



The benefit of section 80-IA(4), available to an entity engaged in developing/operating/maintaining infrastructure facilities, can be denied to a contractor due to retrospective amendment, however, it can not be denied to a developer.

It is not required that the developer should also ‘operate and maintain’ the infrastructure facility.

Background

The Jaipur Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Om Metals Infraprojects Ltd, (OMIL or the taxpayer), held that the benefit of section 80-IA(4) of the Income-tax Act, 1961 (the Act), available to an entity engaged in developing/operating/maintaining infrastructure facilities, can be denied to a contractor due to the retrospective amendment by the Finance Act 2007 [with retrospective effect from (w.r.e.f.) 1 April 2000]. However, it can not be denied to a developer.

Further it is not required that the developer should also ‘operate and maintain’ the infrastructure facility.

The Tribunal observed that the Explanation to section 80-IA(4) of the Act inserted by the Finance Act 2007 (w.r.e.f 1 April 2000) provides that section 80-IA shall not apply to a person executing a works contract. However, OMIL was not a mere ‘contractor’. The term ‘developer’ means a person who makes things happen and as the taxpayer was mobilising and synthesising people, plans, technical expertise, supervision, co-ordination and control etc, it would be regarded as the developer.

Facts of the case

- OMIL, an Indian company, was engaged in manufacturing of dam gates, radial gates, stop lock, etc.

- OMIL entered into an agreement with Vidharbha Irrigation Development Corporation, a Government of Maharashtra Undertaking, for supply, erection, installation of dam gates at Goshi Khurd Project.
- OMIL had claimed deduction under section 80-IA(4) of the Act, in respect of profit earned from the Goshi Khurd project for the financial year 2002-03 and 2003-04, and the same was accepted by the Assessing Officer (AO).
- The Commissioner of Income-tax (CIT) was of a different opinion that as per the provisions of the Act, the enterprises or undertaking carrying on the business of developing the infrastructure facility was eligible for deduction of profits earned from operating and maintaining the infrastructure facility. Whereas profits earned from developing the infrastructure facility was not eligible for deduction under section 80-IA(4) of the Act.
- CIT also observed that Explanation to section 80-IA(4) inserted by the Finance Act 2007 w.r.e.f 1 April 2000 provided that deduction under section 80-IA(4) shall not apply to a person who enters into a works contract with the undertaking or the enterprises.
- CIT held that OMIL is not a developer but a contractor and set aside the order passed by AO under section 263 of the Act and directed the AO to pass a fresh order in the light of the retrospective amendment brought into the act by Finance Act, 2007 which was not available to AO at the time of passing of the order under section 143(3) of the Act.

Issue raised before the Tribunal

- Whether the order passed by AO was erroneous and prejudicial to the interest of revenue and CIT was justified in setting aside the order for fresh assessment?

Tribunal's ruling

- The Tribunal observed that 'developer' means a person who makes the things happen. It was the taxpayer in the present case who was mobilising and synthesising people, plans, technical expertise, supervision, co-ordinating and control, etc. to develop and create the infrastructure facility and Vidharbha Irrigation Development Corporation is merely the sponsor of the project.
- The term 'contractor' is not essentially contradictory to the term 'developer'. On the other hand, Section 80-IA(4) provides that the taxpayer should develop the infrastructure facility as per the agreement with the Central Government, State Government or a local authority. Explanation inserted vide Finance Act, 2007 merely aims at denying deduction to the sub-contractor who executes a works contract with the enterprise.
- The Tribunal held that merely because, in the development agreement for development of infrastructure facility, OMIL was

referred to as contractor or because some basic specifications are laid down, it does not detract the taxpayer from the position of being a developer, nor will it debar the taxpayer from claiming deduction under section 80-IA(4) of the Act.

- In an earlier judicial precedent¹ relied on by the taxpayer, the Tribunal had rejected the contention of the revenue that the developer was not the taxpayer but the Government of Maharashtra and APSEB.
- The insertion of word 'OR' in between 'developing', 'operating and maintaining' and 'developing, operating and maintaining' suggests that a person developing an infrastructure facility to be maintained by the government is also eligible for deduction under section 80-IA(4) of the Act.
- In view of above, the Tribunal held that the assessment orders were neither erroneous nor prejudicial to the interest of the revenue; hence CIT was not justified in setting aside the order.

Our comments

- The decision of the Tribunal upheld the position that the Explanation to section 80-IA(4) introduced with retrospective effect does not apply to a works contract entered into by the Government and the enterprise. It applies to a work contract entered into between the Government / Enterprise and other party's 'sub-contractor'. The amendment merely aims at denying deduction to the sub-contractor who executes a works contract with the enterprise.
- Further it was held that - it is not required that the developer should also 'operate and maintain' the infrastructure facility so as to be eligible for deduction.
- This decision will certainly help the taxpayers who have been denied the benefit of deduction under section 80-IA(4) of the Act on the similar facts.

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¹ Patel Engineering Co. v. ACIT 84 TTJ 646 (Mumbai)

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