

Form No.(J2)

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

P R E S E N T :

THE HON'BLE JUSTICE T.S.SIVAGNANAM
A N D
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

ITAT/231/2017
IA NO:GA/2/2017
(Old No: GA/2128/2017)
PRINCIPAL COMMISSIONER OF INCOME TAX 3, KOLKATA
VS.
M/S. T.M. INTERNATIONAL LOGISTIC LTD.

ITAT/362/2017
IA NO. GA/2/2017
(OLD NO.GA/3628/2017)
PRINCIPAL COMMISSIONER OF INCOME TAX 3, KOLKATA
VS.
M/S. T.M. INTERNATIONAL LOGISTICS LTD.

Mr. Debashis Chowdhury, Adv.
...for appellant in
ITAT/231/2017
Ms. Sucharita Biswas, Adv.
Mr. Asok Bhowmick, Adv.
..for appellant in
ITAT/362/2017
Mr. J.P. Khaitan, Sr. Adv.
Mr. Pratyush Jhunhunwala, Adv.
Ms. Swapna Das, Adv.
...for the respondent

Heard on : 03.01.2022 & 20.01.2022

Judgment on : 20.01.2022

T.S. SIVAGNANAM, J. :- These appeals have been filed by the revenue under Section 260A of the Income Tax Act, 1961 against the common order dated 4th October, 2016 passed by the Income Tax Appellate Tribunal “A” Bench, Kolkata (Tribunal) in ITA/1513/Kol./2008 for the assessment year 2004-2005 and ITA/1914/Kol/2008 and C.O. No. 133/Kol/2008 for the assessment year 2005-2006. The revenue has raised the following substantial questions of law for consideration:-

1. Whether on the facts and the circumstances of the case, the Learned Income Tax Appellate Tribunal, “A” Bench, Kolkata, erred in law in allowing deduction u/s 80-IA of the Income Tax Act, 1961 to the assessee, in respect of operating a multi-purpose berth and not developing and/or operating and maintaining a port as required under the act ?
2. Whether on the facts and circumstances of the case, the Learned Income Tax Appellate Tribunal, “A” Bench, Kolkata, erred in law in accepting the contention of the assessee in the matter of claim of deduction u/s 80-IA despite the assessee having failed to substantiate its claim by not maintaining separate accounts for different units for the purpose of claiming deduction u/s 80-IA of the Income Tax Act, 1961 ?

We have heard Mr. Debashis Chowdhury, learned Counsel and Ms. Sucharita Biswas, learned Counsel duly assisted by Mr. Asok Bhowmick, learned Advocate for the appellant/revenue today as well as on 3rd January, 2022 and Mr. J.P. Khaitan, Learned Senior Counsel duly assisted by Mr. Pratyush Jhunjunwala and Ms. Swapna Das, on behalf of respondent.

The facts which are to be noted are that assessee is a company engaged in a business of terminal port operation including development, operation and maintenance thereof, logistic solutions provider and agency work. The head office of the assessee company is at Calcutta and they are engaged in port activities at Haldia, Paradip and Mumbai. At Haldia Port they have activities at Berth No. 12 and the question is whether they are eligible for deduction under Section 80-IA of the Act. For the assessment year 2004-2005 the assessee filed the return of income and claimed deduction under Section 80-IA for expenses for repairs and maintenance. Similar was the claim made by the assessee for the assessment year 2005-2006. The assessing officer by two separate orders dated 29th December, 2006 and 31st December, 2007 for the assessment years 2003-2004 and 2004-2005 respectively rejected the claim. Since the assessment order is verbatim the same and the assessing officer is also the same person suffice to refer to the assessment order dated 29th December, 2006 for the assessment year 2004-2005. The assessing officer noted that the assessee company had

claimed deduction under Section 80-IA for operating and maintaining multi purpose Berth No. 12 at Haldia Dock Complex. They submitted a letter dated 20th November, 2006 issued by the port authorities stating that Berth No. 12 at Haldia Dock Complex has been allotted to the assessee on leave and license basis for thirty years and it has exclusive license to equip, construct, finance, operate, manage, maintain and replace the project facilities and services. The assessing officer upon noting the letter observed that the letter nowhere indicates or mentions or reveals the nature and extent of work done by the assessee during the year under consideration as it only indicates that there is an agreement between port authorities and the assessee company for a specified purpose and work and, therefore, was of the opinion that the letter can have no significance with regard to the deduction claimed under Section 80-IA of the Act. Further, the assessing officer opined that the assessee has not been developing but only operating a multi purpose berth and not a port. During the course of assessment proceedings the assessee placed reliance on a circular being Circular No. 793 dated 23rd June, 2000, stating that they are entitled for deduction under Section 80-IA of the Act. The assessing officer came to the conclusion that the letter which was relied on by the assessee issued by the port authorities nowhere states that the Berth No. 12 is a part of the port. The assessing officer further stated that Haldia Dock Complex is much larger area and only a part within a port. The assessing officer further noted that in the

said letter issued by the port authorities it was mentioned that assessee company was granted exclusive license for equipping, constructing, financing, operating, managing, maintaining, and replacing the project facilities at Berth No. 12. Though the assessing officer noted the said fact he opined that no details were furnished in respect of the arrangement for construction of Berth No. 12 either on BOT or BOLT basis and transfer of Berth No. 12 to the port authorities. With such reasoning the assessing officer held that assessee company is not eligible for claiming deduction under Section 80-IA of the Act. The assessee filed appeal before the Commissioner of Income Tax (Appeals) –VIII Kolkata (CITA). Apart from factual details placed before the assessing officer the assessee contended that for the assessment year 2003-2004 which was the first year of the claim under Section 80-IA the same was not allowed by the assessing officer for the said assessment year against which appeal was filed before the CITA wherein it was held that the assessee was entitled for the deduction under Section 80-IA of the Act which order has been affirmed by the Tribunal by order dated 30th October, 2007. Therefore, the assessee contended that they are entitled for deduction for the assessment year under consideration before us as for the first year such benefit had been granted which stood concluded by the order passed by the Tribunal. The CIT(A) upon taking note of the said order passed by the Tribunal for the assessment year 2003-2004 accepted the case of the assessee and directed the assessing officer to allow the

deduction under Section 80-IA in respect of profits of the industrial undertaking styled as Berth No. 12, Haldia Dock Complex. The other grounds were also discussed by the CIT(A) and relief was granted to the assessee on the quantum claimed by them. The revenue preferred appeal before the Tribunal contending that the CIT(A) ought not to have allowed the claim of deduction as aforementioned, under Section 80-IA since assessee is not operating a port but only operating Berth No. 12 at Haldia Dock. Further the revenue contended that assessee had not furnished any evidence to support their claim that they have been maintaining the said facility. The Tribunal considered the submissions made by the revenue and after noting that the assessee has been granted the deduction under Section 80-IA for the first year namely 2003-2004 and the said order passed by the Tribunal had been given effect to by the assessing officer, following the decision for the assessment year 2003-2004 the appeals filed by the revenue were dismissed. Challenging those orders revenue is before us by way of these appeals. The learned Senior Standing Counsel appearing for the revenue, have in extenso taken us through the factual position and reiterated the submissions made by the revenue before the Tribunal stating that the assessee is not operating and maintaining a port but they are engaged in activities of Berth No. 12 alone, and therefore, assessing officer was right in not granting the relief. Furthermore, it is contended that no documents were produced by the assessee to establish their case before the assessing officer. Relying

upon the Circular No. 10 of 2005 dated 16th December, 2005 issued by the Central Board of Direct Taxes inviting the attention to the amendment made in Section 80-IA by Finance Act, 2001 it is submitted that unless and until the concerned port authority has issued a certificate that the structures formed part of the port, deduction under Section 80-IA cannot be granted. Firstly, we need to point out that the assessing officer has not disputed the fact that the assessee produced a letter issued by the port authorities. Apart from that an agreement has also been produced for the consideration of the assessing officer. The documents which were placed before the assessing officer in no uncertain terms states that assessee has been granted exclusive license for equipping, constructing, financing, operating, managing, maintaining and replacing the project/project facilities at the said Berth No. 12. The assessing officer has noted these facts however states that the letter does not state whether the said Berth is part of the port. To say the least, the said finding is utterly perverse. Admittedly a Berth can be located only in a seaport and if unfortunately the assessing officer was not even aware of that he should have refrained from taking up the case of the assessee for assessment. That apart, having noted the contents of the letter the assessing officer states that it is not clear whether exclusive license was granted to the assessee. This also, in our considered opinion a perverse finding. What is important is the substance of the letter and the agreement and not the form. It may be true that the port has issued

Circular No. 10 of 2005 stating that the concerned port authorities have to issue a certificate since the definition of port stood amended and it was made as an inclusive definition to mean structures at the port for storage, loading and unloading etc. If the assessing officer had applied his mind and read the letter and the agreement in conjunction he should have arrived at a conclusion that the right granted to the assessee was an exclusive right to maintain the facility and undoubtedly the facility is meant for storage, loading and unloading and would fall within the definition "of port". Fortunately for us the CIT(A) for the earlier assessment year 2003-2004 which is the first year when deduction under Section 80-IA was claimed has done a thorough factual examination and granted relief to the assessee. Thus the order passed by the CIT(A) was challenged before the Tribunal and the Tribunal by order dated 30th October, 2007 dismissed the appeal of the revenue and the assessing officer has also given effect to the order and allowed deduction under Section 80-IA of the Act for which is the first year in the period of ten years. It goes without saying if the assessee has been granted the benefit for the first year the assessing officer should take a consistent stand in the subsequent years unless there are any other change in circumstances warranting a different decision. In the case on hand, there is nothing on record that there was any change in the situation. Therefore, we are of the considered view that the letter and the agreement which were produced by the assessee is undoubtedly a

certificate issued by the port authorities and would satisfy the requirement in Circular No. 10 of 2005. The Tribunal on its part also reexamined the factual position and noted the decision in assessee's own case for the assessment year 2003-2004 while granting relief to the assessee. Furthermore, the Tribunal noted the finding of the assessing officer while giving effect to the order of the CIT(A) for the assessment year 2003-2004 wherein he has stated as follows:-

“It is found from the assessment records that a separate profit & loss account & balance sheet was prepared for Berth No. 12, Haldia Dock Complex. These documents were submitted along with return of income. Further, it is found that as per provision of Act, there is no need for assessee to give evidence of acquisition of new plant and machinery for the eligible unit for claiming deduction u/s.80IA of Income Tax Act, 1961 because the assessee maintains port. As per Circular No. 10/2005 dated 16.12.2005, the business activity of assessee in relation to Berth No. 12, Haldia Dock Complex falls within the meaning of “Port” in Explanation below Section 80(IA)(i)(c) of the Income Tax Act, 1961.”

From the above factual position it is evidently clear that the Tribunal rightly rejected the revenue's appeal and confirmed the order passed by the CIT(A) granting relief to the assessee.

Thus we find there is no grounds to take a different view in the matter.

For the above reasons the appeals filed by the revenue are dismissed and the substantial questions of law are answered against the revenue.

Consequently, the applications are also dismissed.

(T.S.SIVAGNANAM, J.)

I agree.

(HIRANMAY BHATTACHARYYA, J.)

pkd/GH.