

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER
AND SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

ITA No.22/Bang/2014
Assessment year : 2010-11

The Deputy Commissioner of Income Tax, Circle 12(1), Bangalore.	Vs.	M/s. Menzies Aviation Bobba (B'lore) Private Ltd., Plot No.C-04L, Bengaluru International Airport, Devanahalli, Bangalore – 560 300. PAN: AAECM 6862D
APPELLANT		RESPONDENT

Appellant by	:	Shri Sanjay Kumar, CIT-III(DR)
Respondent by	:	Shri V. Srinivasan, Advocate

Date of hearing	:	21.06.2016
Date of Pronouncement	:	24.06.2016

ORDER

Per Asha Vijayaraghavan, Judicial Member

This appeal by the assessee by the Revenue is directed against the order of the CIT(Appeals)-III, Bangalore dated 09.10.2013 for the assessment year 2007-08.

2. The assessee company, Menzies Aviation Bobba (Bangalore) Private Limited (MABB) is engaged in the business of providing cargo

facilities at Bangalore International Airport. During the year under consideration, the assessee had claimed deduction u/s. 80IA(4)(i) of the Income-tax Act, 1961 [hereinafter referred to as “the Act”].

3. Bangalore International Airport Limited (BIAL) was established by Karnataka State Industrial Infrastructure Development Corporation (KSIIDC), as per Greenfield Airport Policy announced by the Government of India. Pursuant to a Concession Agreement, Government of India (GOI) has granted BIAL exclusive rights for development, construction, operation and maintenance of the state of the art International Airport at Bangalore. The concession agreement recognizes that BIAL subject to the concession agreement grant rights to any person for carrying out activities connected to development, construction, operation and maintenance of Cargo Terminal/Facility. One of the key requirement for the Airport is the provision of all necessary facilities for an efficient domestic and international cargo terminal and the provision of cargo services at standards compliant with good industry practice. On the backdrop of this, BIAL has invited tenders across the globe from various companies to offer cargo handling services at the upcoming international airport at Devanahalli, Bangalore.

4. Menzies Aviation plc, UK is a company incorporated under the laws of UK is basically engaged in providing cargo and ground handling and other related services across 70 international airports worldwide. Bobba group of Companies incorporated at Bangalore renders ground handling

services to Lufthansa Airlines. Menzies Aviation Plc and Bobba Group joined together and had bid for providing cargo handling services at the international airport at Devanahalli and were successful in the bid and has been awarded the design, construction, financing, testing, commissioning, maintenance, management and operation of the Cargo Facility at Bangalore International Airport, Devanahalli. A Service Provider's Right Holders agreement (SPRH) has been executed between BIAL and MABB. The agreement is on BOT - Build, Operate and Transfer basis for a period of 15 years and further can be extended for a period of 5 years. The land on which cargo terminal is constructed is part of BIAL Airport and MABB was given the license to use and occupy the land for the facility at the annual consideration of Rupee One.

5. MABB basically handles all the domestic and international cargo at the New International Airport. The Cargo Handling operations basically consist of Handling Imports, Exports and Domestic Cargo. MABB has been appointed as custodian of cargo by the customs authorities in accordance with Customs Act and Rules. MABB has constructed the cargo terminal and installed machineries at the Cargo Terminal at Bangalore International Airport, Bangalore.

6. Conditions for claiming deduction u/s.80IA (4)(i)(b) are that the assessee company should have 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. Infrastructure facility includes a port, airport, inland waterway or inland port or navigational channel in the sea.

7. It is submitted that MABB, i.e., assessee company, has signed an agreement with BIAL to develop, operate and maintain a cargo facility at airport, wherein BIAL is a statutory body as per the definition of Parliament (Prevention of Disqualification) Act (10 of 1959) since BIAL was established by KSIIDC. Alternatively, BIAL has signed a concessional agreement with Government of India (GOI), wherein GOI authorises BIAL to enter into Service Provider Right Holders (SPRH) agreement for Cargo facility. Accordingly, the agreement between BIAL and MABB fulfils the condition of signing with Government or statutory body for the purpose of claiming deduction u/s. 80IA.

8. Further, the assessee relied on the circular issued by the Central Board of Direct Taxes (CBDT) vide No. 10/2005 dated 16.12.2005 (also refer circular no. 793 dated 23.06.2000) wherein Port has been defined as "Port", for the purposes of sections 10(23G) and 80IA of the Income-tax Act, 1961, includes structures at the ports for storage, loading and unloading etc., if the following conditions are fulfilled : (a) the concerned port authority has issued a certificate that the said structures form part of the port, and (b) such structures have been built under the BOT or BOLT

schemes and there is an agreement that the same would be transferred to the said authority on the expiry of the time stipulated in the agreement. Accordingly, airport for the purpose of section 80IA includes cargo facility, according to the assessee.

9. However, the Assessing Officer has not accepted the contentions of the assessee and disallowed the claim for deduction u/s. 80IA.

10. Aggrieved, the assessee went in appeal before the CIT(Appeals).

11. The CIT(Appeals) noted that an identical issue was considered for the AY 2009-10 in ITA No.351/C-12(1)/CIT(A)-III/Bang/11-12 wherein the CIT(A)'s finding was as follows:-

“ I have carefully considered the issue. There are two well-documented stages in the evolution of the entity called the BIAL. Firstly, as per the ministry of Civil Aviation (MOCA) policy, a special purpose vehicle (SPV) was set up which was wholly owned by the State Government of Karnataka. At the second stage, bidding was invited for shareholding in the SPV from qualified private investors to the extent of 74%. Thereafter, the Govt. of Karnataka incorporated the BIAL as a corporate body under the Companies Act, 1956. It also continues to retain a 26% shareholding in the body. On perusal of the Greenfield Airports Policy of the Govt. of India, I find that certain basic premises of the policy are that (Clauses 2.1-2.5) :

"the primary responsibility for development of airports rests with the Central Government. The Union alone has competence to legislate in respect of 'Airways, aircraft and air navigation; provision of aerodromes; regulation and organization of air traffic and of aerodromes ... ' The Aircraft Act, 1934 and the Rules made there-under by the Central Government govern the development, maintenance and operation of all airports, including greenfield airports. Under the Act, Central Government has

the sole right to grant a license for setting an airport, and the operations of the airport would be subject to its licensing conditions (Rule 78 of the Aircraft Rules) Thus an airport can be developed and operated either by AAI or by an Airport Company that has been given a license by DGCA as per its license conditions. The Rules also allow the Central Government or a State Government to obtain a license

4.1.3 In the present case, BIAL was formed as a wholly-owned subsidiary of the State Government of Karnataka, and obtained the requisite clearances under the prevailing central laws to build and operate an airport facility. Thereafter, it obtained bids for investment from qualified private operators, and accordingly, the BIAL as a corporate body was set up. All through, the operation of the relevant statutes in its constitution and in regulating its functioning through conditions stipulated by statutory licenses is very evident. Even when BIAL licensed out some airport functions such as cargo handling through a SPRH Agreement, that very right was also vested in BIAL only by the Central Government through the operation of the Concession Agreement. In this context, I also note that the function of "handling of cargo" finds specific mention at Clause 3.2.1 (ii). I am therefore inclined to agree with the appellant that the BIAL is a "statutory body" for purpose of Sec. 80IA(4)(i)(b), being an entity established under laws for the time being in force, being the Greenfield Airports Policy of the MOCA, the Aircraft Act, 1934, the Airports Authority Act, 1994, and the Companies Act, 1956. I feel that the argument of the AO that BIAL is "merely a company wherein the KSIIDC, Govt. of Karnataka and Airport Authority of India, Govt. of India, have some shareholdings" is not found to reflect the true character and status of the body, which is entrusted under the relevant laws with the establishment and operation of a greenfield airport, the constitution and functioning of which is clearly stage-managed by provisions of existing statutes."

12. Hence, the CIT(Appeals) accepted the contention of the assessee that BIAL is a statutory body for the purpose of section 80IA(4)(i)(b), being an entity established under the laws for the time being in force.

13. The next issue was whether the company ought to comply with the condition that it should be developing, operating and maintaining any “infrastructural facilities”. The AO was of the opinion that the condition of the proviso as regards its transfer of infrastructural facilities from the transferor enterprise to transferee enterprise is not being fulfilled in the present case. The CIT(Appeals) following the order of the CIT(A) for the AY 2009-10 allowed the assessee’s appeal. The findings of the CIT(A) for the AY 2009-10 were as follows:-

“In the light of these various conflicting claims, the basic question therefore comes down to whether handling of cargo at all constitutes an integral part of airport operations or not. Going by the strict parameters taken by the AO, an "Airport" by definition should not include commercial cargo handling activities at all. Yet, it is common knowledge that all airports reserve a significant part of their area for cargo. Apart from the baggage of passengers, commercial cargo handling is an integral part of air traffic operations, whether by sharing of passenger flights or via dedicated cargo craft. It is also very common to find a large amount of non-passenger cargo being uploaded onto commercial aircraft in addition to passengers' luggage. Within this reality, the very location of the cargo-handling area, linked as it is with the critical Airside Service Road and partaking of statutory infrastructure relating to security, customs, X-rays etc. within its own operations, indicates that this service is very much a part-and-parcel of the commercial operations undertaken by air-cargo operators and other air transporters, whose equipment and machinery are also integrated in to the definition of "aerodrome" as per Section 2(2) of the Aircraft Act, 1934. I note that the AO has not qualified the particular reasons why he considers the cargo-handling facility to be located in the "vicinity" of the Airport, but not "within" it. Since the cargo-handling area is flanked by the maintenance hangars, air catering services, fuel farm, fire station etc., there is no reason in my opinion to hold that the same is located in the "vicinity" of the airport and not within it. In that case, all the other critical infrastructure facilities

named above would also likewise be deemed to be not a part of the airport, which would result in an absurdity. I feel the AO has stretched his point without sufficient substratum on this issue. This brings us to the point about whether the appellant's status in the scheme of the Bangalore Airport is one of a stakeholder, or of a contractor.

It is significant to note that Sec 80IA(4)(i) requires development, operation and maintenance of an infrastructure facility. The AO has raised the point of the appellant being a mere contractor to show that the BIAL had not actually transferred the cargo-handling facility to the appellant. However, the SPRH Agreement gives rights for "design, construction, financing, testing, commissioning, maintenance, management and operation of the facility" for a total period of 20 years to the appellant. It is specifically mentioned that " .. the concession is on a BOT basis and the facility shall be transferred to BIAL at the end of the term." The Hyderabad Tribunal in the case of GVPR Engineers Ltd Vs. ACIT 21 Taxman 25 has held that though every person

who enters into a contract for the development of an infrastructure facility is a contractor, in such a case, the contractor and the developer cannot be viewed differently; it found that "every contractor may not be a developer but every developer developing infrastructure facility on behalf of the Government is a contractor." In the instant case, the section requires (i) development, or (ii) operating and maintenance, or (iii) development, operating and maintenance, of an infrastructure facility. It is evident that the appellant is entrusted with all the three functions specified in (iii) hereinbefore, by virtue of the SPRH Agreement, which itself draws its statutory validity from the Concession Agreement. Thus, it is clear that the work performed is not in the nature of a mere works contract, which the AO appears to suggest by invoking Clause 3.2.1 in isolation. The fact of the 20-year duration of the contract, which involves design, construction, testing, maintenance, operations and all other myriad functions associated with an extended BOT arrangement, is a material fact.

In view of all the above, I come to the conclusion that the appellant is entitled to the benefit of deduction u/s 80IA(4), since all the conditions set out by the section are fulfilled in the cargo-handling operations under a BOT arrangement with BIAL being

carried on by it. The addition made by the AO by rejecting the claim is cancelled, and the AO is directed to allow the deduction to the appellant u/s 80IA(4)(i).”

14. Aggrieved by the order of the CIT(Appeals), the department is in appeal before us on the following grounds of appeal:-

“1. The order of the learned CIT(A) is opposed to law and facts of the case.

2. On the facts and in the circumstances of the case the learned CIT(A) erred in granting deduction u/s 80IA(4)(i) in respect of profits earned from cargo handling facility maintained and operated by the assessee at Bangalore International Airport, ignoring the fact that the principal condition for allowing this deduction is that the agreement for development of any infrastructure facility must be entered into with the Central Government or State Government or any local authority/statutory body, while the assessee had entered into a Service Provider Rightholder Agreement with Bangalore International Airport Ltd., a private limited company, for running this facility.

3. The CIT(A) ought to have appreciated that every facility of this nature in the vicinity of the airport cannot fit into the definition of "Airport". The definition of "Airport" as provided in other allied Acts does not bring into its ambit the cargo handling facility although situated within the airport area.

4. The CIT(A) ought to have appreciated that the assessee is only a contractor to whom certain rights were granted by BIAL to operate the cargo handling facility and such contractor cannot be called as a developer of infrastructure facility. Further, the CIT(A) ought to have appreciated that the intention of the legislature is to provide this deduction only to the persons directly developing, maintaining and operating the facility but not to the contractors as held by the Mumbai larger bench of ITAT, in the case of B T Patil & Sons vs ACIT.

5. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it

relates to the above grounds may be reversed and that of the Assessing Officer may be restored.

