

आयकर अपीलिय अधिकरण, पुणे न्यायपीठ "ए" पुणे में
**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

श्री आर. के. पांडा, लेखा सदस्य एवं
श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

**BEFORE SHRI R.K. PANDA, AM
AND SHRI VIKAS AWASTHY, JM**

आयकर अपील सं. / ITA No.1778/PN/2014

निर्धारण वर्ष / Assessment Year : 2010-11

ACIT, Panvel Circle,
Panvel

..... अपीलार्थी / Appellant

बनाम v/s

M/s. Continental Warehousing
Corporation (Nhava Sheva)
Ltd., D.No.1088,
Khopta Village,
Taluka : Uran, Dist. Raigad
PAN : AAACC5849C

..... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Rajeev Kumar, CIT

प्रत्यर्थी की ओर से / Respondent by : Ms. Keuri Desai

सुनवाई की तारीख / Date of Hearing : 03.10.2016	घोषणा की तारीख / Date of Pronouncement: 05.10.2016
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आदेश / ORDER

PER R.K.PANDA, AM :

This appeal filed by the Revenue is directed against the order dated 26-06-2014 of the CIT(A)-I, Thane relating to Assessment Year 2010-11.

2. The only ground raised by the Revenue reads as under :

“Whether the CIT(A)-I, Thane is right in law in holding that the assessee is entitled to deduction u/s.80IA of the Income Tax Act, 1961 even though activities undertaken by the assessee do not fall within clause (d) of the Explanation to 80IA(4) defining the term infrastructure facilities?

3. Facts of the case, in brief, are that the assessee is a company engaged in operating the Container Freight Station (CFS) and filed its return of income on 11-10-2010 declaring total income of Rs.6,78,33,431/- after claiming deduction of Rs.34,27,47,435

u/s.80IA(4) of the I.T. Act. During the course of assessment proceedings the AO observed that the assessee company had set up a Container Freight Station (CFSs) in the Jawaharlal Nehru Port Trust over approx. 30 acres of land. Through CFSs, the assessee company provides a common user facility equipped with fixed installations. It offers services for handling and temporary storage of import/export laden and empty containers. All the activities related to the clearance of goods for home use, warehousing, temporary admissions, re-export, temporary storage for onward transit and outright export, transshipment, take place from this station. It started its operations on 19th January, 2006. It has three warehouses admeasuring 2,60,000 sq.ft. and a container yard.”

4. According to the AO the only issue for consideration is whether on the facts and in the facts of the case and in law the assessee is eligible for claiming deduction u/s.80IA(4) of the Act. The AO analysed the provisions of section 80IA(4), CBDT Circular No.10/2005, dated 16-12-2005 and observed that for claiming deduction u/s.80IA(4) all of the following conditions are to be fulfilled:

“(1) The enterprise who claims the deduction, should carry on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility. As per the clause (d) of the Explanation to section 80IA(4), the infrastructure facility means a port, airport, inland waterway.

The Central Board of Direct Taxes, New Delhi, vide Circular No.10 of 2004 dt. 16-12-2005 further clarified the definition of “port” for the purpose of deduction u/s.80IA including structures at the ports for storage, loading and unloading etc. in the definition of port, subject to issuance of a certificate that the said structures form part of the port by the concerned port authority.

(2) It should be owned by a company registered in India or by a consortium of such companies.

(3) It should have entered into an agreement with the Central Govt. or a State Govt. 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; AND

(4) It should have started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995."

5. The AO also referred to the CBDT Instruction Vide F.No.178/42/2010/ITA-1, dated 06-01-2011 wherein guidelines have been given to AOs on infrastructure activities u/s.80IA(4) of the I.T. Act, 1961 with respect to Container Freight Station and Inland Container Depots and which read as follows (Para 5 of the AO's order) :

"... a port, airport, inland waterway, inland port or navigational channel in the sea. In order to clarify the term port, and whether the facilities of loading and unloading constitute a port, the Board issued two Circulars, i.e. Circular No.793 dated 23-06-2000 and Circular No.10 dated 16-12-2005. In the first circular, it was clarified that structures at ports for storage, loading and unloading will be covered by the definition of port for the purpose of section 10(23G) and section 80IA subject to the condition that the concerned port authorities has issued a certificate that such structures form a part of the port and the same have been constructed under the BOLT scheme. This was again reiterated in the circular dated 16-12-2005 wherein it was stated that for the assessment year 2002-03 onwards, structures at ports for storage, loading and unloading will be included in the definition of port. References have been received in the Board seeking clarification whether the Container "Freight Stations (CFSs). and Inland Container Depots (ICDs) are eligible for deduction under section 80IA(4)(i) and whether that are to be considered as infrastructure facility for the purpose of the said sub-section, especially in view of the aforesaid circular No. 1012005, which states that structures for loading and unloading at the port area are a part of the port. The Board has considered the above . issue and it is has been decided that aforesaid circular is applicable to the structures for loading, unloading and storage at the Port. An ICD or a CFS is usually not located at the port and therefore it is not a part of the Port for the purpose of Section 80IA(4)(i) and not covered by the Circular No. 1012005 dated 16.12.2005 and circular No. 793 dated. 23.06.2000 on the subject. In this regard, it is further added that if such a facility is located at the port then, it can be considered to be a infrastructure facility being a part of the port. References have also been received as to whether Inland Container Depots (ICDs) and Container Freight Station (CFS) can be termed as Inland Ports and thereby classified as infrastructure facility under section 80IA(4)(i) of the Income Tax Act, 1961. In this context, I am further directed to convey that the Board has considered the issue and it has been decided that as ICDS and CFSs are not ports located on any Inland waterway, river or canal, and therefore that cannot be classified as Inland ports for the purpose of Section 80IA(4)(i) of the Income Tax Act.---"

6. He further noted that during A.Yrs. 2008-09 and 2009-10 the claim of the assessee u/s.80IA(4) was also denied. He, therefore, asked the assessee to explain as to how it is entitled to deduction u/s.80IA(4) of the I.T. Act.

7. After considering the various submissions given by the assessee from time to time the AO rejected the claim u/s.80IA(4) on the ground that the assessee did not fulfil the conditions for claiming deduction u/s.80IA(4) of the Act for the following reasons :

“(i) The assessee company is not a ‘port’ (infrastructure facility) as per the Explanation to section 80IA(4) of the I.T. Act, 1961 and CBDT Circular No.10 of 2005 dated 16th December, 2005.

(ii) The assessee company has not entered into an agreement with the Central Govt./State Govt./ Local authority or any other statutory body for developing or operating and maintaining or developing, operating, maintaining a new infrastructure facility.

(iii) The assessee company is not an ‘inland port’ as intended in the Explanation to Section 80IA(4) of the I.T. Act, 1961. There is no CBDT instruction declaring the assessee company as ‘inland port’.”

The AO accordingly disallowed the claim of deduction of Rs.34,27,47,435/- u/s.80IA(4) made by the assessee.

8. In appeal the Ld.CIT(A) allowed the claim of the assessee on the basis of the decision of Hon’ble Delhi High Court in the case of Continental Warehousing of India Vs. ACIT vide ITA No.1411/2009, 967/2011 and 968/2011 order dated 11-05-2002 and the decision of the Special Bench of the Tribunal in the case of M/s. All Cargo Global Logistics Ltd. Vs. DCIT vide ITA No.5018 to 5022 and ITA No.5059 for A.Yrs.2004-05 to 2009-10. The CIT(A) further relied on the decision of the Mumbai Bench of the Tribunal in assessee’s own case, i.e.Continental Warehousing Corporation (Nhava Sheva) Ltd. Vs. ACIT

vide ITA No.7055/Mum/2011 order dated 31-08-2012 for A.Y. 2008-09.

9. Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

10. The Ld. Counsel for the assessee at the outset submitted that the Tribunal in assessee's own case for A.Yrs. 2008-09 and 2009-10 after considering various objections raised by the AO has allowed the claim of deduction u/s.80IA(4) of the I.T. Act. Merely because the Revenue has not accepted the order of the Tribunal and has filed an appeal before the Hon'ble High Court the same cannot be a ground to reverse the decision of the Tribunal in absence of any contrary order.

11. The Ld. Departmental Representative on the other hand fairly conceded that the issue stands decided in faovur of the assessee by the decision of the Tribunal in assessee's own case for A.Yrs. 2008-09 and 2009-10. However, the Revenue has not accepted the decision of the Tribunal and an appeal has been filed before the Hon'ble High Court. Therefore, to keep the matter alive the Revenue has filed this appeal.

12. After hearing both the sides, we find an identical issue has come up before the Tribunal in assessee's own case for A.Y. 2009-10. The Tribunal vide ITA No.906/PN/2013 order dated 18-11-2014, following the decision of the Tribunal in assessee's own case for A.Y. 2008-09, has dismissed the grounds raised by the Revenue by observing as under :

"6. After hearing both the sides, we find an identical issue had come up before the Tribunal in assessee's own case in the immediately preceding assessment year. We find the Tribunal in assessee's own case vide ITA

No.7055/Mum/2011 order dated 31-08-2012 for A.Y. 2008-09 has decided the issue in favour of the assessee by observing as under :

"6. We have heard both the parties and their contentions have carefully been considered. We have also carefully gone through the aforementioned decision of the Special Bench in the case of All Cargo Global Logistics Ltd. & Others (supra) and we find that on identical facts, except difference in the dates it was held by the Special Bench that the assessee is an "inland port" hence, eligible for deduction under section 80 IA(4) of the Act. For the sake of completeness we reproduce relevant portion of the Special Bench order.

"60. The second question before us *is*—whether, on the facts and in the circumstances of the case, the learned CIT(A) was justified in upholding the disallowance of deduction under s. 80-IA(4) of the Act on merits?

61. The facts In the case of All Cargo Global Logistics Ltd. are that the assessee commenced CFS activities on 7th April, 2003. In this connection a letter has been received from the Commr. of Custom (Import), bearing No. 3 of 2003, at. 28th Feb., 2003, classifying the area of 3,282 sq. mtrs. as customs area for the purpose of storage, stuffing/destuffing and clearance of export/import cargo. Subsequently, the assessee has been certified as a custodian of cargo under Customs Act, 1962, by notifying the area as "customs area". It has been submitted that a CFS is common user facility offering services in handling and temporary storing of import/export laden empties carried under customs control and supervision. It is also a bonded warehouse facility where customers can clear the cargo for export to various countries and receive customs- cleared cargo for home consumption. The staff of Customs Department is posted in the CFS for such clearances. The assessee enclosed a certificate from the chartered accountant in Form No. 10CCB, which Is a precondition for claiming the deduction under s. 80-IA(4). A certificate from the port trust has also been enclosed to the effect that the activities may be considered as extended activities as of port-related activities in accordance with the Circular No. 793, dt 23rd June, 2000 [(2000) 161 CTR (St) 211. r/w Circular No. 133/1995-Cus., dt. 22nd Dec.. 1995 of the Board of Excise and Customs. The CBDT had also issued Circular No. 10 of 2005, dt. 16th Dec., 2005 1(2005)199 CTR (St) 971 clarifying that the structures at the port for storage, loading and unloading constitute 'port" for the purpose of s. 10(23G) and s. 80-IA.

62. Before us, learned counsel for the Container Corporation of India submitted at the outset that the decision of Hon'ble Delhi High Court dt. 11th May. 2012 has now been received, a copy of which is placed in paper book on page Nos. 14 to 33. The decision was rendered In respect of three appeals filed by the *assessee* bearing IT Appeal Nos. 1411 of 2009, 967 of 2011 and 968 of 2011. The assessment years involved are 2003-04 to 2005-06. After going through the history of legislation, it Is mentioned In para No. 8 that asst. yr. 1999-2000 was first year in which Inland ports were designated as 'Infrastructure facility" under s. 80-IA. The object was to strengthen Infrastructure In general and the transport

infrastructure In particular. Thereafter it is mentioned in para No. 9 that the question before the Court is—whether, the income from the Inland container depots (ICDs) qualify for deduction under s. 80-IA(4)(i) of the Act r/w Expln. (d) thereto. The Court referred to the facts of the case that the assesses operated 45 ICDs. All the ICDs except 2 were notified by the CBDT for the purpose of s. 80-IA(12)(ca) on 1st Sept, 1998. However the power to notify "Infrastructure facility" for the purpose of this section was taken away from the CBDT w.e.f. 1st April, 2002. The Court noted that wherever the word "port" is used, it carries with it maritime connection or connotation. It is for this reason that the section separately refers to airport as it does not have a maritime connection. The customs clearance takes place both at the airport and post. The ICDs are landlocked and V Is nobody's case that they are located in such a place where ships or vessels have V direct access. The goods which are brought in or removed from the ICDs are brought or taken either by railway wagons or by container trucks, as the case may be. Finally, it has been held that although ICD may not be a port, but it is an Inland port. The relevant portion of the decision is reproduced below:

"19. The Tribunal erred in holding that because of the change made by the Finance Act, 2001 w.e.f. 1st April, 2002 by dropping the power of the CBDT to notify any other public facility of similar nature for the purpose of s. 80-IA of the Act, the ICD cannot be considered as Inland port. The error committed by the Tribunal is to overlook that both before and after the above amendment, inland ports were specifically mentioned as an Infrastructure facility in the statutory provision and In the understanding of the CBEC, which administers the Customs Act, an ICD was actually *an* Inland port. There is also no dispute that even in 1983 amendments had been made to the Customs Act by treating the ICD as part of the customs port for purpose of customs formalities and clearances. In these circumstances, the real question was not whether the CBDT notified the. ICD as an inland port but whether the ICD can be considered to be an Inland port. In our opinion having regard to the provisions of the Customs Act, the communications issued by the CBEC as well as the Ministry of Commerce and Industry, the object of Including 'Inland port' as an infrastructure facility and also having regard to the fact that customs-clearance also *takes* place in the ICD, the assessee's claim that the ICDs are inland ports under Expln. (d) of s. 80-IA(4) requires to be upheld."

63. The submission of the learned counsel In the case of All Cargo Global Logistics Ltd. is that the Hon'ble Delhi High Court has held that ICDs are landlocked and situated far off from the sea port as such. The ICDs of the Container Corporation of India are located at places such as Jamshedpur, Jodhpur, Jaipur, etc. These have been held to be inland ports for the purpose of deduction under s. 80-IA(4). The case of the assesses is better placed than the case of Container Corporation of India Ltd. (*supra*) in as much as it Is situated 5 fans, away from the port and it is apart of the port for carrying out activities mentioned earlier. Customs-clearance takes place from assessee's CFS. Therefore, it is argued that the assesses is entitled to deduction under s. 80-TA.

64. In reply, the learned standing counsel submitted that whenever the assessee claims an Income to be exempt from tax or claims a deduction, the preconditions for exemption or deduction have to be strictly satisfied by him. as held in the case of *Novopan India Ltd. vs. CCB* (1994) 3 SCC 606. In respect of this decision, he laid stress on the finding that liberal and strict constructions of exempt provision are to be Invoked at different stages of its interpretation. When the question is whether a subject falls in the notification or in the exemption clause then it being In the nature of exemption is to be considered strictly and against the subject but once the ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction. In the light of this decision, he dealt with the claim of the assessee under s. 80-IA). It is submitted that in Board clarification at. 6th Jan., 2011, in which dt. 16th .Dec., 2005 and 23rd June, 2000 were considered, It has been clarified that ICDs and CFSs are not 'ports' located on any Inland waterway, river or canal and therefore they cannot be classified as inland ports" for the purpose of s. 80-IA(4). It is further submitted that the certificate Issued by Jawahar Lal Nehru Port Trust has been withdrawn by the port trust It is also submitted that Inland Waterways Authority of India Act. 1985, provides the definition of the term infrastructure facilities", in its cl. (f), as the structures such as docks, wharves, Jetties, stages, locks; buoys, inland ports, cargo handling equipments, road and rail access and cargo storage spaces and states that the expression "infrastructure facilities shall be construed accordingly. In this Act, Inland port is included as item, thus, this term has a distinct meaning, separate and apart from other terms. Therefore, ICDs and CFSs cannot be Interpreted to be Included in the term "inland port". It Is also submitted that Circular No. 74 of 1997-Cus., dt. 30th Dec., 1997 of the CBEC makes a distinction between inland ports and ICDS/CFSs for grant of duty drawback benefit. It is also submitted that a study prepared by Transport and Tourism Division of Economic and Social Commission for Asia and Pacific (a division of the United Nations) provides an insight in the concept of "inland port" vis-avis "seaport". It is mentioned there that access should be provided to inland ports through waterways from sea by developing them.

