IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

ITA No.190/Coch/2017 : AY 2005-06
ITA No.191/Coch/2017 : AY 2006-07
ITA No.192/Coch/2017 : AY 2007-08
ITA No.360/Coch/2014 : AY 2008-09
ITA No.464/Coch/2014 : AY 2009-10
ITA No.165/Coch/2017 : AY 2010-11

The Deputy Commissioner of Income-tax, Circle-1(1), Kochi.	**Vs.**	M/s. Cochin International Airport Ltd., GCDA Commercial Complex, Marine Drive, Kochi-682 031. [PAN:AAACC 9658B]
(Revenue-Appellant)		**(Assessee-Respondent)**

ITA No.344/Coch/2014 : AY 2008-09
ITA No.396/Coch/2014 : AY 2009-10
ITA No.310/Coch/2015 : AY 2010-11

M/s. Cochin International Airport Ltd., GCDA Commercial Complex, Marine Drive, Kochi-682 031. [PAN:AAACC 9658B]	**Vs.**	1. The Deputy Commissioner of Income-tax, Circle-1(1), Kochi. 2. Additional Commissioner of Income-tax, Range-1, Kochi.
(Assessee -Appellant)		**(Revenue-Respondent)**

Revenue by	Smt. A.S. Bindhu, Sr. DR
Assessee by	S/Shri Rajasekharan/K. Gopi, CAs

Date of hearing	23/10/2019
Date of pronouncement	21/11/2019

O R D E R

Per CHANDRA POOJARI, AM:

The appeals filed by the Revenue in ITA Nos. 190 to 192/Coch/2017, 360 & 464/Coch/2014 and 165/Coch/2017, arising out of assessment orders passed u/s. 143(3) r.w.s. 254 of the I.T. Act, 143(3) of the I.T. Act and 143(3) r.w.s. 263 of the I.T. Act respectively are directed against the different orders of the CIT(A)-II, Kochi and pertain to the assessment years 2005-06, 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11. The appeals filed by the assessee in ITA Nos. 344/Coch/2014, 396/Coch/2014 and 310/Coch/2015, arising out of assessment orders passed u/s. 143(3) of the I.T. Act and 143(3) r.w.s. 263 of the I.T. Act respectively are directed against the different orders of the CIT(A)-II, Kochi and pertain to the assessment years 2008-09 to 2010-11.

ITA Nos. 190 to 192/Coch/2017: Revenue's'Appeals: AYs 2005-06 to 2007-08

2. The first common ground in Revenue's appeals in ITA Nos. 190 to 192/Coch/2017 for the assessment years 2005-06 to 2007-08 is with regard to allowability of deduction u/s. 80IA on account of non compliance of agreement and commencement u/s. 80IA(4)(i)(b) of the I.T. Act and 80IA(4)(i)(c) of the Act.

3. The facts of the issue as narrated in ITA No. 190/Coch/2017 for the assessment year 2005-06 are that the assessee claimed deduction u/s. 80IA in their return of

income for the assessment year 2005-06. The Assessing Officer disallowed the claim on the ground that no agreement had been entered into for operation of the airport and that the airport started operations before 01/04/1995, which resulted in the non-compliance of conditions specified in sec. 80IA(4)(i) – Clause (b) & (c).

3.1 This issue came up for consideration before the Tribunal in A.Y.s 2005-06, 2006-07 and 2007-08. . The Tribunal vide their order in ITA Nos. 807/Coch/2008, 375/Coch/2009, and 392/Coch/2010 dt 04.05.2012 read with their order in MP Nos. 08-10/Coch/2013 dt 28.03.2013 directed the AO to consider all records including the submissions made by the assessee and decide the issue afresh, as under:-

> *"6. We have heard the rival contentions on this issue. The agreement contemplated in clause (b) of Sec. 80IA (4) is the agreement entered with Government/Government bodies for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility. Before the AO, the assessee" has filed "Aerodrome Licence-Public Use" and the MOU on provision of Facilities in the Airport, The question is whether these two documents constitute 'Agreement for developing or operating and maintaining or developing, operating and maintaining a new infrastructure facility, in our view, both the agreements do not constitute the agreements specified in clause (b), because the first one is just a license and the second one relates to the provision of facilities inside the airport. What is contemplated in clause (b) is the agreement for developing and/or operation of the infrastructure facility entered with the Government/Government body. Before us also, the assessee has furnished agreements :-*
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> *a) Agreement with Air India for "Ground Handling".*
> *b) MOU with BPCL for fueling operations and Land use.*
> *c) Agreement with Thomas Cook, Arts Jewellery, Multimedia, Bharti Airtel, EIH Ltd.*

These agreements are the agreements entered with the service providers and not the agreements contemplated under clause (b) of the Act. It may be argued logically one can come to the conclusion that there existed the agreement with the Government, since the service providers would not enter into agreement with the assessee unless such an agreement is available. In our view, this case where the assessee is required to fulfill the condition in a straight manner and hence the assessee is directed to furnish the relevant agreement to the AO."

3.2 Consequent to remand by the Tribunal again the Assessing Officer disallowed the claim of the assessee on the ground of non compliance of clause (b) and clause (c) of section 80IA(4)(i) of the I.T. Act. On appeal, the CIT(A) reversed the order of the Assessing Officer and allowed the claim of the assessee u/s. 80IA of the Act. This issue was the subject matter of appeals of both the assessee and the revenue before the Jurisdictional High Court against the original order of the Tribunal ITA Nos. 807/Coch/2008, 375/Coch/2009 and 392/Coch/2010 supra. In the meantime, on assessee's appeals, the High Court vide consolidated order in ITA Nos. 163,169 &176 of 2012 dated 07/08/2017 set aside the order of the Tribunal and held that the assessee had complied with section 80IA(4)(i)(b) of the Act. The order of the High Court was given effect to by the Assessing Officer vide order passed u/s. 143(3) r.w.s. 260 of the I.T. Act dated 31/12/2018 and allowed deduction u/s. 8IA(4)(i)(b) of the I.T. Act. Further, the SLP filed by the Department against the order of the High Court was rejected by the Supreme Court. Hence, the matter has attained finality and covered in favor of the assessee and against the Department.

3.2.1 Against this, the Revenue is in appeal before us.

3.3 We have heard the rival submissions and perused the record. In our opinion, this issue is covered in favour of the assessee by the judgment of the High Court in I.T.A Nos.163, 169 & 176 of 2012 dated 07/08/2017 for the assessment years 2005-06, 2006-07 and 2007-08 wherein it was held as under:

> *"12. From the provisions of Annexure-C and Annexure-K, which contain the obligations of the Airports Authority of India, it is clear that the Airport Authority of India was only undertaking to discharge its functions as provided under Section 12 of the Airports Authority of India Act, 1994 for the operation and maintenance of the airport which was developed by the Cochin International Airport Limited. Such an agreement between the Airports Authority of India and the assesses would qualify to be an agreement entered into with a statutory body for "operating and maintaining the infrastructure facility", viz. the airport.*
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> *13. It was argued by the Senior Counsel for the Revenue that they qualify for the benefit of deduction under Section 80-IA of the IT Act, the agreement with the statutory body should have been entered into by an airport which is already operational. According to him, the provisions of Annexure-C and Annexure-K would show that the obligations undertaken by the airport were, for making the airport operational, which according to the counsel, was a part of development of the airport. Having read clause-(b) of sub-section (4) of Section 80-IA, we are not persuaded to think that to satisfy the requirement of clause (b), the agreement should be one entered into by an airport which is already functional. An airport to be operational require the facilities that are agreed to be provided by the Airport Authority vide Annexure-C and Annexure-K. It is only on installation and operation of such equipments can the airport be operated and maintained. Such an agreement would be an agreement for operating and maintaining the infrastructure facility viz. the airport and for the purpose of Section 80IA, the statute does not contemplate that the airport should already be on stream and that the agreement should be entered into thereafter.*
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> *14. Further, this argument of the revenue would also militate against sub-section 2 which provides that the assessee would be entitled to the benefit of deduction from the year in which the undertaking or enterprise develops or begins to operate the infrastructure facility. Necessarily, therefore, the agreement and the installation of the equipments for the operation of the*

airport should precede the commencement of operation of the infrastructure facility to avail the benefit of deduction. The statutory provision and the agreement being as above, we cannot uphold the conclusion of the Tribunal that both the agreements could not constitute agreement! specified in clause-(b). Accordingly, the findings of the Tribunal with reference to clause(b) of sub-section (4) of Section 80-IA are set aside.

15. The matter will stand remitted to the Assessing Officer for fresh examination as ordered by the Tribunal in paragraph 7 of its order."

In view of the above judgment of the High Court, the assessee is entitled for deduction u/s. 80IA(4)(i)(b) of the I.T. Act. Being so, we do not find any infirmity in the findings in para 15 of the judgment of the High Court in relation to section 80IA(i)(c) of the I.T. Act and not related to section 80IA(4)(i)(b) of the I.T. Act for these assessment years. Thus, this ground of appeals of the Revenue for these assessment years is rejected.

4. The next common ground in ITA Nos. 190 to 192/Coch/2017 for the assessment years 2005-06 to 2007-08 is with regard to allowability of deduction u/s. 80IA on account of non compliance of agreement and commencement u/s. 80IA(4)(i)(c) of the I.T. Act.

4.1 The dispute is regarding compliance of section 80IA(i)(c) i.e., whether it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995. According to the Assessing Officer, the assessee had commenced business before 01/04/10995 and relied on the order of the Tribunal for

A.Y.s 1995-96 and 1996-97 in ITA No. 45/Coch/2000 dated 17/03/2004. It was submitted that the High Court of Kerala had vide their order in ITA No. 256/2009 dated 01st November, 2018 reversed the finding of the ITAT for the AYs 1995-96 and 1996-97 that the assessee had commenced their business before 01.04.1995. In view of the same, it was submitted that the basis of Assessing Officer's presumption that the assessee had commenced business had been rendered null and void.

4.2 We have heard rival submissions and perused the material on record. Section 80IA(4)(i)(c) provide that "(c) It has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995. We find that a similar issue was considered by the Tribunal in ITA No. 807/Coch/2008, 375/Coch/2009, 392 and 373/Coch/2010 dated 4th May 2012 AYs 2005-06 to 2007-08. In Para 7 of its order, the Tribunal held that the difference between the "Commencement of business" and " Starting up of the facility" was not appreciated by the AO and directed the AO to verify when the assesses had actually started the facility. The relevant portion of the order reads as follows:

> *"The difference between the "commencement of business" and "starting of facility" was not appreciated by the AO. Once this difference is appreciated the next requirement is ascertainment of the factual aspects likes various dates in which the various operations were started by the assessee. Evidently, the basic particulars are not borne out of assessment order nor there was any occasion for the AO to verify those vital details. Hence, we are of the view that this issue requires re-examination at the end of the AO. Accordingly, we set aside the order of Ld CIT(A) and restore the same to the file of the AO for examination of the issue in accordance with the law.".*