6. The appellant craves leave to add, alter, amend and / or delete any of the grounds mentioned above.”

15. The Id. counsel for the assessee, Shri V. Srinivasan, took us through the order of the coordinate Bench of this Tribunal for the previous year i.e., AY 2009-10 in ITA No.1160/Bang/2012 dated 30.01.2014 wherein at para 12 of the order, it has been held as follows:-

“ No doubt it is constituted as per the policy of the Central Government but it cannot be said to be a ‘statutory body’ as required under sec. 80IA(4) of the Income-tax Act. Therefore, we are unable to agree with the finding of the CIT(A) that the assessee satisfied the condition of entering into an agreement with the Central or State Governments or local authorities or statutory body.”

16. The Id. counsel for the assessee further pointed out to order of the Tribunal dated 05.10.2015 in MP No.19/Bang/2014 (in ITA No.1160/Bang/2012 dated 30.01.2014) wherein the Revenue’s appeal on this issue was dismissed by holding at para 7 of the order as follows:-

“7. As the very same grounds on which this Tribunal has held that BIAL is not a statutory body, have been considered by the Hon’ble High Court and have been accepted that it is a statutory body. Therefore, respectfully following the Hon’ble Hon'ble jurisdictional High Court Order, we do not see any reason to interfere with the order of the CIT(A).”

17. Respectfully following the order of the coordinate Bench of this Tribunal in MP No.19/Bang/2014 (in ITA No.1160/Bang/2012 dated 30.01.2014), we dismiss ground Nos.2 & 3 raised by the department.

18. With respect to ground Nos.4 raised by the department that assessee is only a contractor to whom certain rights were granted by BIAL to operate the cargo facility and such contractor cannot be called as a developer of infrastructure facility, we find that this issue has been considered by the coordinate Bench of the Tribunal in ITA No.1160/Bang/2012 dated 30.01.2014 for the AY 2009-10 in assessee's own case, wherein it has been held that the agreement entered with BIAL is for development, operation and maintenance of infrastructure facility u/s. 80IA(4) of the Income-tax Act. The relevant portion of the decision is extracted below:-

“14. As regards the other issues such as whether the cargo handling facility is a part of the ‘airport facility’ and also whether the development operation and maintenance of the cargo handling facility is a part of infrastructure facility is concerned, we are in agreement with the findings of the CIT(A) which is also in accordance with the decision of the Tribunal at Hyderabad in the case of GVPR Engineers Pvt. Ltd., (cited supra), which is also relied upon by the CIT(A). The case of B.T. Patil & Sons (cited Supra) on which, the revenue has placed reliance upon, is distinguishable on facts. In the said case, the Special Bench was considering the case of a civil contractor who was engaged in construction of various projects of Govt. of Maharashtra and Govt. of Karnataka and during the relevant previous years, it had claimed deduction u/s 80IA(4) of the Income-tax Act. The Hon’ble Special Bench was considering the nature of the work undertaken by the assessee therein whether to be considered as development of the infrastructure facility and it was held that the

assessee does not own the project but only involves in construction of the project and, therefore, it was held that the assessee therein does not satisfy the conditions stipulated u/s 80Ia(4) of the Income-tax. The Special Bench held the assessee to be only a 'contractor' and not 'developer' and, therefore, not eligible for deduction u/s 80IA(4) of the Income-tax Act. In the case before us, the assessee is not a contractor but is holding a license to develop, operate and maintain the cargo handling facility and is required to transfer his rights in the property to Bangalore International Development Authority after the expiry of the term stipulated under the agreement. Unless and until the assessee has right over the property during the period of the agreement, it is not required to transfer the same after the expiry of the period.

15. In view of the same, we are in agreement that the finding of the CIT(A) that the agreement entered into by the assessee with BIAL is for development, operation and maintenance of infrastructure facility u/s 80IA(4) of the Income-tax Act. Therefore, the grounds of appeal relating to this issue are rejected."

19. Respectfully following the decision of the coordinate Bench for the AY 2009-10 in assessee's own case in ITA No.1160/Bang/2012 dated 30.01.2014, we dismiss ground No.4 raised by the assessee.

20. In the result, the appeal by the Revenue is dismissed.

Pronounced in the open court on this 24th day of June, 2016.

Sd/-

(INTURI RAMA RAO)
Accountant Member

Sd/-

(ASHA VIJAYARAGHAVAN)
Judicial Member

Bangalore,
Dated, the 24th June, 2016.
/D S/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.