory Services to this SPV and has received fees.

**(c) Gorakhpur Infrastructure Company Ltd:-**

M/s Gammon India Ltd, the assessee herein and M/s Associated Transrail Structures Ltd formed consortium. The contract consisted of design, construction, finance, operation and maintenance Km 0.00 to Km 32.27 of Gorakhpur Bypass on NH-28 in the State of Uttar Pradesh on Annuity basis. The assessee herein holds 51% share and M/s Gammon India Ltd holds 39%.

As noticed earlier, the assessee herein has claimed deduction u/s 80IA of the Act in respect of income received on the project advisory services provided by it to the three SPVs mentioned above.

5. For the sake of convenience, we extract below relevant portion of the provisions of sec.80IA:-

“(4) This section applies to—

(i) any **enterprise** carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfils all the following conditions, namely :—

(a) it is owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;

(b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;

(c) it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995”

A perusal of the above said provisions would show that the deduction u/s 80IA is allowed to an “enterprise” carrying on the business of developing etc of “infrastructure facility”. The conditions prescribed in this regard are that:-

(a) the “enterprise” is owned by an Indian company or other forms of organization mentioned in clause (a) above.

(b) the “enterprise” has entered into an agreement with the Government mentioned in clause (b) above.

(c) the “enterprise” has started or starts operating and maintaining the infrastructure facility on or after 1<sup>st</sup> day of April, 1995...

In the instant case, the “enterprise” is the three SPVs mentioned above, since the said SPVs

(a) are owned by the Indian Companies

(b) have entered into an agreement with NHAI, being a statutory body of the Government.

(c) the operations have been started after 1<sup>st</sup> day of April, 1995.

Hence the three SPVs are the “enterprises”, which are mentioned in sec. 80IA(4) of the Act.

6. However, the assessee herein has claimed deduction u/s 80IA of the Act in respect of net Project advisory fees received by it from the above said

Special Purpose Vehicles on the plea that the SPVs are its subsidiary companies and the term “enterprise would include subsidiary companies also. Accordingly, it was contended that the conditions prescribed in sec. 80IA(4) are satisfied as under:-

- (a) The three SPVs are subsidiary companies of assessee herein, meaning thereby, the first condition that the “enterprise” should be owned by Indian Companies stands fulfilled.
- (b) The SPVs are the “enterprises” of the consortium, which have entered into agreement with NHAI. Hence the second condition is also fulfilled.
- (c) Since the project has been commenced after 1<sup>st</sup> day of April, 1995, the third condition also would get fulfilled.

In addition to the above, the assessee, by placing reliance on the decision rendered by Hon’ble Supreme Court in the case of Bajaj Tempo Ltd (196 ITR 188)(SC), also contended that the incentive provisions should be interpreted liberally.

7. The AO did not accept the above said contentions of the assessee. The AO noticed that the Concession agreement has been entered by SPVs with NHAI. The assessee is only remotely connected with the project, i.e., it has provided advisory services to the SPVs. The AO held that the decision rendered in the case of Bajaj Tempo Ltd is not applicable, since the assessee is not developing or maintaining the infrastructure facility and it is only the SPVs which have entered into the Contract and were executing the projects. The AO also held that other decisions relied upon by the assessee before him are not applicable to the facts of the present case. He held that the assessee has only been awarded works contract by the main contractor, being SPVs mentioned above. He also referred to the following Explanation inserted in Section 80IA with retrospective effect from 01-04-2000:-

*“Explanation.—For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub-section (1).”*

Accordingly, the AO held that the assessee is not eligible for deduction u/s 80IA of the Act in respect of project fees received from the SPVs in all the years under consideration.

8. The Ld CIT(A), in principle, upheld the order passed by the AO. In addition to the above, the Ld CIT(A) also noticed that the most of the work has been completed in the earlier years and the assessee has not furnished proof to show that it has executed works mentioned under the “Scope of work” and accordingly, held that the assessee is not eligible for deduction u/s 80IA of the Act in all the years under consideration.

9. We heard the rival contentions and perused the record. The Ld A.R submitted that the assessee along with its consortium members was awarded the work of development of infrastructure facility. In order to execute the Concession Agreement with NHAI, a Special Purpose Vehicle was formed. The work of development of infrastructure facility was divided and allocated to the various consortium members. Accordingly, it was contended that the SPV is only an ‘enterprise’ or ‘undertaking’ of the assessee. Accordingly, the Ld A.R contended that the income received by the assessee from its undertaking is eligible for deduction u/s 80IA of the Act.

10. Thus we notice that the case of the assessee herein flows from the contention that the “Special Purpose Vehicles” are the “enterprise” or the “undertaking” of the assessee herein and hence it is eligible for the deduction u/s 80IA of the Act in respect of the service fee received by it from SPVs. As noticed earlier, the work relating to infrastructure facility has been awarded to the SPVs by the NHAI. The said work was divided and all the consortium

members have been, in turn, awarded work by the SPV. For example, it is stated that, in the case of Kosi bridge construction work, the project advisory services were awarded to the assessee herein. The engineering and construction work was awarded to the other member of Consortium, viz., M/s Gammon India Ltd. It was also submitted that the assessee herein will raise invoices on the SPV in respect of project advice given by it to the SPVs at “cost plus its mark up”.

11. However, a perusal of the provisions of sec.80IA(4) would show that the “Enterprise”, which is executing the infrastructure facility is eligible for the deduction u/s 80IA of the Act subject to the condition that

(a) the said enterprise is owned by an Indian company or other forms of organization mentioned in sec. 80IA(4)(i)(a) of the Act.

(b) the said enterprise has entered into an agreement with Government or other statutory body mentioned in sec. 80IA(4)(i)(b) of the Act and

(c) the said enterprise has started its operation on or after 1<sup>st</sup> day of April, 1995.

The “enterprise” contemplated under sec. 80IA(4), in our view, refers to the division or department or concern exclusively owned by the assessee as its owner and not as holding company. The profit/loss of ‘Enterprise’ shall be reflected in the profit and loss account of the assessee. We notice that the Special Purpose Vehicles have been formed as separate companies under the Companies Act. Hence SPVs are distinct and separate legal person under the eyes of law. There should not be any dispute that the holding companies and subsidiary companies are separate from each other. The profit/loss of subsidiary companies will not be reflected in profit and loss account of Holding company for Income Tax purposes. Hence the SPVs cannot be considered to be an enterprise owned by the assessee.

12. In the instant cases, in our view, the three Special Purpose Vehicles are the “enterprises” which actually satisfy the conditions mentioned in sec.

80IA(4) of the Act and hence only those SPVs may be eligible for deduction u/s 80IA(4) of the Act. We observe so because, it is the Special Purpose vehicles, which have entered agreement with NHAI and also raising invoices upon the NHAI. Hence, in the eyes of law, it is the SPVs which are actually executing the work of development and operation of infrastructure facility. We noticed earlier that the SPVs have divided entire work of execution of infrastructure facility and each of the said work have been allocated to members of the consortium. That's how the assessee has been allotted project advisory work. In addition to the assessee, other consortium members have also executed the part of the work allocated to them. It was stated that the assessee has raised invoices upon the SPVs by including its mark-up over the costs incurred by it. That is how the assessee has earned income on the work executed by it for the SPVs. This fact also shows that the assessee has also recognised the SPVs as separate legal entity and not its own enterprise/undertaking. Further, all the Special Purpose Vehicles are filing their return of income separately. If the enterprise is owned by the assessee, the income earned by the enterprise would be credited to the profit and loss account of the assessee, which is not the case here. The members of consortium are also charging the SPVs at more than the cost incurred by them and thus making their own profits. Under these set of facts, we are of the view that the SPVs cannot be considered as an undertaking or enterprise owned by the assessee. Hence, we are of the view that the AO was right in holding that the assessee has only executed a works contract allotted to it by the SPVs. There should not be any dispute that the deduction u/s 80IA is not available to the persons executing works contract.

13. Before us, the Ld A.R placed reliance on following case laws in support his contentions. In our view they are distinguishable:-

(a) CIT vs. ITC Ltd (2022)(142 taxmann.com 177)(Cal). It is a case where it was held that the deduction u/s 80IA cannot be denied merely



for the reason that the power generated by the undertaking was consumed by the assessee in its entirety.

(b) ACIT vs. Ho Hup Simplex JV (2018)(92 taxmann.com 106)(Kol – Trib). The question in this case was whether the assessee was a developer or mere works contractor. The moot point in this case was that it was the assessee who was awarded contract for construction of Road.

(c) Transstory (India) Ltd vs. ITO (2011)(16 taxmann.com 24)(Visakha). In this case, the Joint Venture Company was acting only as façade. The work was executed by the Joint venture partners. The revenue received by the JV was transferred to the partners on back to back basis, i.e., the Joint Venture Company was acting as a paper entity.

(d) TRG Industries P Ltd vs. DCIT (2013)(35 taxmann.com 253)(Amritsar – Trib.); Bhinmal Contractors Property and Land Developers (P) Ltd vs. ACIT (2018)(93 taxmann.com 296)(Mum – Trib) and M/s Akash Infra Projects P Ltd vs. ITO (ITA No. 2826/Ahd/2007 dated 22-06-2022). In these cases, the issue was whether the assessee was a developer or mere works contractor. We notice that the issue has been decided on the basis of facts available in this case. The Ld A.R has relied upon this decision on the point that financial investment is one of the criteria to categorise an assessee as developer. However, the financial investment is only one of the criteria, but cannot be the only criteria.

(e) ACIT vs. Kunal Printers Ltd (2005)( 2 SOT 414). In this case, the distinction between the expression “Profits and gains derived from any business of an industrial undertaking” and “profit derived from industrial undertaking” has been discussed.

(f) CIT vs. Chanda Diesels (1994)(75 Taxman 428)(Bom). In this case, the assessee has purchased machinery for manufacturing fuel injection pipes for diesel engines. The question was whether the said purchase of machinery would amount to industrial undertaking or not. Thus it was totally different issue.

(g) ITO vs. Oricon (P) Ltd (1990)(32 ITD 645)(Bom). In this case, it was observed that the 'industrial undertaking' have not been defined under the Act. It was held that it would mean a venture or an enterprise carrying on some activities which had some relation to some industrial activity. This decision only lays down the criteria to understand the meaning of an industrial undertaking.

In our view, none of the above said case laws would support the case of the assessee.

14. In view of the foregoing discussions, we are of the view that the Ld CIT(A) was justified in affirming the decision of the AO in rejecting the claim for deduction u/s 80IA of the Act.

15. In the result, all the appeals filed by the assessee are dismissed.

Order pronounced on 31.1.2024.

Sd/-  
(Pavan Kumar Gadale)  
Judicial Member

Sd/-  
(B.R. Baskaran)  
Accountant Member

Mumbai.; Dated : 31/01/2024

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT

5. DR, ITAT, Mumbai.
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BY ORDER,  
(Assistant Registrar)  
ITAT, Mumbai

