IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.02.2021

CORAM :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Ms.Justice R.N.MANJULA

Tax Case Appeal No.654 of 2019
and
C.M.P.No.24830 of 2019

M/s.L&T Chennai-Tada Tollway Limited,
Post Box No.979, TCTC Building,
1st Floor, Mount Poonamallee Road,
Manapakkam,
Chennai - 600089. ...Appellant

Vs

The Income Tax Officer,
Corporate Ward 4(4),
Chennai. ...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 29.03.2019 made in ITA.No.1790/Chny/2017 on the file of the Income Tax Appellate Tribunal, 'D' Bench, Chennai for the assessment year 2014-15, and Appeal against O/o. Commissioner of Income Tax(Appeals)-8 Room No..222, Aayakar Bhavan, Main Building II Floor, Mahatma Gandhi Road, Nungambakkam, Chennai-34 and made in ITA.No.273/16-17 order dated 23/5/2017, and against O/oIncome Tax Officer, Corporate ward-4(4), Chennai Room No.428, 4th floor, Main Building, Aayakar Bhavan, No.121, Mahatma Gandhi Road, Nungambakkam, Chennai-34, and made in PAN/GIR No.AABCL4774G order dated 30/12/2016 for the Assessment Year 2014-15.

For Appellant: Mr.Srinath Sridevan

For Respondent: Mr.Karthik Ranganathan, SSC
assisted by
Mr.S.Rajesh, JSC

JUDGMENT
(Delivered by T.S.Sivagnanam,J)

This appeal, filed by the assessee under Section 260A of the Income Tax Act, 1961 ('the Act' for brevity) is directed against the order dated 29.03.2019 made in ITA.No.1790/Chny/2017 on the file of the Income Tax Appellate Tribunal, 'D' Bench, Chennai ('the Tribunal' for brevity) for the assessment year 2014-15.

2. The appeal was admitted on 27.11.2019 on the following substantial questions of law:

> "(i) Whether on facts and circumstances of the case, the Tribunal is correct in rejecting the claim under Section 80IA of the Act on the ground never urged or argued before the authorities below?
>
> (ii) Without prejudice, based on the material available on record, has the Tribunal erred in stating that the Appellant has not carried on operation and maintenance activities?
>
> (iii) Whether the Audit Report in Form 10 CCB cannot be filed at the time of the Assessment Proceedings?
>
> (iv) Whether on a correct construction of Clause 12.2 of the Concession Agreement dt 3 June 2008 between NHAI and the Appellant, the tolls collected during 'under construction' phase and deployed in accordance thereafter are not monies expended on construction of infrastructural facilities as envisaged in Section 80IA of the Act?"

3. Before we proceed to consider the matter on merits, after hearing the learned counsel for the parties for a considerable length of time, we find that the substantial question of law (iii), as framed above, does not arise for consideration in this appeal, as the Tribunal, in the impugned order, has not dealt with the issue nor raised by the Revenue before the Tribunal. Therefore, we delete the same from the array of questions for consideration and accordingly re-frame the questions on the following terms:

> "(i) Whether on facts and circumstances of the case, the Tribunal is correct in rejecting the claim under Section 80IA of the Act on the ground never urged or argued before the authorities below?
>
> (ii) Without prejudice, based on the material available on record, has the Tribunal erred in stating that the Appellant has not carried on operation and maintenance activities?
>
> (iii) Whether on a correct

construction of Clause 12.2 of the Concession Agreement dt 3 June 2008 between NHAI and the Appellant, the tolls collected during 'under construction' phase and deployed in accordance thereafter are not monies expended on construction of infrastructural facilities as envisaged in Section 80IA of the Act?"

4. We have heard Mr.Srinath Sridevan, learned counsel for the appellant and Mr.Karthik Ranganathan, learned Senior Standing Counsel, assisted by Mr.S.Rajesh, learned Junior Standing Counsel appearing for the respondent/Department.

5. The appellant-assessee is a subsidiary of L&T Infrastructure Development Projects Limited incorporated in 2008. The assessee was awarded the contract, which is termed as a Concession Contract in respect of Six-laning of Chennai-Tada Section on NH-5 from KM 11.00 to KM 54.40 (Length of 43.40 KM) in the State of Tamil Nadu to be executed as Build, Operate and Transfer-BOT (TOLL) on DBFO Pattern under NHDP Phase-V.

6. The National Highways Authority of India (NHAI) entered into an agreement with the assessee dated 03.06.2008 titled as Concession Agreement. This agreement contains various clauses under various chapters and we may refer to a few of the clauses under Part-2 of the agreement, 'The Concession', Construction of the Project Highway, etc. The assessee filed its return of income admitting the total income as 'NIL'.

7. In this appeal, we are concerned with the claim of deduction made by the assessee under Section 80IA of the Act. The Assessing Officer rejected the claim made by the assessee on the ground that Form No.10CCB, which is an audit report duly signed and verified by the Chartered Accountant, was not filed along with the return of income.

8. It is not in dispute that the said form was filed during the course of the assessment proceedings i.e., before the assessment was finalized. Aggrieved by the same and as well as by other findings rendered by the Assessing Officer, the assessee was on appeal before the Commissioner of Income Tax (Appeals)-8, Chennai [CIT(A)].

9. The contentions advanced by the assessee as well as the Revenue was considered and the CIT(A) opined that it is an undisputed fact that the assessee had filed Form No.10CCB in the course of assessment proceedings and by applying the decision of the Hon'ble Supreme Court in G.M.Knitting Industries (P.) Ltd. [reported in 376 ITR 476 (SC)], allowed the assessee's appeal. The Revenue raised a plea by placing reliance on the CBDT

Notification No. S.O.1513(E) dated 11.6.2013, where under the Income Tax Rules was amended with effect from 01.04.2013 and the filing of the statutory form was made mandatory. The CIT(A) considered the said argument of the Revenue and held that though the rule has been amended and filing of such form along with the return of income was made mandatory, held that violation of the said rule would not take away the substantive right of the assessee in claiming a deduction under Section 80IA. Ultimately, the appeal stood allowed on the above ground in favour of the assessee. The CIT(A) also opined that, at best, it can be only a procedural formality and cannot deny the substantive right of the assessee. The Revenue was on appeal before the Tribunal.

10. From the impugned order, more particularly in paragraph 3, wherein the Tribunal has extracted the grounds of appeal raised by the Revenue having set out, the Revenue was largely aggrieved on account of non-fulfillment of the mandate under Rule 12(2) of the amended Income Tax Rules.

11. We find from the impugned order that the Tribunal did not go into the said issue, but though fit to proceed on the basis that the assessee Company has not derived any profits from the activities of developing or operating and maintaining any infrastructure facilities. The correctness of this question is called in before us.

12. Firstly, we may note that though the Revenue had raised the issue regarding the mandate under Rule 12(2) of the Income Tax Rules before the Tribunal, the Tribunal did not take a decision on the same. Nevertheless, there are long line of decisions which hold that a substantive right cannot be denied or taken away by virtue of a rule which is only a machinery provision. In any event, the benefit granted under Section 80IA is a special benefit bearing in mind that industrial undertakings would undertake infrastructural projects. In the case on hand, the claim made by the assessee was under Section 80IA(4), by executing a project with the Government of India Organization. Therefore, we are of the view that the CIT(A) was right in rejecting such a plea raised by the Revenue.

13. As mentioned above, the Tribunal did not go into the question as to the effect of the mandate under Rule 12(2), but proceeded to hold that the assessee Company has not derived any profits from the activities of developing or operating and maintaining any infrastructure facilities.

14. Firstly, we need to mention that there are absolutely no examination of the factual position in the case on hand. The Tribunal did not go through the Concession Agreement based on which the assessee Company had been granted the development work.

15. Furthermore, Section 80IA(4) would apply to any enterprise carrying on business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfills all the conditions, which are set out in clause (a), (b) and (c), to be read along with the provisos thereunder.

16. The important aspect to be taken note of is the use of the expression 'or'. Therefore, an enterprise, carrying on the business of developing or operating and maintaining or developing, operating and maintaining any infrastructure facility, which fulfills the conditions set out under Sub-section 4, will be entitled to claim deduction. Therefore, the Tribunal, failed to make any endeavour as to whether the assessee was entitled to claim deduction under any one of the these heads, made a sweeping observation that the assessee has not derived any profits from the activities of developing or operating and maintaining any infrastructure facilities.

17. It is the submission of the learned Senior Standing Counsel appearing for the Revenue that the Concession Agreement pertain to formation of the fifth and sixth lane adjoining the existing four lane road, which was developed and was hither to maintain by NHAI and the assessee at no point of time made any development to the four lane road, which was already in existence. Therefore, her submission that whatever was the income earned by the assessee, for the purpose of developing and maintaining the fifth and sixth lane, probably the assessee may be entitled to make a claim for deduction and not for the entire toll road.

18. In our considered view, this was never the case of the Revenue at any point of time i.e., before the Assessing Officer or before the CIT(A) or before the Tribunal. That apart, we also find that the scope of the Concession Agreement as set out in Article 12 of the Concession Agreement would be very relevant, more particularly Clause 12.2, which mandates that the assessee shall maintain, at its cost, the existing lanes of the project. Therefore, to state that the existing four lanes would not fall within any one of the clauses under Sub-section 4 of 80IA is factually incorrect, as the assessee develops the fifth and sixth lane and would also operate and maintain the same and so far as the existing lanes, namely 1 to 4, in terms of the Concession Agreement, the assessee has to operate and maintain the same, so that the traffic worthiness and safety are at no time materially inferior as compared to its existing condition prior to the execution of the agreement. Therefore, we are of the clear view that the finding rendered by the Tribunal is utterly perverse and calls for interference.

19. For all the above reasons, which we have assigned, the assessee is entitled to succeed. In the result, the Tax Case Appeal is allowed and the substantial questions of law are answered in favour of the assessee. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//
Sub Assistant Registrar

hvk

To

1. The Income Tax Appellate Tribunal,
   'D' Bench, Chennai.

2. The Income Tax Officer,
   Corporate Ward 4(4),
   Chennai.

3.The Commissioner of Income Tax Office,
   Room.222, Aayakar Bhavan,
   Main Building, II Floor,
   Mahatama Gandhi Road,
   Nungambakka, Chennai-34.

+1cc to Mr.Srinath Sridevan, Advocate SR.5593

T.C.A.No.654 of 2019
and
C.M.P.No.24830 of 2019

RR(CO)
CB(05/03/2021)