4.3 The CIT (A) considered this issue in the light of the directions of the Tribunal for earlier years, and held that the assessee had started operating and maintaining the airport after 1.4.1995 and complied with section 80 IA (4) (i) (c). The Ld. AR submitted that an airport would start operating and maintaining only when it is authorised to operate by the regulatory authority of the country and aircrafts are allowed to land /take off from the airport. Assessee airport was granted provisional authorization to operate by Government of India, Ministry of Civil Aviation as per the order dated 9th June 1999. The final authorization was issued on 10.06.1999. Subsequently, the Government of India notified by way of Notification dated 22nd June 1999, that all civil commercial flights will operate (to and from) the assessee airport with effect from 1st July 1999. Thus, it was clear that the assessee had started operating and maintaining the Airport only from 1st July 1999, and hence, the assessee has satisfied the condition under section 80 (IA)(4)(i)(c) of the I.T. Act. The High Court had confirmed the order remanding the ground to the AO for fresh adjudication and the Assessing Officer had given effect to the order of High Court on 31.12.2018 and allowed deduction u/s. 80IA(4)(i)(c) of the I.T. Act. Accordingly, the Ld CIT(A) has rightly allowed the claim of the assessee regarding 80IA of the Act that assessee has complied with the requirements of Section 80IA (4)(i)(b) & (c) of the Income Tax Act. Hence, this ground of appeal of the Revenue is dismissed.

5. The next common ground in Revenue's appeals in ITA Nos. 190 to 192/Coch/2017 for the assessment years 2005-06 to 2007-08 is with regard to surcharge from prepaid taxi, sale of scrap, notice pay, interest on delayed payment and bond from staff as 'income from other sources' and not as income from business for claiming deduction u/s. 80IA of the Act.

5.1 The facts of the case are that in the appeal by the department to Tribunal, the Tribunal held that all the income referred to by the AO except miscellaneous income is to be assessed under the head income from business. In respect of the items included under the head Miscellaneous income, the Tribunal had directed the AO to examine the nature of income included under the said head and take a decision in the light of the directions given by the ITAT in their order for the AY 2004-05.

5.2 During the course of the assessment, the assessee furnished details of the miscellaneous income. After examining the details, the AO held that the following incomes are not business income and is assessable under the head Income from other sources, as they do not arise from or out of the core business of the assesse.

1. Income from surcharge from pre paid tax	Rs. 30,10,645
2. Income from sale of scrap	Rs. 10,55,631
3. Notice pay	Rs. 77,907
4. Interest on delayed payment	Rs. 21,184
5. Income from film shooting	Rs. 2,46,000
6. Bond from staff	Rs. 16,000

5.3 On appeal, the CIT(A) allowed this ground of appeals of the assessee.

5.4. Against this, the Revenue is in appeal before us.

5.5 We have heard the rival submissions and perused the record. In our opinion, the issue was the subject matter of dispute before the High Court for the assessment years 2005-06 to 2007-08 and vide judgment in ITA Nos. 194,197,200 & 208/2012 dated 17th August 2017, it was held that income derived from core and essential activities other than incidental amenities to passengers is eligible for deduction u/s. 80IA of the I.T. Act. The relevant portion reads as follows:

> *"10. The question to be considered is whether such rent and services and royalty received by the assessee would qualify to be 'profits and gains' derived from the business of the assessee. We have referred to section 80 IA and indicated that what is permitted to be deducted in computing the total income of the assessee is an amount equal to 100% of profits and gains derived from such business, viz. the business of operating an airport. Therefore, the first issue to be considered is whether the rent and services and royalty received by the assessee are profits and gains derived by the assessee from its business. The term 'profit and gains derived', used in Section 801A, is also used in other provisions of the Income Tax Act. The Apex Court in Cambay Electric Supply Industrial Co.Ltd. v CIT ([1978] 113 ITR 84), referring to section 80J (since omitted by Finance Act (No.2, 1996), inter alia held thus:*
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> > "*In this connection it may be pointed out that whenever the legislature wanted to give a restricted meaning in the manner suggested by the learned Solicitor-General it has used the expression 'derived from', as for instance in Section 80-J. In our view, since the expression of wider import, namely, 'attributable to' has been used, the legislature intended to cover receipts from sources other than the actual conduct of the business of generation and distribution of electricity".*

11. The Privy Council in its judgment in CIT v Raja Bhadur Kamakhaya Narayan Singh (16 ITR 325) had also construed the term 'derived' in the following manner:

"The word 'derived' is not a term of art. Its use in the definition indeed demands an enquiry into the genealogy of the product. But the enquiry should stop as soon as the effective source is discovered. In the genealogical tree of the interest land indeed appears in the second degree, but the immediate and effective source is rent, which has suffered the accident of non-payment and rent is not land within the meaning of the definition."

12. The judgment in CIT v Raja. Bhadur Kamakhaya Narayan Singh (16 ITR 325) was approved by the Apex Court in Bacha F.Guzdar v CIT (27 ITR 1). Another provision where this expression occurs is section 80(HH) of the Act. This provision came up for consideration of the Apex Court in Pandian Chemlals Ltd. v Commissioner of Income Tax, Madurai ([2003] 262 ITR 278). In this judgment, after referring to the aforesaid precedents, it was held that the words 'derived from' in section 80-HH must be understood as something which has direct or immediate nexus with the assessee's industrial undertaking.

13. Viewed in the manner as the Apex Court has understood the term 'derived from' occurring in section 80-HH, we have to construe the expression 'profit and gains derived from such business' used in section 801A, as the profits and gains gained by the assessee, which has direct and immediate nexus with the assessee's business, viz. airport. Therefore, what qualifies to be the business income of the assessee would be the income derived by the assessee from its core and essential activities of the airport and not from its incidental activities providing amenities to passengers in the airport.

14. However, we find that neither the assessing officer nor the first appellate authority or Tribunal has examined the issue in the manner as indicated by us. Instead, the. Tribunal was fully guided by the judgment of the Court of Appeal and the copies of agreements which were seen to have been produced. Necessarily, therefore, the orders will have to be set aside and the matter has to be remitted to the assessing officer to reconsider each and every item of the income derived by the assessee towards rent and services and royalty and decide whether the income of the assessee was derived by it from its core business.

15. Therefore, the orders of the Assessing Officer, appellate authority and the Tribunal, in so far as it is decided that the income derived by the

assessee from royalty, rent and services are assessable under the head 'income from business' are set aside. The matter will stand remitted to the assessing officer, who will issue notice to the assessee and decide the matter afresh in the manner as indicated above.

The questions of law framed are answered in the above manner and the appeals are accordingly disposed of."

5.6 The Assessing Officer had already given effect to the above order of the High Court vide order dated 31/12/2008 by allowing the claim of the assessee u/s. 80IA of the Act. Hence, the department cannot contest this issue once again before the Tribunal. Thus, this ground of appeals of the Revenue is dismissed as infructuous for the assessment years 2005-06, 2006-07 and 2007-08.

5.7 In the result, the appeals of the Revenue in ITA Nos.190 to 192/Coch/2017 are dismissed.

ITA Nos. 360/Coch/2014 & 464/Coch/2014 : Revenue's Appeal : AYs. 2008-09 & 2009-10

6. The first common ground in ITA Nos. 360/Coch/2014 and 464/Coch/2014 is with regard to allowability of deduction u/s. 80IA on account of non compliance of agreement and commencement u/s. 80IA(4)(i)(b) of the I.T. Act . As discussed in para 6 and 6.1 of this order in ITA Nos. 190 to 192/Coch/2017, this ground of appeal of the revenue is dismissed.

6.1 The next common ground in ITA Nos. 360/Coch/2014 and 464/Coch/2014 is with regard to allowability of deduction u/s. 80IA on account of non compliance of agreement and commencement u/s. 80IA(4)(i)(c) of the I.T. Act. As discussed in para 6.2.2 and 6.2.3 of this order in ITA Nos. 190 to 192/Coch/2017, this ground of appeals of the revenue is dismissed.

7. The next common ground in Revenue's appeals in ITA Nos. 360/Coch/2014 and 464/Coch/2014 for the assessment years 2008-09 and 2009-10 is with regard to assessment of income from royalty as income from other sources and not as income from business eligible for deduction u/s. 80IA of the Act.

7.1 The facts of the issue as narrated in ITA No.464/Coch/2017 is that the Assessing Officer noticed that the assessee was earning income from a number of activities which cannot be said to be derived from the operation of infrastructure facility and hence, it cannot be treated as income derived from airport operations. Thus, the Assessing Officer disallowed the following income:

(i) Income from rent and services at Rs.1,37,434,981/-

ii) Miscellaneous income at Rs.14,786,972/-

(iii) Interest at Rs.1,09,0546,410 and

(iv) royalty under various heads of Rs.225,584,859/-

7.2 On appeal, the CIT(A) observed that for royalty income, it is derived from the operations of the airport, and hence, should be allowed while computing deduction u/s. 80-IA. The CIT(A) held that the royalty income earned by the assessee under the following heads can be treated as income derived from airport operations:

Royalty Baggage Wrapping	1,374,117.00
Royalty Cargo Operations Ethihad	160,983.00
Royalty from Air India for Ground handling	195,224,205.22
Royalty from Fuel/BPCL for aircraft fuelling	4,530,104.14
Royalty Terminal Handling Services & Valet Services	3,016.631.56
Total	204,306,040.92

7.3 However, it was observed that the following heads of royalty income are incidental and related to providing better passenger services, but they cannot be treated as derived from airport operations. These include-

Royalty Mobile Phone Counters	4,713,263.10
Royalty on Mobile Charger box	2,226,219.00
Royalty/Restaurants	5,039,404.53
Royalty/foreign Exchange/Thomas Cook	879,494.70
Royalty/Vending Machines	2,018,552.94
Royalty-Others(Video Walls/Conferencing etc.)	6,059,681.46
Total	20,936,615.73

7.4 Thus, in view of the above, the CIT(A) held that the following heads of income are treated as not derived from the operation and maintenance of the airport/eligible business of running of infrastructure facility, and hence, would not be eligible for computation of deduction u/s. 80-IA:

i) Income from rent and services at Rs.13,74,34,981/-

ii) Miscellaneous income at Rs.14,786,972/-

iii) Interest income at Rs.1,09,056,410/- and

iv) Royalty under various heads as listed Table II above.

Total of (i) to (iv) above : Rs.282,214,979/-

7.5 Accordingly, deduction u/s. 80IA(4)(i) was allowed to the assessee. However, income to the tune of Rs.282,214,979/- was excluded from computation of such profits for the purposes of this deduction being not derived from the operation of airport.

7.6 Against this, the Revenue is in appeal before us. The Ld. DR submitted that the above income is not derived from core and essential business activities of the assessee and it being incidental income, the same is not entitled for deduction u/s. 80IA of the Act.

8. The Ld. AR submitted that this issue was considered by the Tribunal in ITA No. 807/Coch/2008, 375/Coch/2009, 392 and 373/Coch/2010 dated 4th May 2012 for AYs 2005-06 to 2007-08 wherein it was held that the income from Royalty, Rent & Services are from the core business activities of the assessee. In para 8 of the said order, the Tribunal considered the Miscellaneous income, and observed that though the break-up of such income was not furnished by both parties, from the ground

raised by the revenue, such income consisted of income received on account of foreign exchange fluctuation, film/video shooting, income tax refund, tender form fee etc. and gave the following specific findings.

> i) The income derived from foreign exchange fluctuation, tender form fee are having connection with the core business activity carried on by the assessee and hence should be assessed as 'Income from Business',
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> ii) The income derived from film/video shoot and interest on income tax refund etc, do not have any connection with the core business activities and hence should be assessed under the head 'Income from Other Sources'. Since the details of the other items included under the head Miscellaneous income were not available, the Tribunal set aside the order of the CIT(A) to the AO with a direction to examine the nature of other items of 'Miscellaneous income' and decide the head of income under which it is assessable in the light of the directions of the Tribunal (ie. whether income is connected with the core business activity of the Airport or not) as above and also in accordance with law.

8.1 The revenue accepted the Hon ITAT direction regarding the Miscellaneous income but filed an appeal against the issue of Income from Royalty, Rent and Services, which was decided by the Hon High Court vide its order dated 17.08.2017 (ITA 194 Of 2012). The High Court held in Para 13 of its order that what qualifies to be the business income of the assessee would be the income derived by the assessee from its core and essential activities of the airport and not from its incidental activities providing amenities to passengers in the airport. The High Court remitted the matter back to the assessing officer to reconsider each and every item of the income derived by the assessee and decide whether the income of the assessee was derived by it from its core business.

8.2 The question is whether the income referred above is from core and essential activities of airport and not from incidental activities of providing amenities to passengers. In this regard it was submitted that the term “airport" is not defined in the Act. Accordingly, the High court vide its order dated 07.08.2017 in assessee’s own case for the AYs 2005-06, 2006-07 & 2007-08, held that as per Section 2(b) of "The Airports Authority of India Act 1994 an *"Airport" means a landing and taking off area for aircrafts, usually with runways and aircraft maintenance and passenger facilities and includes aerodrome as defined in clause (2) of section 2 of the Aircraft Act, 1934".* Thus, the operations and maintenance of the airport mainly consist of are:

a. Ensuring safe landing / taking off of aircrafts in/from the airport.

b. Providing passenger facilities within the airport as required and expected at an international airport

8.3 It was submitted that essential operational services of any airport include but not limited to activities such as refueling of aircrafts/airport vehicles; provision of hoists/lifts/ wheel chairs/ aerobridges/ladders for boarding/embarking passengers; loading/unloading of food/ passenger luggage and cargo in the aircrafts; arrangements for check in counters and security screening of passengers and luggage ; handling passenger baggage/cargo; Security at the airport premises, ensuring availability of food/essential purchases/medical aids/telephone & communication facilities, foreign currency exchange arrangements, rest rooms etc. in the restricted area of the airport terminal to passengers waiting in the airport

lounge; display of information about arrival/ departure of aircrafts; facilities for transportation for passengers arriving at/ departing from the airport and etc.

Amenities and Facilities

8.4 It was submitted that the High Court referred to income derived by the assessee from its core and essential activities of the airport and not from its incidental activities providing amenities to its passengers in airport. It was submitted that the airport should statutorily as per the Airport Authority of India Act perform two main duties, one of which is providing passenger facilities, as stated earlier. Hence, providing passenger facilities is one of the statutory responsibility of the airport and hence, providing passenger facility. Each of these incomes has direct and immediate nexus with operation of the airport, and hence are income "derived" from operation of the airport.

Royalty from ground handling – Rs.19.52 crores

8.5 These services are provided to the airlines operating in the airport. Such services include passenger handling, ramp handling, cargo, flight handling on ramp (loading off cargo to the aircraft), off loading of cargo from aircraft to pre-customs space for customs clearance, customs clearing of export of cargo, movement of cargo within the airport, facilities for check in, security screening and handling passenger baggage , arrival /departure information etc., The assessee had engaged Air India as its associate for operation of ground handling, where assessee provides

necessary space, water and electricity, security, telephone, fixed installation at the Airport counters, conveyor belts, departure and arrival information boards, baggage x-ray machines, weighing scales, owned and maintained by the assessee, as also electricity, water, security related infrastructure/facilities and Air India handles these works in the airport , and pay assessee a percentage of their gross turnover from airlines in this regard. The tariff for ground handling is fixed in consultation with assessee and assessee is also a party to the agreements entered with airlines for ground handling. Since, ground handling is an essential service and a core activity without which the airport cannot function, the income thereon has a direct and immediate nexus with the operation of the Airport and is not an incidental amenity.

Royalty from Terminal Handling – Rs.0.30 Crores

8.6 It is in respect of passenger services rendered by Airlines in the terminal and have direct and immediate nexus with the operation of the Airport and is not an incidental amenity.

Royalty Baggage wrapping of Rs. 0.13 Crores

8.7 It is for security wrapping of passenger luggage in the international terminal as per industry practice, and have a direct and immediate nexus with the operation of the Airport and is not an incidental amenity.