65. We have considered the facts of the cases and submissions made before us. it may be mentioned that one of the arguments advanced by the learned counsel for the assessee Is that the case of *Container Corporation of India* (supra) is not based on any of the circulars issued by the port authorities, however, the CFS of the assessee has been granted such certificate. The certificate mentions that the CFS carries on port related activities, and it may be considered as an extendable activity of the port related activities. It is clarified that the CFS has not been built on BOT or BOLT Scheme sand that It is situated on land which does not belong to the port The letters written by port trust to the assessee also state that the matter has been referred to the IT Department. The Department has clarified that an ICD/CFS does not constitute an inland port. In the case of *GIT vs. ABG Heavy Industries Ltd. & Ors.* (2010) 231 CTR (Bom) 127: (2010) 37 DTR (Bom) 233: (2010) 189 Taxman 54 (Bom), the Hon'ble Court has held that the assessee is entitled to deduction under s. 80-IA. However there is a very salient difference

in facts that structures were located at port and such structures had to be handed over to the port trust on expiry of the period of agreement. In the case at hand it is clear that the assets of the CFS are not to be handed over to the port trust at any point of time as it is not built on BOT and BOLT Scheme. The CFS is also not located at the port. As against the aforesaid, the learned standing counsel has submitted that clarifications issued by other authorities including CBEC under the relevant Acts do not lay guidelines under the IT Act and that the matter has to be decided under the IT Act Independently. For doing so, initially a strict Interpretation has to be placed on the words "inland port" to examine that the assessee is entitled to the deduction. CBDT has furnished opinion that ICDs and CFSs are not entitled to such deduction as they do not constitute Inland ports. Other Acts as well as study report lead to the conclusion that a port can said to be an Inland port only if it has an access to the sea via a waterway.

66. We find that the solitary decision in this case by any High Court is in the case of Container Corporation Of India Ltd. (supra). In this case it has been held that an ICD is not a port but It Is an inland port. The case of CFS is similarly situated In the sense that both carry out similar functions. i.e.. warehousing, customs clearance and transport of goods from. Its location to the seaports and vice versa by railway or by trucks in containers. Thus, the issue is no longer res integra. Respectfully following this decision, it Is held that a CFS is an Inland port whose Income is entitled to deduction under s. 80-IA(4). Question No. 2 is answered accordingly,"

6.1 In this view of the situation, respectfully following the aforesaid decision of Special bench we allow the appeal filed by the assessee and it is held that assessee is entitled to get deduction under section 80IA(4) of the Act."

6.1 Respectfully following the decision of the Tribunal in assessee's own case in the immediately preceding assessment year and in absence of any contrary material brought to our notice by Ld. Departmental Representative , we find no infirmity in the order of the CIT(A) allowing the claim of the assessee. Accordingly, the order of the CIT(A) is upheld and the grounds raised by the Revenue are dismissed."

13. Since the Ld.CIT(A) while deciding the issue in favour of the assessee has followed the decision of the Tribunal in assessee's own case as well as various other decisions, therefore, in absence of any contrary material brought to our notice against the decision of the Tribunal in assessee's own case, we do not find any infirmity in the order of the CIT(A) allowing the claim of deduction u/s.80IA(4). Merely because the Revenue has filed an appeal before the Hon'ble High

Court, the same in our opinion cannot be a ground to take a contrary view than the view taken by the Tribunal especially in absence of any order reversing the decision of the Tribunal. Accordingly, we uphold the order of the CIT(A) and the grounds raised by the Revenue are dismissed.

14. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 05-10-2016.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 05th October, 2016.
सतीश

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT(A),-I, Thane
4. The CIT-I, Thane
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" पुणे / DR,
5. ITAT, "A" Pune;
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

//सत्यापित प्रति //True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune