IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH : KOLKATA

[Before Hon'ble Sri N.V.Vasudevan, JM & Dr.Arjun Lal Saini, AM]

I.T.A No.2616/Kol/2013
Assessment Year : 2010-11

D.C.I.T., Circle-12, Kolkata	-vs.-	M/s. Vantage Advertising Pvt. Ltd. Kolkata. [PAN : AABCV1202 B]
(Appellant)		(Respondent)

For the Appellant : Md. Usman, CIT(DR)
For the Respondent : Shri J.P.Khaitan, Sr.Advocate &
Shri Pratyush Jhunjhunwala, Advocate

Date of Hearing : 19.12.2017.
Date of Pronouncement : 03.01.2018.

ORDER

Per N.V.Vasudevan, JM

This is an appeal by the Revenue against the order dated 08.08.2013 of CIT(A)-XII, Kolkata relating to A.Y.2010-11.

2. Ground No.1 raised by the revenue reads as follows :-

"1.In the facts and circumstances of the case the ld. CIT(A) erred in deleting the disallowance of Rs.15,55,200/ - on account of purchase from. M/s. B.M.Sales Corporation despite the fact that this party has denied any transaction with the assessee company."

3. The Assessee is a company. It is engaged in the business of outdoor advertising and media advertising, infrastructure development and maintenance. In the course of assessment proceedings for A.Y.2010-11 the AO noticed that the assessee had claimed to have purchased angles and channels from M/s. B.M.Sales Corporation of the value of Rs.15,55,200/- for the purpose of display of hoardings. The said sum was claimed as an expenditure and deduction while computing the income from business. The AO noticed that in A.Y.2009-10 purchase from M/s. B.M.Sales Corporation was held by the AO in the order of assessment for A.Y.2009-10 to be not

genuine. This was based on the reply received from M/s. B.M.Sales Corporation in response to a notice by the AO u/s 133(6) of the Act that it had never supplied any material whatsoever to the assessee. Following the findings in the order of assessment for A.Y.2009-10, the AO disallowed the claim of the assessee for deduction of a sum of Rs.15,55,200/-.

4. On appeal by the assessee the CIT(A) deleted the addition made by the AO as in the order of the CIT(A) against the order of the AO for A.Y.2009-10, it was held that purchase from M/s. B.M.Sales Corporation were genuine. The CIT(A) found that except placing reliance on the order of assessment for A.Y.2009-10 the AO had made the disallowance of expenditure on purchase of Rs.15,55,200/- in the present A.Y.2010-11 and that no new facts or findings were brought on record by the AO to disallow the claim for deduction of the aforesaid expenditure. Since the disallowance for A.Y.2009-10 was deleted by CIT(A), the disallowance for A.Y.2010-11 was also deleted by the CIT(A).

5. Aggrieved by the order of CIT(A) the revenue has raised ground no.1 before the Tribunal.

6. We have heard the rival submissions. At the time of hearing it was brought to our notice that as against the order of CIT(A) for A.Y.2009-10 dated 12.06.2012 (CIT(A)-XII, Kolkata) the revenue preferred an appeal before the Hon'ble ITAT but the addition on account of disallowance of purchase from M/s. B.M.Sales Corporation was not challenged by the revenue. Thus the order of CIT(A) for A.Y. 2009-10 has become final. Since the impugned disallowance is based only on the findings in the order of assessment for A.Y.2009-10 and since the said disallowance has now been deleted we are of the view that CIT(A) was fully justified in deleting similar addition made in A.Y.2010-11. We find no ground to interfere with the order of CIT(A). Accordingly, ground No.1 raised by the revenue is dismissed.

7. Ground No.2 raised by the revenue reads as follows :-

"2. In the facts and circumstances of the case the Ld.CIT(A) erred in deleting the disallowance of Rs.2,64,548/- computed uls.14A read with Rule 8D."