Royalty from Aircraft Fuelling – Rs.0.45 crores

8.8 This relate to supply of aviation fuel to all landing/departing aircrafts, which is an essential operational requirement of the airport. The assessee had entered into agreements with BPCL and IOC to ensure availability of fuel in the airport and the required infrastructure and facilities are provided by the assessee. BPCL and IOC pay royalty to assessee based on their turnover in the airport, which has a direct and immediate nexus with the operation of the Airport and is not an incidental amenity.

Royalty from Cargo Operation of Rs.0.02 crores

8.9 This was received from cargo operators who operate from the airport which was a regular operation having direct and immediate nexus with the operation of the airport and is not an incidental amenity.

8.9.1 Thus, it was submitted that the royalty income of Rs 20.43 crores as above are the profits and gains derived by the airport as referred to section 80(IA)(4). In this regard, it was submitted that while giving effect to the order of the High Court as above for the AYs 2005-06,2006-07 & 2007-08, the AO had accepted the contentions of the assessee and allowed the Royalty Income from Ground handling and aircraft refueling as income eligible for deduction u/s 80IA. In view of the above submissions, it was submitted that the CIT(A) had rightly held the Royalty

Income of Rs 20.43 crores as income from operation of the airport and therefore eligible for deduction u/s 80IA (4)of the I.T. Act.

9. We have heard rival submissions and perused the material on record. The High Court vide judgment in assessee's own case in ITA No. 163, 169 & 176/2012 dated 07/08/2017 for the AYs 2005-06, 2006-07 & 2007-08, held that as per Section 2(b) of "The Airports Authority of India Act 1994 an *"Airport" means a landing and taking off area for aircrafts, usually with runways and aircraft maintenance and passenger facilities and includes aerodrome as defined in clause (2) of section 2 of the Aircraft Act, 1934".* Thus, the operations and maintenance of the airport mainly consist of are:

a. Ensuring safe landing / taking off of aircrafts in/from the airport.

b. Providing passenger facilities within the airport as required and expected at an international airport

9.1 The Assessing Officer had considered this issue in AYs 2005-06 to 2007-08 and granted deduction u/s. 80IA of the I.T. Act in respect of above income and denied deduction u/s. 80IA in respect of income from surcharge from pre paid taxi, income from sale of scrap, notice pay, interest on delayed payment, income from film shooting and bond from staff. Hence, in these assessment years also, the assessee is not entitled for deduction u/s. 80IA in respect of these items only. Being so, the CIT(A) is justified in granting deduction u/s. 80IA of the Act in respect of royalty income, treating it as business income. Accordingly, this ground of appeals of the

Revenue is dismissed. Thus, the appeals of the Revenue in ITA Nos. 360/Coch/2014 and 464/Coch/2014 are dismissed.

ITA No. 344/Coch/2014 : Assessee's Appeals: A.Y. 2008-09
ITA No. 396/Coch/2014 : Assessee's Appeals: A.Y. 2009-10

10. The assessee has filed appeals in ITA Nos. 344/Coch/2014 & 396/Coch/2014, arising out of assessment orders passed u/s. 143(3) against the different orders of the CIT(A)-II, Kochi for the assessment years 2008-09 and 2009-10.

10.1 The first common ground in ITA Nos. 344/Coch/2014 and 396/Coch/2014 for the assessment years 2008-09 and 2009-10 is with regard to assessment of income from rent and services, royalty from passenger facilities, miscellaneous income, income from foreign exchange fluctuation as income from other sources not derived from the operation and maintenance of the airport infrastructure facility as against 'income from business' as offered by the assessee.

10.2. We have heard rival submissions and perused the material on record. The High Court vide judgment in assessee's own case in ITA No. 163, 169 & 176/2012 dated 07/08/2017 for the AYs 2005-06, 2006-07 & 2007-08, held that as per Section 2(b) of "The Airports Authority of India Act 1994 an *"Airport" means a landing and taking off area for aircrafts, usually with runways and aircraft maintenance and passenger facilities and includes aerodrome as defined in clause*

(2) of section 2 of the Aircraft Act, 1934". Thus, the operations and maintenance of the airport mainly consist of are:

a. Ensuring safe landing / taking off of aircrafts in/from the airport.

b. Providing passenger facilities within the airport as required and expected at an international airport.

10.3 Being so, the income related to above two activities, i.e., (a) and (b) only is to be considered as income entitled for deduction u/s. 80IA(4) of the Act. The assessee has to prove that the impugned income is directly derived from the above two activities. With this observation, this ground of appeals of the assessee is partly allowed for both the assessment years. Thus, the appeals of the assessee in ITA Nos. 344/Coch/2014 and 396/Coch/2014 are partly allowed for statistical purposes.

11. The next common ground of the assessee in ITA Nos. 344/Coch/2014 and 396/Coch/2014 for the assessment years 2008-09 and 2009-10 is with regard to depreciation of runway.

11.1 The facts of the case are that in the original assessment, the assessing officer treated certain assets of the assessee i.e. runway, isolation parking bay and roads, culverts and drains as buildings and allowed depreciation accordingly.

11.2. On appeal, the CIT(A) relying on the decision of JCIT Vs. National Airport Authority of India(2008-TIOL-135-ITAT Delhi) wherein it was held that the assets of

such nature are to be treated as plant and machinery and allowed the claim of the assessee. He also relied on the unreported decision in the case of HAL Vs. ACIT in ITA 776/Bang/86 by Bangalore Bench of ITAT.

11.3 It was observed that similar issue had come up before the ITAT in the appeals of the assessee in ITA Nos. 807/Coch/2008, 375/Coch/2009, and 392/Coch/2010 dt 04.05.2012 wherein it was stated that they are inclined to follow the decisions referred in those cases, but observed that the CIT(A) did not verify whether all the assets stated above were covered by the said decision. For the purpose of verifying this aspect, the ITAT restored the issue to the file of the assessing officer with a direction to follow decisions of the Tribunals referred above and decide the issue accordingly.

11.4 In the set aside proceedings, the AO stated that from the decisions referred as above, it is seen that only runway is covered, whereas, isolation parking bay and roads, culverts and drains are not covered. Accordingly, the CIT(A) granted depreciation on runways @ 25% as applicable to plant and did not allow the claim of the assesse in respect of isolation parking bay and roads, culverts and drains.

11.5. Against this, the assessee is in appeal before us. It was submitted that the AO had not appreciated or followed the directions of the ITAT to follow the decision of National Airport Authority of India' s case referred above and examine whether

the assets on which assesse claimed depreciation as 'Plant' are same as the assets referred to in that case. In the assessment order, it was stated that the issue before the Tribunal was whether the terminal building is to-be treated as plant for allowing depreciation at 25%, to which the assessee pointed out that terminal building includes runway, taxi way, Apron, conveyor belt, escalators, elevators, electricity systems and other facilities for successful operation and maintenance of the infrastructure facility, airport. The Tribunal held that on a careful consideration of the entire material on record, terminal building comprising of these assets are to be treated as plant.

11.6 It was submitted that the isolation parking bay was for parking aircrafts(Aprons) and roads, culverts & drains are for operating/managing the transport service for passengers and goods at the airport and the assets under reference are the same as the assets referred to in the National Airport Authority of India case, which the Tribunal had directed the AO to follow. It was submitted that the Assessing Officer has not stated any reason for his deviating from the direction of the ITAT, nor why the isolation parking bay, roads, culverts and drains do not form part of the assets which were found to be plant, as per directions of the Tribunal.

11.7 We have heard the rival submissions and perused the record. The Tribunal vide their order in ITA Nos. 807/Coch/2008, 375/Coch/2009, and 392/Coch/2010 dt

04.05.2012 for the assessment years 2005-06 to 2007-08 remitted the issue to the file of the Assessing Officer by observing as follows:

> *"8. The next common issue relates to the allowance of depreciation on certain assets, viz., Runway, Isolation Parking Bay and Roads, Culverts & Drains. According to the assessee, these assets are to be treated as "Plant" for the purpose of depreciation and hence they should be allowed depreciation @ 25%. However, the AO took the view that they fall in the category of building and hence he restricted the depreciation to 10%. The Ld CIT(A) allowed the claim of the assessee by following the decision rendered by the tribunal in the following cases:-*
>
> *(a) JCIT Vs. National Airport Authority of India (2008-TIOL-135-ITAT-DEL)*
> *(b) HAL Vs. ACIT in ITA No.776/Bang/86 by Bangalore bench of ITAT.*
>
> *Since a particular view has been taken by the above said benches of Tribunal, we are inclined to follow the decision rendered in those cases. However, we notice that the Ld CIT(A) did not verify whether all the assets stated above are covered by the above said decisions. Hence for the purpose of carrying on necessary verification, we set aside the order of Ld CIT(A) on this issue and restore the same to the file of AO with the direction to follow the decision of the Tribunals referred supra and decide the issue accordingly."*

11.8 In view of the above order of the Tribunal, this issue is remitted to the file of the Assessing Officer on similar directions. Thus, this ground of appeals of the assessee in ITA Nos. 344/Coch/2014 and 396/Coch/2014 for the assessment years 2008-09 and 2009-10 are partly allowed for statistical purposes.

12. The next ground in the assessee's appeal in ITA No. 396/Coch/2014 is with regard to disallowance of provisions for gratuity ad leave encashment which was confirmed by the CIT(A).

12.1. The main contention of the Ld. AR is that the CIT(A) erred in confirming the addition made by the Assessing Officer towards provisions made for gratuity and leave encashment in the computation u/s. 115JB of the I.T. Act, treating them as unascertained liability under sub clause (c) of Explanation 1 to section 115JB on the ground that the said provision is not deductible in view of section 43B(1) of the Act. It was submitted that section 43B(f) has no application in the computation of book profit u/s. 115JB. It was submitted that the provision for gratuity and leave encashment was made on the basis of independent actuarial valuation as per statutory requirements of the Companies Act, 1956 and is not a provision towards unascertained liability. Thus, it was submitted that provisions made towards gratuity and leave encashment on the basis of independent actuarial valuation as per the mandatory requirements of Accounting Standards cannot be considered as unascertained liability and hence, cannot be added back to the computation of book profit u/s. 115JB of the I.T. Act.

12.2 We have heard the rival contentions and perused the record. The contention of the ld. AR is that this issue was considered by the Delhi High Court in the case of CIT vs. Ilpea Paramount Pvt. Ltd. (192 taxman 65) and Punjab & Haryana High Court in the case of CIT vs. National Hydroelectric Power Corporation (45 DTR 117) wherein it was held that if the provisions towards gratuity and leave encashment were made with reasonable certainty on the basis of independent actuarial valuation, the same is to be allowed. In view of this, we are inclined to remit this

issue to the file of the Assessing Officer to consider the basis of making provisions towards gratuity and leave encashment and decide accordingly. Thus, this ground of appeal of the assessee for the assessment year 2009-10 is allowed for statistical purposes. The appeals of the assessee in ITA Nos. 344 & 396/Coch/2014 are partly allowed for statistical purposes.

ITA No.310/Coch/2015 : Assessee's Appeal: A.Y. 2010-11

13. The facts of the case are that this appeal was filed against the order of the Commissioner of Income tax, Kochi passed u/s.263 of the IT Act. The CIT had set aside the assessment order passed u/s.143(3) of the IT Act dt.27-3-2013 with a direction to redo the assessment as indicated in the order.

13.1 In the said order passed u/s.263 of the IT Act, the CIT held as below:

> *"In the 263 proceedings for the assessment year 2010-11 also the assessee's representative filed those agreements whatever filed before the Hon. ITAT and before the Ld. AO, ie. The Additional Commissioner of Income tax, Range-1, Kochi and no fresh agreements or any composite agreement as envisaged u/s.80IA (4)(i)(b) have been filed."*

> *3. From the above facts available on records, I am of the opinion that the order passed by the Additional Commissioner of Income tax, Range-1, Kochi, dt.27-3-13 u/s.143(3) is erroneous and prejudicial to the interest of the revenue and accordingly, the Commissioner of Income tax, Kochi, set aside the order dt.27-3-13, passed by the above AO and direct him/her to redo the assessment as indicated above".*

13.1.1 Against this, the assessee is in appeal before us.

13.2. The Ld. AR submitted that the assessee Airport was an infrastructure facility as defined in CPD and Explanation to Sec. 80IA sub-sec.(4), eligible for benefit u/s.80IA and claimed the same in the total income filed by the assessee. While completing the assessment u/s.!43(3) on 27-03-2015, the AO examined the claim u/s. 80IA and allowed the same. The AO had dealt with the matter in Page No 12 of the order in assessment u/s.143(3) in detail. The claim was allowed after detailed examination.

13.3 The Ld.CIT issued a notice u/s.263 of the IT Act dt.23-03-2015 and after considering the reply filed by the assessee issued an order directing the AO to revise the order passed u/s.143 (3) with regard to the admissibility of the claim u/s.80IA allowed in the assessment. .,

13.4 It was submitted that the admissibility of deduction u/s.80IA(4)(i)(b) was covered in favour of the assessee by the consolidated order of the Hon. High Court of Kerala in assessee' s own case for the AYs. 2005-06, 2006-07 & 2007-08. In the said order the High Court held that the assessee had complied with the conditions specific u/s.80IA(4)(i)(b). The SLP filed by the revenue was rejected by the Supreme Court. Accordingly, it was submitted that there was no error prejudicial to the interest of the revenue in the order passed by the AO u/s. 143(3) requiring

revision u/s.263 of the IT Act. Therefore, it was prayed the Tribunal set aside the order passed u/s.263 of the IT Act by the Commissioner of Income tax, as the High Court had held that the agreement filed with the ITAT which the CIT had found that is the same that was filed with the AO, is an agreement entered into in accordance with Sec. 144(i)(b). So the order of the AO is not erroneous and prejudicial to the interest of the revenue and hence, the finding of the CIT is not correct on facts and law.

13.5 We have heard the rival submissions and perused the record. In this case, the CIT passed order u/s. 263 of the I.T. Act dated 30/03/2015 for re-considering the issue related to deduction u/s. 80IA(4)(i)(b) of the I.T. Act.. This issue has already been decided by us in favour of the assessee in paras 3.3 and 3.4 of this order. In view of this, we hold that the CIT is not justified in exercising power u/s. 263 of the I.T. Act. Accordingly the order passed by the CIT u/s.263 of the I.T. Act is quashed and the appeal of the assessee in ITA No. 310/Coch/2015 is allowed.

ITA No.165/Coch/2017 : Revenue's Appeal :A.Y. 2010-11

14. The only ground raised by the Revenue is that the CIT(A) is not correct in holding that the assessee has complied with all the conditions of section 80IA(4) of the Act and therefore, eligible for deduction u/s. 80Iain respect of receipts from operation of CNS/ATM facilities. Since we have quashed the order of the CIT

passed u/s. 263 of the I.T. Act dated 30/03/2015 in ITA No.310/Coch/2015, the appeal of the Revenue in ITA No. 165/Coch/2017 has become infructuous. Thus, the appeal of the Revenue in ITA No. 165/Coch/2017 is dismissed.

15. In the result, appeals of the Revenue in ITA Nos. 190 to 192/Coch/2017, 360/Coch/2014, 464/Coch/2014 and 165/Coch/2017 are dismissed. The appeals of the assessee in ITA Nos. 344 /Coch/2014 and 396/Coch/2014 are partly allowed for statistical purposes and in ITA No. 310/Coch/2015 is allowed.

Order pronounced in the open court on 21st November, 2019.

sd/-	sd/-
(GEORGE GEORGE K.)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Place: Kochi
Dated: 21st November, 2019
GJ
Copy to:
1. M/s. Cochin International Airport Ltd., GCDA Commercial Complex, Marine Drive, Kochi-682 031.
2. The Deputy Commissioner of Income-tax, Circle-1(1), Kochi.
3. The Additional Commissioner of Income-tax, Range-1, Kochi.
4. The Commissioner of income-tax(Appeals)-II, Kochi.
5. The Pr. Commissioner of Income-tax, Kochi.
6. D.R., I.T.A.T., Cochin Bench, Cochin.
7. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin