

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "एच" मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI

BEFORE HON'BLE S/SHRI JOGINDER SINGH (JM), AND B.R.BASKARAN (AM)

सर्वश्री जोगिन्दर सिंह, न्यायिक सदस्य एवं बी.आर.बास्करन, लेखा सदस्य

आयकर अपील सं./I.T.A. No.4613/Mum/2013

(निर्धारण वर्ष / Assessment Year :2009-10)

Income Tax Officer 12(3)(1), Room No.114, 1st floor, Aayakar Bhavan, M.K.Road, Mumbai-400020	बनाम/ Vs.	M/s Hiranandani Builders, 514, Dalamal Tower, Nariman Point, Mumbai-400021
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

CO No.188/Mum/2014

Arising out of I.T.A. No.4613/Mum/2013

(निर्धारण वर्ष / Assessment Year: 2009-10)

M/s Hiranandani Builders, 514, Dalamal Tower, Nariman Point, Mumbai-400021	बनाम/ Vs.	Income Tax Officer 12(3)(1), Room No.114, 1st floor, Aayakar Bhavan, M.K.Road, Mumbai-400020
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AAAFH0945F

अपीलार्थी ओर से / Revenue by	Shri K Mohandas
प्रत्यर्थी की ओर से/Assessee by	Shri Chetan Karia

सुनवाई की तारीख / Date of Hearing : 16.10.2015

घोषणा की तारीख /Date of Pronouncement : 28.10.2015

आदेश / O R D E R**PER B.R. BASKARAN (AM)**

The appeal filed by the revenue and the cross objection filed by the assessee are directed against the order dated 08-03-2013 passed by Ld CIT(A)-23, Mumbai and it relates to the assessment year 2009-10.

2. The revenue is aggrieved by the decision of Ld CIT(A) in holding that the assessee is eligible to claim deduction u/s 80IA of the Act on the following receipts:-

- (a) Interest on IT refund.
- (b) Interest from others.
- (c) Interest on FDR
- (d) Tender fees.

3. In the cross objection, the assessee is contending that the deduction u/s 80IA should have been disallowed on the net receipts, i.e., net of expenses instead of denying deduction on the gross receipts.

4. The facts relating to the case are stated in brief. The assessee is operating two IT parks under the name "Fairmount" and "Winchester" and also one Special Economic Zone (SEZ) under the name "Kensington". The provisions of sec. 80IA(1) provides for deduction in respect of profits and gains derived by an undertaking from any business referred in sub-section (4) thereof. Under the provisions of sec. 80IA(4)(iii), the deduction u/s 80IA(1) shall be allowable to an undertaking which develops, develops and operates or maintains and operates an industrial park or special economic zone notified by the Central Government in accordance with the scheme framed and notified by the Government for the period beginning on the 1st day of April, 1997 and ending on the 31st day of March, 2006. There is no dispute between the parties that the assessee is eligible to claim deduction u/s

80IA(1) of the Act in respect of profits and gains derived from the operation of two IT parks and one SEZ mentioned above.

5. The provisions of sec. 80IA(1), as stated earlier, provide for deduction in respect of "Profits and gains derived by an undertaking". The assessing officer, by placing reliance on the decision rendered by Hon'ble Supreme Court in the case of Liberty India Ltd (317 ITR 280), held that the following receipts declared by the assessee cannot be considered to be the "Profits and gains derived by an undertaking":-

Particulars	Amount (RS.)
Damage charges	4,800
Income from extra work	25,934
Income from shooting	10,000
Interest on I.T Refund	1,12,09,827
Interest on others	3,749
Interest on FDR with bank	58,55,932
Misc.income	3,25,013
Sale of scrap	25,93,954
Sundry balane w/o	58,894
Tender fees	24,300
Total	2,01,12,403

6. In the appellate proceedings, the Ld CIT(A) held that the following receipts should be considered as derived from the undertaking and accordingly held that the assessee is eligible for deduction u/s 80IA(1) of the Act.

- (a) Interest on IT refund.
- (b) Interest from others.
- (c) Interest on FDR
- (d) Sale of scrap
- (e) Tender fees.

In respect of remaining receipts, the Ld CIT(A) upheld the view taken by the assessing officer. The revenue is aggrieved by the decision of Ld CIT(A) in granting relief in respect of the above said receipts except on sale of scrap. In the cross objection, as stated earlier, the assessee is contending that the

“net income” should have been disallowed in respect of the receipts that were held to be not eligible.

7. We heard the parties and perused the record. The issue that requires examination is whether each of the receipts mentioned above can be considered to be profits or gains “derived” from the eligible business or not. The AO has placed reliance on the decision of Hon’ble Supreme Court rendered in the case of Liberty India Ltd (supra) to decide against the assessee. In the above said case, the Hon’ble Supreme Court has held the words “derived from” is narrower in connotation as compared to the words “attributable to” and the receipts falling in the first degree shall alone fall in the category of “derived from”. In the case of Liberty India Ltd (supra), the assessee therein claimed deduction u/s 80IB in respect of DEPB credit/duty draw back. However, the Hon’ble Supreme Court held that the DEPB credit/duty draw back flows from the scheme framed by the Government and hence they cannot be considered to be the profits derived from the eligible business.

8. In the instant case, the assessee is not operating any industrial undertaking. It has developed IT parks and SEZ and derives lease income upon leasing out of the properties. Hence the primary income of the assessee consists of lease income only. While leasing out the properties, the assessee has also collected lease deposits from the tenants and part of lease deposits have been parked in the bank as Fixed deposits, which has generated interest income. The tenants have deducted tax at source from the lease rent payments made to the assessee as per the provisions of the Income tax Act. In view of the deduction claimed by the assessee u/s 80IA of the Act, the entire amount of tax deducted at sources (TDS) became refundable to the assessee. The assessee has received interest on the refund of TDS as per the provisions of the Income tax Act. The assessee has also received interest from tenants on delayed payment of lease rent. The assessee also generated

income on sale of tender forms and sale of scrap. The Ld CIT(A) has held that the assessee is eligible for deduction u/s 80IA of the Act in respect of all the receipts stated above.

9. There is no dispute with regard to the fact that the lease rental income derived by the assessee is eligible for deduction u/s 80IA of the Act. The dispute is with regard to the remaining receipts. The submissions made by the assessee before the AO in respect of the each of the receipts are extracted below, for the sake of convenience:-

4. Interest on I. T. Refund of Rs.1, 12,09,8271-

Firm has two I.T. Parks and one SEZ and firm receives Lease Rental and Maintenance and TDS on the same is deducted by the lessees. Since income of firm is exempt from tax, firm claims the same as refund in its Return of Income. The said refund is received by firm along with interest on it.

During the year firm has received refund of Rs.1,12,09,827/- for A Y. 2006-07 and 2007-08 along with interest thereon. Details of the same are enclosed herewith from the above it can be seen that interest on income tax refund is received on account of refund of TDS on Lease Rentals of projects, income from which are exempt and therefore this amount is also eligible for exemption u/s 801A.

Further, firm had applied for Nil deduction certificate from department but the same was received in July, TDS was deducted on Lease Rentals. If the said TDS was not deducted (in view of the lower deduction proceedings not taking time) there was No question of any refund or nay interest on refund.

Further if the said TDS was not deducted firm would have been able to utilize the said amount in repaying its loan and reduce the interest liability. Therefore even if the interest on Income Tax Refund of Rs.1,12,09,827/- is considered as Income from other sources then interest paid of Rs.7,88,92,760/- should be allowed deduction against the same.

5. Interest on Others of Rs. 3,749/-

The lease Agreements provide for payments of interest by the lessee in case of delay in paying the rental. These are interest in case of lease rentals which are received late. During the year three lessee's one each in Fairmount, Winchester and Kensington building had made late payments and interest was recovered from them. Details of the same are enclosed herewith. Since the incomes of these three buildings are exempt the shooting income is also

exempt u/s 801A.

6. Interest on FDR with Bank of Rs. 58, 55, 932/-

Firm has two I.T. Parks and one SEZ and receives Lease Rental and Maintenance from the same. The Lease Agreements provide from Lease deposit from lessee's and the same are refundable to them as and when they vacate the premises.

Based on the Agreements the firm has received lease deposit of RS.63 crore from various lessee's of Fairmount, Winchester and Kensington buildings. Since these amounts become refundable on vacating of leased premises which can be anytime firm has to keep sufficient amount in fixed deposit so that the same can be repaid immediately. Firm has kept aside sum of RS.43 crore in Fixed deposits for such unforeseen eventualities. From the above it can be seen that interest on fixed deposit received are directly related to Leased units in projects whose income are exempt, and therefore this amount is also claimed exempt.

Further if the said amount was not kept in Fixed Deposits firm would have been able to utilize the said amount in repaying its loan and reduce the interest liability. Therefore even if the Interest on Fixed Deposits of Rs.58,55,932/- is considered as Income from other sources then Interest paid of Rs.7,88,92,760/- should be allowed as deduction against the same.

7. Misc. Income of Rs.3,25,013/-

Fairmount, Winchester and Kensington are I T Parks and SEZ These premises are highly secured and maintained very well as they are occupied by Multinationals. Therefore penalty is charges any damage done to any property or violation of any rules. Misc Income are amounts recovered as penalty from outside service providers to lessee's in Fairmount, Winchester and Kensington buildings. Further amounts are also charged from Telecom and other companies for putting up stalls in these buildings. Details of Misc Income are enclosed herewith. Since these incomes arise from these three buildings the same are also claimed as exempt.

8. Sale of Scrap of Rs. 25, 93, 954/-

During the year under assessment Kensington B building was completed by firm. After the completion form had some accumulated scrap and the same was sold to various parties by the firm and amount of Rs.25,93,954/- was realized from the same. Further firm has paid Custom Duty of the same of Rs.6,99,662/-. Details of same are enclosed herewith. Since income of Kensington building is exempt these incidental income is also claimed as exempt. Alternatively the same can also be deducted from the Material expenses debited in Profit & Loss account.

9. Sundry Balances Written back of Rs, 58,894/-

During the year under assessment Kensington B building was completed by firm. After the completion firm had reconciled all the balances with various parties and the excess balances were written back. Details of the same are enclosed herewith. Since the income of three buildings is exempt these is also claimed as exempt. Alternatively the same can also be deducted from the Material expenses debited in profit & loss account.

10. Tender Fess of Rs. 24,300/-

Firm floats Tenders for all the contract works and collects fees for the same. During the year firm had floated various tenders for work in Fairmount, Winchester and Kensington buildings and collected amount of Rs. 24,300/- Details of the same are enclosed herewith. Since the incomes of these three buildings are exempt the incidental receipts for the same area also claimed exempt.

Alternatively even if these income amounting to Rs.2,01,12,403/- is considered as income from other sources (which we strongly object to in view of the explanations given above for each of them along with the relevant explanations and supporting) then the following period cost of Rs.10,59,12,975/- incurred by firm should be allowed as deduction against the same.

The above said explanations were not convincing to the assessing officer and hence he rejected the claim for deduction u/s 80IA in respect of the above said receipts.

"I have considered the assessee's reply, the words 'derived from' is narrower in connotation as compared to the word 'Attributable to'. In the recent decision in the case of Liberty India Ltd 317 ITR 280 (SC), the Hon'ble Supreme Court has made the distinction between these two words. By using the expression 'derived from', Parliament intended to cover sources not beyond the first degree. Whatever be the income receipts shown as income as stated above, in my opinion do not fall within the ambit of first degree sources as it is not directly relatable to the income of the assessee. Therefore, no deduction u/s. 80-IA can be allowed on these receipts."

10. However, the Ld CIT(A) was convinced with the said explanations given by the assessee in respect of the following receipts and for the sake of convenience, we extract below the decision rendered by Ld CIT(A):-

S.No.	Nature of income	Amount Rs.	Remarks
1	Interest on IT refund	1,12,09,827	It is submitted that the said interest was received from income tax debarment on refund arising from excess tax deducted at source from appellant's leasing income. Thus, the excess amount lying with the income tax department was part and parcel of the business receipt of the appellant falling under the first degree source and, therefore, eligible for deduction under section 80IA of the Act.
2	Interest on others	3,749	This interest is charged to appellant's customers for delayed payment of lease charges. The interest so received partakes the character of lease rentals falling under the first degree source and, therefore, eligible for deduction u/s 80IA of the Act.
3	Interest on FDR	58,55,932	As per the terms of the lease agreements, appellant received deposits from its customers which are returnable on vacation of the premises. To meet these eventualities deposits are kept in bank with fixed tenure. Interest so received is, therefore, has direct nexus with the developmental activities of the appellant and, therefore, eligible for deduction u/s 80IA of the Act.
4	Sale of scrap	25,93,954	Appellant submitted that during the year under consideration, its SEZ building was completed. The accumulated scrap generated during construction of the building was sold. Thus, the income has direct nexus with the construction activity of the appellant and, therefore, eligible for deduction u/s 80IA of the Act.
5	Tender fees	24,300	For the purpose of construction SEZ building appellant had availed services of various vendors in the shape of sub-contractors. These vendors were selected through the tender system and appellant received tender fees on this account. Thus, the activity of inviting tender being very much part of the development activity of the company it falls under first degree source of income eligible for deduction under section 80IA of the Act.

The Ld CIT(A) further followed the decision rendered by Hon'ble Supreme Court in the case of CIT Vs. Govinda Choudhry and sons (203 ITR 881), wherein it was held by the Hon'ble Apex Court that the interest received on delayed payment cannot be separated from other amounts granted to the assessee under the awards and hence it cannot be treated as "income from other sources".

11. The first receipt disputed by the revenue relates interest received from the Income tax department on the refund received by it. We have earlier noticed that the income derived by the assessee from the operation of IT Parks and SEZ is the lease income received from the occupants of the premises. However, the assessee could not receive the gross lease income from the lessees, since the lessees are required to deduct tax at source (TDS) from the lease rent as per the provisions of Income tax Act. Hence, the non-receipt of the TDS portion of the lease rent is beyond the control of the assessee. However, the Income tax department was constrained to refund a portion of TDS, since the income of the assessee is deductible u/s 80IA of the Act. On the amount so refunded, the Income tax department has paid interest as per the provisions of the Act. Under these set of facts, it was contended by the assessee that the refund of TDS amount is akin to delayed payment of lease rent along with interest and hence the interest amount shall partake the character of lease rent as per the decision of Hon'ble Supreme Court in the case of Govinda Choudury and Sons (supra). The assessee has also submitted that the lessees would not have deducted TDS, if no-deduction certificate had been issued by the AO in time, in which case, the question of granting refund along with the interest would not have arisen. In that scenario, the assessee would have been in a position to use the TDS portion of the lease rent for business purposes, including for repaying the loans taken for construction of IT parks and SEZ. Accordingly, in the alternative, it was submitted by the assessee that the interest on TDS refund should be netted off against the interest payment, in which case also, the interest on TDS would get deduction u/s 80IA automatically.

12. Thus, we notice that the TDS deduction from lease rental income was beyond the control of the assessee and also due to the delay in getting no-deduction certificate from the AO. In view of the same, the assessee was

deprived of funds to the extent of TDS amount, which would have otherwise used for the purpose of business purposes including repayment of loan taken for construction of IT parks and SEZ. The Income tax department was required to pay interest only due to the delay in granting refund of TDS. In the case of Liberty India Ltd (supra), relied upon by the AO, the assessee therein received DEPB credits as per the scheme framed by the Government of India. Hence the Hon'ble Supreme Court held that the primary source of the DEPB receipt is the scheme framed by the Government. However, in the instant case, TDS deduction is integral part connected with the receipt of lease income and the same cannot be separated from the activity carried on by the assessee. Since the lease income is the primary source of the assessee and since the TDS has been deducted from the said primary source and since the assessee was deprived of a portion of lease rent for a temporary period for the reasons beyond the control of the assessee, there is some merit in the contention of the assessee that the interest on TDS refund should be equated with the interest on delayed payment of business receipts. In our view, the assessee has got strong case in the alternative contentions that interest received by it on the TDS refund should be netted off against the interest expenditure for the purpose of computing the profits and gains derived from the undertaking, in which case, the interest income need not be assessed separately and it would automatically get deduction u/s 80IA of the Act due to netting off. In view of the above, we uphold the decision taken by the Ld CIT(A) on this issue.

13. The next receipt relates to the interest received from others, which is the interest received from the lessees for the delayed payment of lease rent. In view of the decision rendered by the Hon'ble Supreme Court in the case of Govinda Choudhary & Sons (supra) and the decision of Hon'ble jurisdictional Bombay High Court in the case of CIT Vs, Bhansali Engg. Polymers Ltd (2008)(306 ITR 194), we do not find any infirmity in the decision of Ld CIT(A)

in holding that interest so received partakes the character of lease rentals and hence eligible for deduction u/s 80IA of the Act.

14. The next receipt relates to the interest received on FDR. The assessee had received lease deposits from the lessees, which is required to be returned to them upon vacating the premises. Since the possibility of vacating the premises in the middle is always there, in which event the lease deposits are required to be refunded, the assessee was not in a position to use the entire lease deposits for business purposes including for repayment of loans taken by it. Hence, as a prudent business policy, the assessee was constrained to keep part of the lease deposits into the Fixed deposits maintained with banks. The said fixed deposits have earned interest income. Thus, we notice that the assessee was required to keep part of lease deposits amounts in fixed deposits out of business compulsion. Since the lease rental income is the primary source of the assessee, in our view, the keeping of fixed deposits shall form integral part of the business of operation of IT parks and SEZ. We also find merit in the alternative argument of the assessee that the interest income should be netted off against the interest expenditure, since the assessee was constrained to keep part of lease deposits into fixed deposits in view of the peculiar nature of activities of the assessee instead of using the same for business purposes including repayment of loan. In view of the above, we do not find any infirmity in the decision taken by the Ld CIT(A) on this issue.

15. The next item of receipts relates to the Tender fees received by the assessee on sale of tender forms. The Ld CIT(A) has noticed that the assessee has availed the services of various sub-contractors for the purpose of carrying out various works in the IT parks and SEZ. In order to select the vendors (sub-contractors), the assessee has followed tender system and in that process, it has collected money on sale of tender forms. Hence, the Ld

CIT(A) has held that the activity of inviting tender is very much part of the development and operation of SEZ and accordingly held that the sale of tender forms shall be eligible for deduction u/s 80IA of the Act. Since the tenders have been invited in connection with the development and operation of IT parks and SEZ, we are of the view that the Ld CIT(A) was justified in holding that the tender fees are eligible for deduction u/s 80IA of the Act.

16. In the cross objection, the assessee has pleaded that the corresponding expenditure relating to the items of receipts, which were not considered to be deductible u/s 80IA of the Act, should be deducted and the deduction should be denied only in respect of net receipts. We find merit in the said contentions, since the deduction u/s 80IA is allowed in respect of "Profits and gains", which means only net income, i.e., Gross receipt less corresponding expenditure incurred to earn the said income. Accordingly, we direct the AO to exclude only the net receipts in respect of ineligible item of income.

17. In the result, the appeal filed by the revenue is dismissed and the cross objection of the assessee is treated as allowed for statistical purposes.

Pronounced accordingly on 28th Oct, 2015.

घोषणा खुले न्यायालय में दिनांक: 28th Oct, 2015 को की गई ।

Sd

sd

(जोगिन्दर सिंह/**JOGINDER SINGH**)

(बी.आर. बास्करन,/ **B.R. BASKARAN**)

न्यायिक सदस्य / **Judicial Member**

लेखा सदस्य/**Accountant Member**

मुंबई Mumbai: 28th Oct,2015.

व.नि.स./ SRL , Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

True copy

आदेशानुसार/ BY ORDER,

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai