irb Infrastructure Ltd. Vs. Ito

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Jan-09-2008

Reported in : (2008)304ITR76(Mum.)

Judge : A Garodia, A Vijayaraghavan, J Member

Appellant : irb Infrastructure Ltd.

Respondent : ito

Judgement :

1. This is an assessee's appeal directed against the order of learned CIT(A)-VI, Mumbai dated 18.2.2005 for A.Y. 2001-02.

1a) On the facts and circumstances of the case and in law, learned CIT(A) erred in upholding the rejection made by the Assessing Officer of accounting policy in respect of completed contract method for infrastructure project under BOT scheme with Toll rights and thereby further erred in confirming the addition of Rs. 1,32,19,906/- made by the Assessing Officer to the income of the appellant on account of so called profit arise during the previous year from the said infrastructure project.

i) The Assessing Officer has erred in treating the BOT contract with toll rights as building contract.

ii) No accounting standard has been prescribed by the ICAI or CBDT Under Section 145.

iii) The method of accounting adopted by the Assessing Officer taking toll collection and allowing deduction for amortisation of the value of cost of construction suffers from serious defects in view of uncertainly of the consideration and unforeseen losses.

iv) The appellant had consistently following the completed contract method and reported this accounting policy since beginning; and v) The impugned project could be said to have been completed at the end of the concessional period or at the earliest when specific costs of the project have been recouped for the reason that the project is linked with toll collection and the project can be said to have been substantially completed when the cost of the project is considerably recouped.

c) In reaching to the conclusion and confirming such huge addition, learned CIT(A) omitted to consider relevant factors, considerations, principles and evidences while he was overwhelmed, influenced and prejudiced by irrelevant considerations and factors.

2. The learned CIT(A) erred in not passing any speaking order in respect of losses of earlier years to be calculated as per accounting policy adopted by the Assessing Officer in making the assessment for the A.Y. 2001-02.

3. The learned CIT(A) erred in not allowing depreciation on the cost of construction of bridge in computing profit arise from the impugned project.

4. The learned CIT(A) failed to appreciate that the Assessing Officer has erred in charging interest Under Section 234B and 234C. 5. The learned CIT(A) failed to appreciate that the Assessing Officer has erred in initiating the penalty proceedings Under Section 271(1)(c).

3. Briefly stated, the facts are that the assessee company has undertaken an infrastructure project for construction of a major bridge across Patalganga river and ROB (Rail Over Bridge) on National Highway-17 in Raigad District from Government of Maharashtra under BOT (built, operate and transfer) scheme with toll rights. The construction of the above bridge was completed on 20.7.99 and the

toll collection was started from 21.7.99. In its books of account, the company has accounted for the receipts in respect of its toll collection as reduction from work-in-progress and as such, no profit has been offered in the above activity of the company during this year, earlier year or in subsequent year. During this year, the assessee company disclosed the position as under:i) Opening work in progress : 33,92,25,338/-Add: Other Expenses : 3,70.34.094/- ---------- on interest payment ---------- 7,16,28,993/- 30,46,30,439/- The above has been depicted as closing work-in-progress. The contention of the assessee was that all the revenue accrued should be first adjusted with the expenditure incurred and only after full costs have been recovered, any profit can be assessed as income liable to tax.

This contention of the assessee was not accepted by the Assessing Officer; and he computed the profit on the activity of toll collected by the assessee by allowing the expenditure incurred during the present year; which are in the nature of revenue expenses; and accordingly, Assessing Officer worked out the profit on account of above collection of toll in respect of above bridge at Rs. 1,32,19,906/-. While doing so, the Assessing Officer allowed amortization of construction cost over the period of operation of the agreement i.e. 16 years. The Assessing Officer worked out that the assessee has incurred construction cost till the completion of project of Rs. 3,415.44 lakhs; and accordingly, he allowed amortization of Rs. 213.46. lakhs during this year.

The assessee carried the matter in appeal before learned CIT(A); but without success; and now, the assessee is in further appeal before us.

4. It is submitted by learned AR of the assessee that there was receipt of Rs. 4,15,81,150/- on account of toll collection during the year ended 31.3.2000 i.e. A.Y. 2000-01. It is also submitted that in that year, the assessee has followed the same method of accounting and this receipt of toll collection of Rs. 415.81 lakhs was reduced from work-in-progress and the return of income was filed on 30.11.2000 without offering any income from this project and this return of income filed by the assessee stands accepted by the department Under Section 143(1). It is submitted that as per the rule of consistency, there is no reason to disturb this method of accounting followed by the assessee in the present year. As an

alternative contention, it is submitted by him that, if the method adopted by the Assessing Officer and confirmed by learned CIT(A) is upheld, then the Assessing Officer should be directed to follow the same method in A.Y. 2000-01 also since that is the first year of receipt of toll charges and as a result, there will be a loss of Rs. 1019.16 lakhs in A.Y. 2000-01 because in that year, receipt by way of toll collection is of only Rs. 415.81 lakhs; whereas, expenses in that year is of Rs. 1289.43 lakhs and an amount of Rs. 158.08 lakhs is to be allowed on account of amortization of construction cost resulting into loss of Rs. 1019.16 lakhs in that year after considering return income of Rs. 12.54 lakhs on account of other business income. Reliance was placed on the Judgement of Hon'ble Apex Court rendered in the case of Radhasoami Satsang v. CIT 193 ITR 321 (SC) in support of this contention that, in the absence of any material change justifying the department to take a different view from that taken in earlier proceedings, the question of the exemption of the assessee should not have been reopened.

5. Reliance was also placed on the Judgement of the Special Bench of the Tribunal rendered in the case of Shankar Rice Co. v. ITO, 249 ITR (AT) 44 in support of the same contention. It was also submitted that in the subsequent years, i.e. in A.Y. 2002-03, 2003-04 and 2004-05, the assessee has revised return of income on the same basis as adopted by the Assessing Officer in this year; and hence, in the preceding year i.e. A.Y. 2000-01 also, the Assessing Officer may be directed to follow the same method of accounting resulting into loss of Rs. 1019.16 lakhs in that year, which should be allowed to be set off in the present year and subsequent years.

6. Learned Departmental Representative of the revenue supported the orders of authorities below.

7. We have considered the rival submissions, perused the materials on record and have gone through the orders of authorities below and Judgements cited by learned AR of the assessee. The contention of learned AR of the assessee is that either the method followed by the assessee in this year and the earlier year should be allowed to be followed or the Assessing Officer should be directed to follow the same method in A.Y. 2000-01, i.e. the method, which is adopted by the assessing

officer in A.Y. 2001-02. It is submitted that the preceding year i.e. A.Y. 2000 - 01 is first year because the assessee has received toll charges for the first time in that year only. It is submitted that if the method followed by the assessing officer in the present year is followed in the preceding year also i.e. A.Y. 2000-01, there will be a loss of Rs. 1019.16 lakhs in that year; and if, that loss is set off in the present year, there will be no taxable income in the present year; and still there will be a loss to be carried forward to subsequent years. Reliance has been placed on the Judgement of Hon'ble Apex Court rendered in the case of Radhasoami Satsang (supra).

In this case, Radhasoami Satsang, a religious institution, was founded in 1861 for the purpose of promoting the ideals of the Radhasoami faith among the public. Out of the donations and offerings to the Satgurus, large funds were built up and properties were acquired over the years.

In 1902, during the time of the third Satguru, a central council was established and the right, title and interest of all the properties were vested in the council under the direction of the Satguru whose mandate was paramount. In 1904, a trust deed was also executed. The trust deed was revocable at the discretion of the central council. On the death of the third Satguru in October 1907, the creed split into two as the Swami Bagh sect and the Dayal Bagh Satsangis. In income tax proceedings on the Radhasoami Satsang for the assessment year 1937-38, the Commissioner had accepted that the offerings though made to the Satgurus, were not for their personal benefit and held that though no formal trust had been created by the donors in respect of their offerings, the offerings were impressed with trust character and that the offerings were exempt from income tax under Section 4(3) (i) of the Indian Income-tax Act, 1922. And the claim of the Dayal Bagh Group for exemption from income tax under Section 4(3)(i) was accepted by the Allahabad High Court in the case of Secretary of State for India in Council v. Radha Swamin Sat Sang 13 ITR 520. The question before Hon'ble Apex Court was whether, for A.Y. 1964-65 to 1969-70, the assessee trust was entitled to exemption from income tax under Section 11 of the I.T. Act, 1961. There was no Satguru long before the periods of assessment. The Tribunal held that the assessee was entitled to the exemption but on a reference, the High Court reversed the decision

of the Tribunal. On appeal to the Supreme -Court, order of the High Court was reversed and that of the Tribunal was confirmed. The following Para of this Judgement of Hon'ble Apex Court is relevant, which is reproduced by us: We are aware of the fact that, strictly speaking, res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent years.

8. We find that in the present case, the facts in the present year are the same as in the earlier year i.e. A.Y. 2000-01, which is the first year of operation of this project. We are of the considered opinion that since there is no change in the facts in the present year, the Assessing Officer was not justified in taking a different view in the present year but at the same time, we find that the assessee itself has accepted the view of the Assessing Officer by filing revised return in subsequent years. In the light of these facts, we feel that ideally, the view taken by the assessing officer in the present year should be confirmed but at the same time, the assessment in the preceding year i.e. A.Y. 2000-01 should also be completed on the same basis as has been done by the Assessing Officer in the present year and which is accepted by the assessee also in the subsequent years; but earlier year is not open before us. It is also to be noted that, if earlier year is disturbed, there will be assessed loss of Rs. 1019.16 lakhs in that year as against the returned income of Rs. 12.54 Lacs. The assessed income is of Rs. 142.67 lakhs in the present year; and therefore, there will be carry forward loss of Rs. 876.49 lakhs at the end of the present year and there will be nil taxable income in the present year as against total income of Rs. 10.47 lakhs declared by the assessee itself in the present year as per return of income. In the subsequent years, gross total income before deduction Under Section 80IA, deduction Under Section 80IA and the net income is as under:----------
Assessment Gross total 80IA Net income Year income deduction (Lakhs) (Lakhs) (Lakhs)---------- 2002-03 160.60 151.69 9.00---------- 2003-04 135.30 128.93

6.37---------- 2004-05 245.01 243.79 1.22---------- Total : 541.00 From the above, it can be seen that the gross income of succeeding three years is only Rs. 541 lakhs as against loss to be carried forward after this year of Rs. 876.49 lakhs. Under these facts, we feel that disturbing the preceding year i.e. A.Y. 2000-01 will not only result into disturbing of the assessment of the present year, which will be rupees nil as against income of Rs. 10.47 lakhs declared by the assessee in the return of income filed by it; but it will also result into nil income in subsequent three years as against taxable income as per the return filed by the assessee in these three years. Considering the facts of the present case in its totality, we feel that in the interest of justice, method followed by the assessee should be accepted in the present year by following the Judgment of Hon'ble Apex Court rendered in the case of Radhasoami Satsang (supra) because facts in the present year and in the preceding year are same. In the preceding year, the assessee has applied for revision of the assessment order Under Section 264; but the Commissioner of Income Tax-VI, Mumbai has rejected this claim of the assessee as per his order dated 18.9.2007; copy of which has been submitted before us. It is said by the learned Commissioner in his order that the intimation Under Section 143(1) dated 22.1.2002 is not an order for the purpose of Section 264; and hence, petition of the assessee Under Section 264 has been held to be infructuous. In this view of the matter, we feel that the order of the Assessing Officer in A.Y. 2000-01 has attained finality and since, the facts in the present year and earlier years are same, the assessee should be allowed to follow the same method of accounting in the present year. We also find that it will not cause any prejudice to the revenue because if the earlier year is disturbed, the result will be that in all the years from A.Y. 2000 - 01 to A.Y. 2004-05, the assessed income will be NIL as against positive returned income in all years of Rs. 39.60 Lacs (Total) and there will be loss to be carried forward of total Rs. 335.49 Lacs at the end of A.Y. 2004 - 05. We, therefore, delete the addition made by the Assessing Officer in the present year and we direct the Assessing Officer to complete the assessment by accepting the method of accounting followed by the assessee in the present year. However, we want to make it clear that in the subsequent years, the assessee itself has revised the return on the basis of accounting system, which was followed by the

Assessing Officer in the present year and because, we have allowed the assessee to continue the old method of accounting in the present year, this will not give rise to a claim by the assessee that in the subsequent years also, the same method. years, the assessee itself has revised the return which is duly accepted by the department also; and hence, in the subsequent years, the new method has attained finality, which should not be disturbed.

However, regarding the quantum of deduction allowable to the assessee on account of amortization, we find that the same was worked out by the Assessing Officer in the present year on the basis of change of method in the present year; but since, in the present year, we allow the assessee to follow the same method of accounting, which was followed by the assessee in the preceding year, this amount of amortization of expenses in the subsequent years have to be worked out on the basis of cost of project at the end of present year, which is Rs. 30,46,30,439/- at the end of this year i.e. 31.3.2001 and this should be amortized in 15 years; and hence, in the subsequent years, amortization available to the assessee should be Rs. 2,03,08,696/- per year from the next year i.e. A.Y. 2002-03. To this extent, assessment order in the subsequent years can be rectified. However, this will not affect the final income determined by the assessing officer in these subsequent years wherein deduction is available Under Section 80IA because in those years, deduction allowable Under Section 80IA will go up by the same amount.

This issue is disposed off accordingly.

Order has been pronounced in the Open Court on 9^th Day of January, 2008.