8. The assessee earned dividend income of Rs.2,10,56,437/-. The dividend income does not form part of the total income and is exempt. In terms of section 14A of the Income Tax Act, 1961 (Act), the assesee had disallow expenditure incurred in earning exempt income. The assessee quantified the expenses incurred in earning dividend income at Rs.8,66,839/- which comprises of payments made to Reliance Portfolio Management Services and Security Transaction Tax (STT) as expenses incurred in earning the exempt income. The AO did not agree with the aforesaid computation made by the assessee. He was of the view that facilities and other set up of the company has also been used to manage the investments. Therefore a part of the total expenses should be considered as incurred for earning the dividend income. He therefore applied the provision of Rule 8D of the IT Rules and disallowed a sum of Rs.11,31,387/- . Since the assessee had already disallowed a sum of Rs.8,66,839/- the AO made an addition of Rs.2,64,548/- (11,31,387 - 866839) to the total income of the assessee by way of disallowance u/s 14A of the Act.

9. On appeal by the assessee the CIT(A) deleted the addition made by the AO. The CIT(A) held that the AO has not brought any material on record to show that the claim made by the assessee that only a sum of Rs.8,66,839/- was incurred to earn the exempt income was incorrect. Hence the addition made by the AO was deleted by CIT(A).

10. Aggrieved by the order of CIT(A) the revenue has raised ground no.2 before the Tribunal.

11. On a perusal of the order of AO it is clear that the AO has not brought any material on record to show that the claim made by the assessee regarding disallowance u/s 14A of the Act was incorrect. It is mandatory on the part of the AO to first reject

on an objective basis the claim of the assessee with regard to expenses incurred to earn exempt income before resorting to his own basis of expenses to be disallowed u/s 14A of the Act. Without doing so the AO is not entitled to apply the provision of Rule 8D to make disallowance of expenses u/s 14A of the Act. The following decisions relied upon by CIT(A) in coming to the aforesaid conclusion support the conclusion of CIT(A).

1. Advance Construction Co.Pvt. Ltd, Mumbai vs ACIT (2008-TIOL-281-ITAT-MUM):
2. ACIT vs Eicher Ltd. (2006) (101 TTJ 369) (Del-ITAT):
   Birla Group Holdings vs DCIT (2007) 13 SOT 642 (ITAT Mumbai).
3. Wimco Seedling Ltd. Vs DCIT (2007) 109 TTJ 462 (Del) (TM)

We find no grounds to interfere with the order of the CIT(A). Accordingly, Ground No.2 raised by the revenue is dismissed.

12. Ground No.3 raised by the revenue reads as follows :-

"3.In the facts and circumstances of the case the Ld.CIT(A) has erred in holding the advertisement hoardings as temporary structure and allowing depreciation @ 100% without appreciating that the hoardings are in fact permanent structures meant for longer duration and needs to be treated as Plant & Machinery which attracts 15% depreciation only; thereby deleting disallowance of Rs.1 ,86,71,881/-"

13. The assessee had claimed depreciation at 100% on hoardings structure. The Assessee is a company. It is engaged in the business of out-door advertisement. The assessee claimed depreciation at 100% on hoarding structures. Under part-A in Appendix-I to the Income Tax Rules, 1962 (Rules) under the head 'Tangible assets' entry (4) depreciation at 100% on "Purely temporary erections such as wooden structure" is allowed.

14. According to the AO erection of hoardings is done by first creating an iron structure fabricated according to the requirements. The iron structure is erected on a cement base which is a permanent structure. On this iron structure there is a wooden

board on which the final advertisement sheet is displayed. According to the AO hoardings therefore have life time for a considerable period and therefore cannot be regarded as "purely temporary erection". In ITA Nos.1054 & 1055/Kol/2008 dated 30.06.2009 for A.Y.2004-05 and 2005-06 in assessee's own case and ITA Nos. 1388 to 1392/Kol/2012 order dated 10.03.2015 for A.Y. 2004-05, 2006-07 to 2009-10 in assessee's own case the Tribunal allowed 100% depreciation on hoarding structures irrespective of whether hoardings were used for less than or more than 180 days during the relevant previous year. It was the plea of the assessee that hoardings had a life of one or two months or less than a year as they were exposed to sun, rain and adverse weather conditions and were to be regarded as temporary structures which are eligible for deduction at 100% depreciation. According to the AO in none of those decisions rendered in assessee's own case, the question whether advertisement hoardings can be regarded as permanent or temporary structure was ever decided. The AO therefore disallowed the depreciation claimed at 100% hoardings. According to the AO hoardings have to be regarded as plant and machinery on which allowable depreciation as per Rules was only 15%. The AO accordingly disallowed the difference between the depreciation claimed by the assessee and that allowed by the AO.

15. On appeal by the assessee, the CIT(A) allowed depreciation at 100% on hoardings. In doing so the CIT(A) followed the decisions rendered by the Tribunal referred to in the earlier paragraphs of this order. The CIT(A) directed the AO to allow the claim of the assessee for depreciation at 100% on hoardings.

16. Aggrieved by the order of the CIT(A), the revenue has raised Gr.No.3 before the Tribunal. The ld. DR, submitted that under part-A in Appendix-I of the Rules, under the head ' Tangible assets' entry (4) depreciation at 100% on "Purely temporary erections such as wooden structure is allowed. According to him the hoardings in question cannot be regarded as purely temporary erection.

17. We have given a very careful consideration to the rival submissions. We are of the view that the Tribunal has already taken a view in favour of the assessee in the

past assessment referred to in the earlier part of this order. It cannot be argued by the ld. DR at this stage that in none of these decisions the question whether the hoardings were temporary or permanent structure was considered by the Tribunal. Going by the principle of consistency we are of the view that it would be just and proper not to take a view different from the view which has already been taken in assessee's own case in the past. Even in the order of assessment the facts to substantiate a stand taken by the revenue have not been brought out.

18. Keeping in mind the precedents on the issue we are of the view that the order of CIT(A) does not call for any interference. Accordingly ground no.3 raised by the revenue is dismissed.

19. Ground No.4 raised by the revenue reads as follows :-

> *"4. In the facts and circumstances of the case the Ld.CIT(A) has erred in deleting the disallowance of the claim of deduction u/s.80IA of Rs.1 ,74,42,469/- without appreciating the fact that the Foot Over-bridges as well as Bus Shelters are not "Road" the revenue from which is eligible for deduction u/s. 80IA."*

20. The assessee claimed deduction u/s 80IA (4) (i) of the Income Tax Act, 1961 (Act) of a sum of Rs. 1,74,42,469**/-.** The aforesaid sum was claimed by the assessee to be revenue generated by displaying advertisement on foot over bridge that had been developed by the assessee for various municipalities/corporations. It was explained by the assessee that the municipalities and corporations allow the assessee to develop infrastructural facility in the form of Foot Bridge and Roads (including road median and street lights) The Assessee has to build and maintain the aforesaid infrastructure facility. The Assessee was allowed to display Advertisement hoardings on Foot Bridge and Road Medians and Street lights. The assessee derived income from Advertisement display on foot over bridge at Rs.80,61,448/- and roads including road medians and street lighting amounting to Rs.93,81,021/-. The revenue generated by Advertisement was to recoup the cost of development. This was claimed by the assessee to be income derived by the assessee from carrying on the business of

developing, operating and maintaining infrastructure facility within the meaning of section 80IA(4)(i) of the Act.

21. The Provisions of Sec.80-IA(4)(i) reads thus:

> **"Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.**
>
> **80-IA.** (1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.]
>
> (2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park or develops a special economic zone referred to in clause (*iii*) of sub-section (4) or generates power or commences transmission or distribution of power or undertakes substantial renovation and modernisation of the existing transmission or distribution lines :
>
> **Provided** that where the assessee develops or operates and maintains or develops, operates and maintains any infrastructure facility referred to in clause (*a*) or clause (*b*) or clause (*c*) of the *Explanation* to clause (*i*) of sub-section (4), the provisions of this sub-section shall have effect as if for the words "fifteen years", the words "twenty years" had been substituted.
>
> (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 [1][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;"

22. The details of various agreements with Municipalities/Corporations between the assessee were as follows :-

Sl. No.	Agreement entered into with	Date of the Agreement / letter	Infrastructure Facility	F
1	Bangalore Mahanagar Palike	20 November 2004 for a period of 5 years	Foot over bridge	A
2	Bangalore Mahanagar Palike	21 July 2007 for a period of 25 years (High court consent and extension to agreement dated 20 November 2004)	Foot over bridge	A
3	Corporation of Madurai	06 October 2008 for a period of 6 years	Road Median	A
4	Mysore City Corporation	31 March 2004 for a period of 3 years commencing from 01 August 2004	Street Lighting	A
5	Mysore City Corporation	18 June 2007 for a period of 3 years (extension letter to agreement dated 31 March 2004)	Street Lighting	A
6	Mysore City Corporation	25 July 2007 for a period of 5 years commencing from 01 December 2007	Street Lighting	A
7	Corporation of Madurai	29 January 2009 for a period of 15 years	Street Lighting	A

23. It was not disputed by the AO that on identical facts the Hon'ble ITAT, Kolkata Bench in the case of Vantage Advertising Pvt. Ltd in ITA Nos. 1054 & 1055/Kol/2008 order dated 30.06.2009 (Assessee's own case) and in another case Selvel Advertising P. Ltd. In ITA No.820/Kol/2008 has taken a view that income

from the business similar to the one carried on by the assessee in the present case was entitled to deduction u/s 80IA(4)(i) of the Act.

24. The AO was however of the view that subsequent to the decision rendered by the tribunal referred to in the earlier paragraph, the Hon'ble Supreme Court in the case of Liberty India Ltd. 83 Taxman 349 (SC) held that the word "derived from " has narrower connotation as compared to the words "attributable to". According to the AO by using the word "derived from", the Parliament intended to cover the sources not beyond the first degree. AO was further of the view that income from displaying of advertisement boards on toilet blocks and foot bridges cannot be regarded as a source of the first degree.

25. On appeal by the assessee, the CIT(A) allowed the claim of the assessee. According to CIT(A), the AO disallowed the claim of the Assessee disregarding the decisions rendered in Assessee's own case on identical issue by placing reliance on the decision of the Hon'ble Supreme Court in the case of Liberty India vs. CIT (supra). According to CIT(A), the facts of the Assessee's case was distinguishable from the facts in the case of Liberty India(supra). According to CIT(A), the Hon'ble Supreme Court in the said case has dealt with the issue of whether the DEPB credit/Duty drawback receipt can be considered as profit 'derived' from the industrial undertaking. According to CIT(A), in the case of the Assessee, profit derived by the Assessee has to be regarded as only from the first degree of source and in fact there is no other sources from where the profit can be derived. According to CIT(A), the Assessee had collected advertisement revenue in consideration of construction and maintenance of the infrastructure facility. The Assessee has only been given the right to collect advertisement revenue by display of advertisement panels The Assessee did carry on the business of developing, operating and maintaining the infrastructure facility continuously and systematically by the application of its labour and skill with a view to earning advertisement income. Since the Central Local Authority/other statutory body, did not have the funds to compensate the Assessee for costs it incurred for developing infrastructure facility, the Assessee was given license to collect

advertisement revenue by display of advertisement panels. The advertisement revenue collected by the Assessee retained the character of income derived from the business of the assessee from developing and maintaining "lnfrastructure facility" and does not change as income from 'advertisement business". The immediate source of advertisement income is the infrastructure facility business and the effective source of the genealogy of the source of the advertisement income is the infrastructure facility business. There was a direct nexus between the advertisement revenue and infrastructure facility business of the assessee. According to the CIT(A) from the terms of the agreements between the Assessee and the various municipal authorities, it was clear that the advertisement revenue was part of and directly related to said infrastructural facility. The CIT(A) also referred to the decision of the Mumbai Bench of ITAT in the case of ITO vs. E. A. Infrastructure Operations Pvt. Ltd. (2011) 135 TTJ 239 (Mum ITAT) wherein on an identical claim such as the one made by the Assessee in the present case, the concept of 'derived from' was explained as hereunder:

"9.On going through the principle laid down in above judicial pronouncements, it is manifest that the expression "derived from" is constricted in its ambit when considered in juxtaposition to the expression "attributable to" In order. to be covered within .the former expression it is sine quo non that the relation between the income and source must be that of. the first degree. In other words, income must directly spring from the source, which is subject matter of consideration in the language of section. Where the relation between income and source slips from first to second degree, income stands excluded from the scope of expression "derived from" and may fall within the purview of "attributable to". Consequently an income, so as to be characterized as 'derived from' an undertaking, should directly result from it. To put it simply, it should be "generation of profits (operational profits)" [as held in Liberty India (supra)] of the eligible undertaking. If however the income has got some indirect or remote relation with the industrial undertaking but does not spring from it, the same cannot be held to be derived from it."

Further, my attention is also drawn to a recent decision of the Bangalore Tribunal in the case of M/s Skylines Advertising Pvt. Ltd for AYs 2006-07, 2007-08 & 2008-09, wherein Hon'ble Tribunal has allowed the claim of deduction under section 80IA of the Act on structure facilities such as center road median. foot over bridge, bus shelter and street lighting, by relying on the decision of the Kolkata Tribunal in appellant's own case for AY 2005-06.

It is also found that the issue has been decided in favour of appellant by my predecessor while disposing the appeal of the appellant for A.Ys. 2008-09 & 2009-10 in Appeal No. 430/XII/R-12/1 0-11 & 482/XII/Cir-12/11-12, respectively.

> In the light of the above factual position of the case, after considering the appellant's submission and as the issue is covered by the Hon'ble Tribunal's decision in appellant's own case stated above and following the decision of my predecessor in the A Ys.2008-09 & 2009-10 on the same set of facts. I decide these grounds of appeal in favour of the appellant and direct the AO to allow the claim of the appellant accordingly. Hence these grounds of appeal are allowed."

26. Aggrieved by the order of the CIT(A) the revenue has raised ground no.4 before the Tribunal.

27. The ld. DR submitted before us that the CIT(A) has not seen that the assessee was in the business of advertisement and not development of infrastructure facility. His further submission was that he has also not examined that the quantification of the amount of eligibility of deduction u/s 80IA of the Act. According to him a part of the advertisement cannot be considered as derived from development of infrastructure facility. According to him the CIT(A) has co-terminus power with that of the AO and he ought to have examined the quantum of deduction that should be allowed u/s 80IA of the Act. He prayed that the matter should be remanded to the CIT(A) on the above aspects.

28. The ld. Counsel for the assessee, on the other hand, pointed out that the only issue raised in ground no.4 by the revenue as to whether foot over bridges can be considered as development of road for the purpose of allowing deduction u/s 80IA of the Act. He pointed out that there is a reference to bus shelters in the grounds of appeal which is erroneous and had obviously referred to only road median and lighting carried out by the assessee for municipalities and corporations. He brought to our notice that in support of the quantum of deduction u/s 80IA of the Act claimed by the assessee Form No.10CCB has been filed and copies of the same are placed at page nos. 456 to 460 of the assessee's paper book. He also submitted that even on the basis that the assessee is not a developer and only a works contractor the claim for deduction cannot be disregarded as according to the agreement with the municipalities and corporations, the assessee undertook the development of infrastructure facility and

assumed all the risks and had not acted as a contractor. He pointed out that the AO had not disputed the quantum of deduction u/s80IA of the Act claimed by the assesse. He also submitted that the Hon'ble Supreme Court in the recent decision rendered in the case of CIT vs Meghalaya Steels Ltd.383 ITR 217 (SC) has distinguished the decision rendered by the Hon'ble Supreme Court in the case of Liberty India 317 TR 218 (SC) in the context of a similar deduction u/s 80IB and 80IC of the Act as follows :-

> *"Liberty India being the fourth judgment in this line also does not help the Revenue. What this court was concerned with was an export incentive, which is very far removed from reimbursement of an element of cost. A Duty Entitlement Pass Book Drawback Scheme is not related to the business of an industrial undertaking for manufacturing or selling its products. Duty entitlement pass book entitlement arises only when the undertaking goes on to export the said product, that is after it manufactures or produces the same. Pithily put, if there is no export, there is no duty entitlement pass book entitlement, and therefore its relation to manufacture of a product and or sale within India is not proximate or direct but is one step removed. Also, the object behind the duty entitlement pass book entitlement, as has been held by this court, is to neutralise the incidence of customs duty payment on the import content of the export product which is provided for by credit to customs duty against the export product. In such a scenario, it cannot be said that such duty exemption scheme is derived from profits and gains made by the industrial undertaking or business itself. "*

29. We have given a very careful consideration. We find that identical issue has been considered and decided in assessee's own case in the decision cited by the ld. Counsel for the assessee. For the sake of ready reference we may refer to the order of the Tribunal in assessee's own case in ITA Nos. 1388 to 1390/Kol/2012 for A.Y.2004-05, 2006-07 to 2009-10 dated 10.03.2015 wherein this aspect has been considered and the tribunal as follows :-

> *"8. We have carefully considered the submissions and perused the records. We find that the issue on merits as to whether the assessee is entitled to deduction u/s 80IA of the Act for construction of foot over bridge as well as bus shelter is covered in favour of assessee by the decision of the Tribunal and the Hon'ble Calcutta High Court as referred in the submissions of the ld. Counsel of the assessee. The Tribunal in assessee's own case as well as in the case of DCIT vs Selvel Advertising Pvt. Ltd. (supra) has held that bus shelters and foot over bridges should be considered as part of the infrastructure facility for claiming deduction u/s 80IA of the Act. This issue was also supported by the decision of the Hon'ble Calcutta High Court in the case of Selvel Advertising Pvt. Ltd.*

wherein the Hon'ble High Court has upheld ITAT's decision quashing the revision order passed by ld. CIT u/s 263 of the Act wherein bus shelters and foot over bridges were not to be considered as part of the infrastructure facility for claiming deduction u/s 80IA of the Act.

8.1. As regards the issue raised by the ld. DR that the income which is the subject matter of claim of deduction u/s 80IA of the Act was not derived from the business of advertising of bus shelters and foot over bridges, we find that this is altogether a new issue which is not even the case of AO. The AO has made the disallowance only on the ground that construction of bus shelter and foot over bridge cannot be treated as development of infrastructure facility. Hence they do not qualify for deduction u/s 80IA of the Act. This aspect of AO's disallowance has been duly over ruled by ld. CIT(A) as well as ITAT. The same also draws support from the Hon'ble Calcutta High Court decision in the case of DCIT vs Selvel Advertising P.Ltd. In these cases it has been held that development of foot over bridges and Bus shelters do qualify for deduction u/s 80IA of the Act on account of infrastructure development. When the AO has not raised any issue as to whether the income of the assessee can be considered to be income derived from the industrial undertaking and the same was also not the subject matter of consideration before the ld. CIT(A) nor any such ground has been raised before the ITAT, in our considered opinion the ld. DR can not now enlarge the scope of the Revenue's appeal before us.

8.2. In this regard we also draw support from the Hon'ble Madhya Pradesh High Court exposition in the case of Kamal Kishore and Co. vs CIT 232 ITR 668 for the following proposition :

> *"Section 253 of the Income-tax Act, 1961, permits appeals to the Appellate Tribunal. Under sub-section (2) of this section, the Commissioner may, if he objects to any order, direct the Assessing Officer to appeal to the Appellate Tribunal against the order. It is thus clear that there has to be an appeal and there has to be a specific objection. Under Order 41, rule 2, of the Code of Civil Procedure also it is clear that the appellant shall not except by leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal."*

On the basis of the above ratio the Hon'ble High Court had held that admittedly the ground of status was not taken by the Department in terms of section 253(2) of the Act. No leave was obtained to urge the ground in regard to the status as regards the liability to tax. The Tribunal erred in law in setting aside the findings given by the Appellate Assistant Commissioner that the assessee was a separate entity and the assessment made in the case of the assessee should be treated as substantive.

8.3. Thus from the above we hold that the issue which was not the basis of disallowance by the AO and the same was not the subject matter of consideration by the ld. CIT(A) and the same was also not the subject matter of the ground of

appeal taken before ITAT the issue now being raised by the ld. DR need not be adjudicated by us. Hence on the issue as to whether foot over bridges and bus shelters qualify for deduction of section 80IA of the Act we hold that the ld. CIT(A) is correct in holding the assessee's entitlement for deduction u/s 80IA of the Act. Accordingly this ground of appeal raised by the revenue stands dismissed."

30. Respectfully following the decision of the Tribunal we hold that there is no merit in ground no.4 raised by the revenue.

31. With regard to the other contentions of the ld. DR before us we are of the view that these issues were never raised by the AO or the CIT(A) and it is not open to the revenue to set up a new case which does not emanate either from the orders of the revenue authorities or grounds of appeal filed before the Tribunal. For the reasons given above we find no merits in Ground No.4 raised by the revenue and the same is dismissed.

32. Ground Nos. 5 and 6 raised by the revenue read as follows :-

"5. In the facts and circumstances of the case the Ld.CIT(A) has erred in deleting the disallowance of Rs. 10,12,45,605/- by holding that the payment for renting of hoarding space attracts TDS @ 2% uls.194C (contractual in nature) and not @ 10% u/s. 1941 (rental in nature)

6. In the facts and circumstances of this case the Ld.CIT(A) has erred in not appreciating that TDS has to be deducted under the specific provision. The provisions under residuary section can be invoked only if there is no specific section under the I.T.Act. TDS on payment of rent will attract TDS only u/s. 1941 and not u/s.194C which is a residuary section for any type of contractual payments."

33. During the AY under consideration, the Assessee has deducted TDS under section 194C of the Act on payment of Rs. 101,245.605 made for obtaining right of displaying the advertisement on hoardings. The claim of the assessee was that the right to display advertisement hoarding and not taking hoarding on rent. Therefore

Provisions of Sec.194C of the Act in respect of payment for execution of work will apply for TDS and not Section 194I of the Act which applies to payment of rent. The Assessee contended that it never had any right to use the hoarding structures but only had a limited right of displaying advertisement on hoarding structures belonging to others. It was also pointed out that the hoarding structures were not operated and maintained by the assessee but was operated and maintained (including maintaining of outdoor media, illumination of lit media 'etc.) by advertising agencies.

34. According to the AO this payment was the payment in question was not a payment under contract for putting up a hoarding and therefore the assessee ought to have deducted tax at source on the aforesaid payment u/s 194I of the Act at 10% and it was not in the nature of payment made to a contractor for carrying out any work u/s 194-C on which TDS was required to be made at 2%.

35. The AO referred to CBDT Circular No.715 dated 08.08.1995 wherein the scope of an advertising contract has been explained by CBDT as follows :-

> " .. Question 1 : What would be the scope of an advertising contract for the purpose of section 194C of the Act?
>
> Answer: The term 'advertising' has not been defined in the Act. During the course of the consideration of the Finance Bill, 1995, the Finance Minister clarified on the Floor of the House that the amended provisions of tax deduction at source would apply when a client makes payment to an advertising agency and not when advertising agency makes payment to the media, which includes both print and electronic media. The deduction is required to be made at the rate of 1 per cent. It was further clarified that when an advertising agency makes payments to their models, artists, photographers, etc., the tax shall be deducted at the rate of 5 per cent as applicable to fees for professional and technical services under section 194J of the Act. .. "

36. The AO thereafter came to the following conclusion for disallowing and adding a sum of Rs.10,12,45,605/- to the total income of the assessee u/s 40(a)(ia) of the Act for non deduction of TDS as per Section 194I of the Act :

> "It means that the payments made by company advertising its products will be termed as advertising payments. The payments made by the assessee company is not to advertise its products hence the payments cannot be termed as advertising and TDS is liable to be deducted u/s 194I and not 194C. Assessee has deducted TDS at lower rate u/s 194C and not the rate prescribed u/s 194C. Lower deduction is equivalent to non deduction of TDS and hence Rs.10,12,45,605/- should be disallowed for lower deduction of TDS."

37. In the appeal against the order of the AO, the assessee submitted before the CIT(A) that the payment on which the tax was deducted at source u/s 194C of the Act has to be regarded as payment to a contractor for carrying out work and does not actually relate hiring of advertisement hoarding sites. Though the entire payment was shown in the profit and loss account, under the head "site hiring charges", the Assessee maintained this distinction whenever payment was made which was carrying out work and that which was in the nature of rent and deducted tax at source as per the relevant statutory provisions of Sec.194C or Sec.194I of the Act. The assessee therefore submitted that the assessee had rightly deducted tax at source u/s 194C of the Act. The assessee further submitted that the assessee has deducted tax u/s 194C of the Act being payments made to contractors and sub-contractors and it is not a case of non-deduction of tax or no deduction of tax as is the import of section 40(a)(ia) of the Act. The conditions laid down u/s 40(a)(ia) of the Act for disallowance of the debit is that tax is deductible at source and such tax has not been deducted. If both the conditions are satisfied then such payment cab be disallowed .u/s 40(a)(ia) of the Act. But where tax is deducted by the assessee, even under bonafide wrong impression, under wrong the provisions of TDS, the provisions of section 40(a)(ia) of the Act cannot be invoked. The assessee has deducted tax u/s 194C of the Act and not u/s 194I of the Act and paid the sum deducted within the prescribed time. The provisions of section 40(a)(ia) of the Act has two limbs, one is where, inter alia, assessee has to deduct tax and the second where after deducting tax, inter alia, the assessee has to pay into Government Account. There is nothing in the said section to treat, inter alia, the assessee as defaulter where there is it shortfall in deduction. With regard to the shortfall, it cannot be assumed that there is a default as the deduction is not as required by or under the Act, but the facts is that this expression, "on which tax is deductible at

source under Chapter XVII-B and such tax has not been deducted or, after deduction has not been paid on or before the due date specified in sub-section (1) of section 139". It was argued that Section 40(a)(ia) of the Act refers only to the duty to deduct tax and pay to government account. It there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provision, the assessee can be declared to be an assessee in default u/s 201 of the Act and no disallowance can be made by invoking the provision of section 40(a)(ia) of the Act.

38. The Assessee also relied on the decision of the Hon'ble Jurisdictional High Court, in its judgement vide CIT Vs. M/s S.K. TEKRIWAL 361 ITR 432 (Cal) wherein it has been held the same issue and decided the same in the favour of the assessee that "if there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions, the assessee can be declared to be an assessee in default u/s 201 of the Act and no disallowance can be made by invoking the provisions of sec 40(a)(ia) of the Act".

39. The CIT(A) deleted disallowances made by the AO by following the decision of the Hon'ble Calcutta High Court in the case of M/s. S.K.Tekriwal (supra) wherein it was held that Section 40(a)(ia) of the Act cannot be invoked where there is a short deduction and can be invoked only when there is non-deduction. The CIT(A) did not go into the question as to whether the payment in question fell within the ambit of section 194C or 194I of the Act.

40. Aggrieved by the order of the CIT(A) the revenue has raised ground no.3 before the Tribunal.

41. The ld. DR while conceeding that the issue is covered in favour of the assessee by the decision of the Hon'ble Calcutta High Court nevertheless brought to our notice the decision of Kerala High Court in ITA No.16 of 2014 order dated 20.07.2015 wherein the Hon'ble Kerala High Court has taken a view contrary to the view taken by the Hon'ble Calcutta High Court.

42. We are of the view that the decision of the Hon'ble Calcutta High Court is binding on this tribunal being on the decision of the Jurisdictional High Court. We are therefore of the view that the order of CIT(A) on this issue does not call for any interference. Accordingly ground no.5 & 6 raised by the revenue are dismissed.

43. In the result the appeal by the revenue is dismissed.

Order pronounced in the Court on 03.01.2018.

Sd/-	Sd/-
[Dr.A.L.Saini]	[N.V.Vasudevan]
Accountant Member	Judicial Member

Dated : 03.01.2018.
[RG Sr.PS]

Copy of the order forwarded to:

1. M/s. Vantage Advertising Pvt. Ltd., C-56, First Avenue, Anna Nagar East, Chennai-600 102.
2. D.C.I.T.-Circle-12, Kolkata.
3. C.I.T.(A)-XII, Kolkata 4. C.I.T.-IV, Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy By Order

Senior Private Secretary
Head Of Office/ D.D.O., ITAT Kolkata Benches