

IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES “B” : HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA.No.421, 422 & 423/Hyd/2015
Assessment Years 2009-2010, 2010-2011 & 2011-2012

Hyderabad Menzies Air Cargo P. Ltd., Shamshabad -500409 Ranga Reddy District. PAN AACCC9611N	vs.,	DCIT, Circle-2(2) Hyderabad.
(Appellant)		(Respondent)

For Assessee :	Mr. Yogesh A. Thar & Mr. Sunil Jain
For Revenue :	Smt. Nivedita Biswas

Date of Hearing :	13.07.2016
Date of Pronouncement :	06.10.2016

ORDER

PER SMT. P. MADHAVI DEVI, J.M.

All the appeals are filed by the assessee for the A.Ys. 2009-2010, 2010-2011 and 2011-2012 respectively. In all these appeals, the assessee is aggrieved by the denial of the claim of deduction under section 80IA(4) of the I.T. Act, 1961.

2. Brief facts of the case are that the assessee company, engaged in the business of maintaining cargo terminal at Shamshabad Airport at Hyderabad, filed its return of income for the respective assessment years admitting income after claiming deduction under section 80IA(4) of the Act. The returns were initially processed under section 143(1) of the Act. Subsequently, the assessments were taken-up for scrutiny through CASS and

accordingly, notices were issued and served on the assessee. The assessee appeared through its Authorised Representative and furnished the information called for.

3. During the course of hearing, the Assessing Officer issued a letter dated 28.11.2011 requiring the assessee to explain as to why the deduction claimed under section 80IA(4) should not be disallowed. In response thereto, the assessee filed a reply on 21.12.2011 stating that the assessee is a company registered in India and has entered into an agreement with GHIAL ("GMR Hyderabad International Airport Limited") for operating and maintaining the cargo facilities at Hyderabad International Airport. It was submitted that though GHIAL is not a Government body, the Government of India has granted a right to GHIAL to assign certain business activities to other service providers and therefore, GHIAL, has granted further concession to the assessee along by sub-leasing part of the infrastructure facility to the assessee. It was submitted that the assessee being the company carrying on the operation of the airport be allowed the claim of deduction under section 80IA(4) of the Act.

4. The Assessing Officer was, however, not convinced with the assessee's contentions, and came to the conclusion that the assessee does not fulfill the conditions laid down under section 80IA(4) of the Act. He observed that one of the condition is that the assessee should have entered into an agreement with the Central Government or a State Government or a Local Authority or any other Statutory Body. He observed that the agreement with GHIAL cannot be considered as an agreement with the Government of India as assessee company has not furnished any clinching evidence that the Government of India

has accorded permission to GHIAL to assign the work of cargo handling to the assessee company. Further, he observed that under clauses (a) to (c) of sub-section (4) of section 80IA, the reference is only to such an entity which can justifiably claim the deduction and further that the proviso thereto also specifically refers to the transfer that takes place between the transferor enterprise and the transferee enterprise which goes to imply that only that enterprise which transfers the entire enterprise to a transferee enterprise and that in such circumstances only a transferee enterprise can claim the deduction for the unexpired period as if the transfer had not taken place. He observed that the assessee had not created any new infrastructure facility except operating the existing infrastructure facility which has also only been leased out to the assessee.

4.1. He observed that it is the GHIAL which completed the entire infrastructure facility and in case it is not in a position to maintain and operate the infrastructure, it can transfer the facility in entirety, but not only a piece of the operation to enable the assessee to claim deduction under section 80IA(4) of the Act. According to the Assessing Officer, Section 80IA(4) confers benefits only on one entity. Thus, he came to the conclusion that the assessee's claim of deduction under section 80IA(4) is not allowable. He accordingly, disallowed the claim of deduction under section 80IA(4) for all the three assessment years and brought it to tax. Aggrieved, assessee preferred an appeal before the CIT(A) who confirmed the order of the Assessing Officer and the assessee is in second appeal before us.

5. The Learned Counsel for the assessee, while reiterating the submissions made by the assessee before the authorities

below, has advanced the following arguments in support of the assessee's claim of deduction under section 80IA(4) of the Act.

- (1) According to the proviso to section 80IA(4)(b), the agreement of GHIAL with the Government of India is sufficient compliance of the provision and a separate and independent agreement by the assessee with the Governments is not necessary;
- (2) Without prejudice to the above, GMR International Airport is a statutory body; and
- (3) Without prejudice to the above, approvals received from various other departments of the Government itself constitutes the agreement with the Government of India.

5.1. In support of the above propositions, the Learned Counsel for the assessee, drew our attention to the concession agreement between the Ministry of Civil Aviation, Government of India and Hyderabad International Airport, Hyderabad Ltd., ("HIAL"), wherein the HIAL has been granted the exclusive right and privilege to carry-out the development, design, financing, construction, commissioning, maintenance, operation and management of the Airport [but excluding the right to carry-out the reserved activities and to provide communication and navigation surveillance/air traffic management services which are required to be provided by AAI]. He has drawn our attention to Article 3.2.1 (b) which provides that Government of India recognizes that HIAL may carry-out any activity or business in connection with or related to the arrival/departure and for handling of aircraft, passenger's baggage, cargo and/or mail at

the airport. Thus, according to him, Cargo handling is also an activity assigned to HIAL, by the Government of India. Further, by virtue of Article 3.2.2. HIAL has further been granted right to grant 'Service Provider Rights' (including the right of the Service Provider Right holders to grant sub-rights) to any person for the purpose of carrying-out the activities and businesses described in Article 3.2.1 on such terms and conditions as HIAL may determine are reasonably appropriate.

5.2. He has also drawn our attention to the Tripartite Agreement between GHIAL, Menzies Aviation PLC and the assessee placed at page-232 of the paper book and more particularly page No.243 and Article 2.1 of the agreement whereby the assessee has been granted the exclusive right to render and provide or arrange to provide the O & M services for operation and maintenance of the Cargo terminal and the assessee shall also have exclusive right to levy and collect Cargo Charges and to Article 2.3 thereof, under which GHIAL warrants to the company to build the Cargo building as per the specifications and design set out in the Cargo Building Lease Agreement while the assessee company warranted to GHIAL that Menzies shall build the facilities/additional facilities in compliance with Cargo Agreements and that the design, engineering, construction, testing and commission of the Cargo terminal shall be free from defect and of correct design and workmanship, of good quality and internationally accepted standards. He has also drawn our attention to the Cargo Building Lease Agreement dated 28.04.2006 between the assessee and GHIAL, by virtue of which the Cargo building was to be constructed by GHIAL as per the specifications set-out therein and agreed to by Menzies which was provided to the assessee on

lease for a period of 15 years from the Airport opening date along with a right to sub-lease, license etc.

5.3. He submitted that GHIAL has not claimed any deduction under section 80IA(4) as it has not earned any profits during the years. It was further submitted that the assessee earned income from Cargo operations and the operating expenditure includes the concessionaire fee and concessionaire rent paid to GHIAL and has drawn our attention to the relevant entries in its books i.e., P & L A/c and Schedule-L thereto.

5.4. In addition to the above submissions on facts, the Learned Counsel for the assessee, has also placed reliance on the decision of the Coordinate Bench of this Tribunal in the case of Ocean Sparkle Ltd., reported in (2006) 155 taxmann 133 (Hyd) (NAG) for the proposition that since GHIAL has been authorised to assign certain functions and has accordingly entered into the agreement with the assessee for operation and maintenance of the cargo facility at Hyderabad International Airport, under the proviso to section 80IA(4)(i), the assessee is entitled to claim the deduction. Further, as regards the meaning of the term 'transfer' used in the said proviso also, the Learned Counsel for the assessee relied upon the above decisions wherein it is held that the term 'transfer' should not be construed in a conservative manner so as to mean the transfer of ownership of the infrastructure facility to the specified authority but it only means the handing over of the infrastructure facility to the specified authority at the end of the concession/license period.

5.5. In support of his contention that Cargo facility is part of airport and therefore, 'Infrastructure Facility' under section

80IA(4), the Learned Counsel for the assessee, placed reliance upon the decision of the Coordinate Bench of the Tribunal at Bangalore in the case of M/s. Menzies Aviation Bobba (Bangalore) Pvt. Ltd., in ITA.No.1160/Bang/2012 dated 30.01.2014 and also the decision of the Hon'ble Madras High Court in the case of CIT, Chennai vs. AL Logistics (P) Ltd., reported in (2015) 55 taxmann.com 283 (Mad.).

5.5.1. In support of his contention that the assessee is eligible for deduction under section 80IA(4) on profits and gains derived from an undertaking established in a building taken on lease also, the Learned Counsel for the assessee, placed reliance upon the decision of the Hon'ble Supreme Court in the case of Bajaj Tempo Ltd., reported in (1992) 62 taxmann 480 (SC) and also in the case of Narang Dairy Products reported in (1996) 85 taxman 375 (SC).

5.5.2. In support of his contention that the cargo facility approved by Customs Authorities is an 'Infrastructure Facility' under section 80IA(4), the Learned Counsel for the assessee, placed reliance upon the decisions of the Hon'ble Delhi High Court and Hon'ble Bombay High Court in the cases of Container Corporation of India Ltd., vs. ACIT reported in (2012) 21 taxmann.com 317 (Delhi) and CIT vs. Continental Warehousing Corporation (Nhava Shava) Ltd., reported in (2015) 58 taxmann.com 78 (Bom.) respectively.

5.6. Finally, the Learned Counsel for the assessee also relied upon the decision of the Coordinate Bench of the Tribunal at Bangalore in the case of M/s. Menzies Aviation Bobba (Bangalore) Pvt. Ltd., (cited supra) for the proposition the GHIAL

is also a statutory authority like Bangalore International Airport Ltd., and therefore, the agreement with GHIAL is an agreement with a statutory authority.

6. The Ld. D.R., on the other hand, supported the orders of the authorities below and submitted that the assessee is not eligible to the claim of deduction under section 80IA(4) as the conditions set-out therein are not fulfilled by the assessee. As regards the applicability of the decision of the Coordinate Bench in the case of Ocean Sparkle Ltd., (cited (supra) he submitted that the said case is factually distinguishable from the facts of the case before us. Further, he submitted that sub-leased contractors cannot be regarded as eligible for deduction under section 80IA(4) of the Act.

6.1. As regards the contention of the assessee that since the assessee has received approval from various Government departments to operate and maintain the Cargo facility, it should be considered as having entered into an agreement with the Government of India itself, the Ld. D.R. submitted that the approvals given by various departments of the Government i.e., Customs Authorities etc., is only for carrying on the functions effectively, but cannot be deemed to have given the approval for the purposes of deduction under section 80IA(4) of the Act. Thus, according to him, the orders of the authorities below have to be confirmed.

7. Having regard to the rival contentions and the material on record, we find that the main question before us for adjudication is whether the assessee is eligible for deduction

under section 80IA(4) of the Act. For proper appreciation of the case the relevant provision is reproduced hereunder :

(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:

Provided that where an infrastructure facility is transferred on or after the 1st day of April, 1999 by an enterprise which developed such infrastructure facility (hereafter referred to in this section as the transferor enterprise) to another enterprise (hereafter in this section referred to as the transferee enterprise) for the purpose of operating and maintaining the infrastructure facility on its behalf in accordance with the agreement with the Central Government, State Government, local authority or statutory body, the provisions of this section shall apply to the transferee enterprise as if it were the enterprise to which this clause applies and the deduction from profits and gains would be available to such transferee enterprise for the unexpired period during which the transferor enterprise would have been entitled to the deduction, if the transfer had not taken place.

Explanation.—For the purposes of this clause, "infrastructure facility" means—

(a) a road including toll road, a bridge or a rail system;

- (b) a highway project including housing or other activities being an integral part of the highway project;*
- (c) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;*
- (d) a port, airport, inland waterway, inland port or navigational channel in the sea;*

7.1. From a literal reading of the above provision, it is clear that the deduction is allowable not only for development of a infrastructure facility, but is also allowable in case of operating and maintaining or developing, operating and maintaining an infrastructure facility. In the case before us, the Assessing Officer and the CIT(A) have held that the assessee has not created any new infrastructure facility but is only doing the operation on the existing leased infrastructure facility developed by GHIAL. Therefore, it is now necessary to see whether the Cargo facility being operated and maintained by the assessee is an 'infrastructure facility' within the meaning of section 80IA(4) of the Act.

7.2. GHIAL has developed the Rajiv Gandhi International Airport at Hyderabad. Cargo handling facility is an integral part of the Airport. GHIAL has assigned the operation and maintenance of the Cargo facility to the assessee. Vide Facility Lease Agreement, Menzies has agreed to own, procure, install and commission the facilities and the Additional Facilities (if any) at the Cargo Building and to lease the Facilities and Additional Facilities (if any) to the assessee and vide operation and maintenance agreement, GHIAL has granted the assessee the right for the operation and maintenance of the cargo terminal. The assessee had relied upon the decision of the Hon'ble Madras High Court in the case of AL Logistics (P) Ltd (cited Supra) in

support of his contention that cargo facility is also infrastructure facility u/s 80IA(4) of the Act. We find that in the said case, the Hon'ble High Court was considering whether the assessee therein operating and maintaining a Container Freight Station (CFS), is eligible for deduction u/s 80IA(4). The Hon'ble High Court has upheld the order of the Tribunal that the CFS are 'customs area' attached to a port and the work related to customs is performed at these inland container depots/container freight stations and accordingly, inland container depots and CFS are 'inland ports' as they carry out functions like ware housing, customs clearance and transport of goods from its location to the seaports and vice versa by railway or by trucks in containers.

7.3. In the case before us also, the assessee is handling the Cargo facility which is into similar activities. Further, the Coordinate Bench of the Tribunal in the case of Ocean Sparkles Ltd has held that where the assessee therein was required to fulfill the developers' obligation pertaining to operation and maintenance of ports as laid down under the original agreement between the developers and specified authorities, it is exactly the situation which has been contemplated by the proviso to section 80IA(4)(i) of the Act. As regards the objection of the Revenue therein that two persons are not to get the deduction u/s 80IA for the maintenance of the same facility, the Tribunal held that assessee's claim therein was restricted to its performance of job and it was concerned with that activity only.

7.4. Under the Explanation to section 80IA(4), the definition of 'infrastructure facility' includes airport within its scope and the cargo facility is an integral part of the airport. The Coordinate Bench of this Tribunal at Bangalore in the case of

Menzies Aviation Bobba (Bangalore) Pvt. Ltd (cited Supra) has held the 'cargo facility' to be infrastructure facility eligible for deduction u/s 80IA(4) of the Act. Further, it is seen that GHIAL has constructed the Cargo building as per the specification of the Menzies and Menzies has provided the facilities at the cargo building and while GHIAL has leased out the cargo terminal to the assessee, Menzies has leased the facilities to the assessee and it is the responsibility of the assessee to operate and maintain the cargo facility in accordance with the obligation of GHIAL to operate and maintain the facility by virtue of the concession granted by the Govt. of India. Each assessee is eligible to claim deduction u/s 80IA(4)(i) of the Act only in relation to the activity carried on by it and there cannot be any duplication of the claim. Therefore, we are of the opinion that the 'Cargo facility' operated and maintained by the assessee is infrastructure facility eligible for deduction u/s 80IA(4) of the Act.

7.5. The second objection of the Revenue is that the assessee has not entered into any agreement with the Central Govt., or State Govt. or local authority or a statutory body as provided u/s 80IA(4) of the Act. It is the contention of the assessee that Govt. of India has authorized GHIAL to grant further rights in respect of any of its activities, pursuant to which GHIAL has entered into an agreement with the assessee and therefore, there is no requirement of the assessee to enter into a separate agreement with the Govt. In support of this contention, the assessee has relied on the decision of the Coordinate Bench in the case of Ocean Sparkles Ltd. In the said case, the assessee therein, engaged in the business of operation and maintenance of ports, cargo services and other related services, had entered into

agreement for operation and maintenance of port, with developers who were engaged in development and operation of ports and had entered into an agreement with specified authorities i.e. State Govt. for development and maintenance of certain ports. The Hon'ble Tribunal observed that later on, under an agreement, the operation and maintenance services of said ports were sub-contracted by the developer to assessee company in accordance with original agreement with specified authorities after 1-4-99 and held that as per the proviso to section 80IA(4)(i), the assessee therein was entitled to deduction u/s 80IA(4) of the Act. For this purpose, the Tribunal had taken into consideration the proviso to section 80IA(4)(i) to hold that the proviso aims at qualifying the transferee enterprises, as enterprise eligible for deduction under this section provided, the other conditions be satisfied and that the proviso does not require any direct agreement between the transferee enterprise and the specified authority.

7.6. Further, the Learned Counsel for the assessee has also placed reliance upon the decision of Hon'ble Madras High Court in the case of A.L. Logistics P. Ltd., wherein it has been held that where the proposal of the assessee was accepted by the Government on certain conditions, which were duly complied with by the assessee, there is no need to insist for specific execution of agreements. In the said case, the assessee therein had applied to the Ministry of Commerce and Industry, Government of India, Infrastructure Division of the Department of Commerce for setting-up of a CFS at Haldia for handling, import and export of Cargo which has been approved by the Ministry, subject to execution of certain documents of compliance of other terms and conditions as stated in the letter. Taking the

same into consideration, the Hon'ble Madras High Court held that since the proposal of the assessee was accepted by the Government on certain conditions which were duly complied with by the assessee, there is no need to insist for the specific execution of the agreements. Similarly, in the case before us, the assessee has applied to the Government of India, Ministry of Civil Aviation for registration as a Regulated Agent for handling the Cargo facilities at Hyderabad International Airport and vide letter dated 24.11.2008, the assessee was granted the registration while GHIAL has granted the assessee the right to handle the Cargo facilities by virtue of the agreement. The assessee's contention is that the assessee has been recognized also as a 'Service Provider Right Holder' as stipulated under the Concession Agreement itself and that further that the Government has recognized the assessee as 'a Regulated Agent' and therefore, the decision of the Hon'ble Madras High Court is applicable to the assessee and the assessee's contention that since the assessee has been given approval by the Ministry of Civil Aviation, it is not necessary to enter into a specific and independent agreement with the Government for claiming deduction under section 80IA of the Act, has to be accepted.

7.7. The assessee has also placed reliance upon the definition of "Regulated Agent" under clause (5) of Rule-2 of the Aircraft (Security) Rules, 2011. Therefore, according to the assessee, the assessee being accepted as a regulated agent under the Aircraft (Security) Rules, 2011 needs no specific agreement with the Government for carrying on the work. However, we are unable to accept this contention of the assessee because the definition of a "Regulated Agent" given in the Aircraft (Security) Rules, 2011 is only to govern the security measures for Aircraft

operators and it does not mean that assessee has been recognized as an agent to operate and maintain the Cargo facilities at the Airport. In fact, it is the other way round, i.e., the person operating and maintaining the Cargo facilities is recognized as a 'Regulated Agent' who can function in accordance with the Aircraft (Security) Rules, 2011.

7.8. The assessee has also placed reliance upon the decision of this Tribunal in the case of Menzies Aviation Bobba, Bangalore in M.P.No.19/Bang/2014 in ITA.No.1160/Bang/2012 dated 05.10.2015 wherein the Tribunal has accepted Bangalore International Airport Limited as a statutory body under section 80IA(4) of the Act. We find that in the said case, the Tribunal had relied upon the decision of the jurisdictional High Court therein i.e., the Hon'ble Karnataka High Court in a writ petition filed by M/s. Flemingo Duty-Free Shops P. Ltd., against the Bangalore International Airport Ltd., ("BIAL") wherein the Hon'ble Karnataka High Court has held BIAL to be a statutory authority as it is discharging statutory functions of the Government. There is no such decision in respect of Hyderabad International Airport Ltd., by the jurisdictional High Court i.e., Hon'ble High Court of Telangana and Andhra Pradesh. However, since we have already held that the assessee does not require a specific and independent agreement with the Government for claiming deduction under section 80IA(4), we do not find it necessary to adjudicate this issue at this stage. In view of these facts, the assessee's appeal is allowed.

8. In the result, appeals of the assessee are allowed.

Order pronounced in the open Court on 06.10.2016.

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(P. MADHAVI DEVI)
JUDICIAL MEMBER

Hyderabad, Dated 06th October, 2016

VBP/-

Copy to

1.	Hyderabad Menzies Air Cargo Pvt. Ltd., Air Cargo Terminal, Rajiv Gandhi International Airport, Shamshabad – 500 409 Ranga Reddy District.
2.	Dy. Commissioner of Income Tax, Circle-2(2), I.T. Towers, A.C. Guards, Hyderabad.
3.	CIT(A)-2, Hyderabad.
4.	Pr. CIT-2, Hyderabad.
5.	D.R. ITAT 'B' Bench, Hyderabad.
6.	Guard File.