

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ "जी" मुंबई

**IN THE INCOME TAX APPELLATE TRIBUNAL " G" BENCH,
MUMBAI**

**BEFORE HON'BLE S/SHRI SAKTIJIT DEY (JM), AND ASHWANI
TANEJA (AM)**

आयकर अपील सं./I.T.A. No.3617/Mum/2012

(निर्धारण वर्ष / Assessment Year:2007-08)

Gammon Infrastructure Projects Ltd, Gammon House, Veer Savarker Marg, Prabhadevi, Mumbai-400025	बनाम/ Vs.	Asstt. Commissioner of Income Tax, CC 41, Room No.653, 6 th floor, Aayakar Bhavan, M K Road, Mumbai-400020
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN. :AABCG8641H

अपीलार्थी ओर से / Appellant by	Mr. F. V. Irani
प्रत्यर्थी की ओर से/Respondent by	Mr. Harshar Vengurlekar

सुनवाई की तारीख / Date of Hearing :20.10.2015

घोषणा की तारीख /Date of Pronouncement: 16.12.2015

आदेश / O R D E R**Per ASHWANI TANEJA, AM:**

This is an appeal filed by the assessee challenging the appeal order passed by the first appellate authority dated 29.12.2012 for the assessment year 2007-08.

2. The main ground raised by the assessee in this appeal is that the assessee was not provided with fair and reasonable opportunity of being heard to the assessee before passing the order.

3. The return of income was filed by the assessee on 31.10.2007 declaring total income of Rs. 6,25,87,573/-. The assessee is engaged in the business of infrastructure developer, operator and maintenance, provider of advisory services and investor in infrastructure activities.

4. At the time of hearing, the Ld. AR submitted that in this case, the deduction claimed by the assessee u/s 80IA (4) of the Income Tax Act, 1961 has been denied by the AO and the same was confirmed by the Id CIT(A) by following the decision of Pune Bench of the Tribunal in B.T. Patil & Sons Belgaum Constructions Pvt. Ltd vs. ACIT (ITAT Pune) (2010) (126 TTJ 577), wherein the Hon'ble Bench had taken a view that the deduction u/s 80IA was not allowable to the assessee for the reasons that it was not allowable on works contract. It was submitted by the Ld. AR that this judgment was contested by the said company before its jurisdictional High

Court (i.e. Bombay High Court), and the High Court had sent the issue back to the Tribunal for fresh decision. Thereafter, the Tribunal passed fresh order in the case of M/s B.T. Patil & Sons Belgaum Constructions Pvt. Ltd vs. ACIT in ITA Nos.1408 and 1409/PN/2003 (AY-2000-01 and 2000-01) dated 28.2.2013, wherein it was held that the assessee was eligible for deduction u/s 80IA, and while holding so, Hon'ble Bench had relied upon the judgment of Jurisdictional High Court in the case of CIT Vs. ABG Heavy Industries Limited. (2010) 322 ITR 323 (Bom).

In the aforesaid facts, it was thus requested that since whole premise of the order of Ld. CIT(A) has been changed, therefore, this issue requires fresh adjudication in view of the changed position of law. It was further submitted by the assessee in ground no.1 of the appeal that no effective opportunity of being heard was given to the assessee by the AO before making assessment order, and this issue was raised by the assessee before the Ld. CIT(A), which was not accepted by the Ld. CIT(A) for the reasons that opportunities were being granted by him in the first appellate proceedings. It was submitted by the Ld. AR that in case no proper opportunity is given by the AO, it cannot be substituted by the Ld. CIT(A), since under the law the assessee deserves proper opportunity of hearing at the stage of assessment proceedings. In support of his contention, the Ld. AR has relied upon the judgment of Hon'ble Supreme Court in the case of Institute of Chartered Accountants of India vs. L.K. Ratna and others 164 ITR 1 (SC). It was thus, submitted by the Ld. Counsel that for the above reasons this issue needs to be sent back

to the file of the AO for granting proper opportunity of being heard to the assessee for correct appreciation of law and facts.

5. On the other hand, the Ld. DR opposed the submissions made by the Ld. AR for the reasons that the Ld. CIT(A) has passed his order not only on the basis of judgment of Hon'ble Tribunal in the case of B.T. Patil (supra) but also discussed the facts independently.

6. We have gone through the submissions made by the parties. It is noted that the assessee had taken ground of lack of opportunity before the Ld. CIT(A). It has been held by the Ld. CIT(A) in his order that since the counsel of the assessee had appeared from time to time before the AO and that the AO had applied his mind and thereafter passed a speaking order, and thus there does not seem to be any infirmity on the part of the AO in providing an opportunity to the assessee. It has been further held that the assessee has been given opportunity to substantiate the grounds of appeal and file written submissions and paper book during the course of first appellate proceedings. It was held by him that the requirements of principles of natural justice were fully met and therefore the ground of appeal with regard to lack of opportunity was treated as infructuous.

6.1. We do not agree with the reasoning and findings given by the Ld. CIT(A) on the aspect of opportunity. In our view, it is not enough to say that the Ld. Counsel had attended the hearing from time to

time. We feel that what is to be seen is that whether the AO had given sufficient time and opportunity for giving reply by the assessee in response to the queries raised by the AO and whether all the queries or doubts were pointed out by the AO to the assessee in black and white and whether all the issues raised in the assessment order were confronted to the assessee and effective opportunity of hearing was given to the assessee for fair and judicious proceedings. If these elements are absent, fairness cannot be presumed. As a student of law, we were taught that fair opportunity in any proceedings, whether it is- administrative, quasi-judicial, judicial or otherwise, is sine-qua-none. How so ever strong or well reasoned an order may be, but if it is passed without affording a proper opportunity as per law, it would not be sustainable in the eyes of law.

6.2. It is further noted that the Ld. CIT(A) has stated in the order that the opportunity has been given by him to the assessee and therefore, any way, he has substituted or compensated it with the opportunity that should have been provided by the AO to the assessee. We do not agree with the views of Ld. CIT(A). We find that the position of law has not been correctly understood by the Ld. CIT(A). With a view to correctly analyse the true position of law we begin with **Sir William Wade's** erudite and classic work on '*Administrative Law*', wherein the learned author observed that:

"....in principle there ought to be an observance of **natural justice** equally at both stages, and if natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a

corrected initial hearing: instead of fair trial followed by appeal, **the procedure is reduced to unfair trial followed by fair trial.**"

It is worth mentioning that learned author made a reference to useful observations of Justice Megarry in the case of ***Leary v. National Union of Vehicle Builders***. [1971] Ch. 34, wherein while dealing with another aspect of this issue, the learned Judge said:

"If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him, I cannot think that natural justice is satisfied by a process whereby an unfair trial, though not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, **I hold that a failure of natural justice in the trial body cannot be**

cured by a sufficiency of natural justice in an appellate body."

6.3. In this regard, reliance is also made on the judgment of **Hon'ble Supreme Court in the case of Institute of Chartered Accounts of India vs L K Ratna and others 164 ITR 1 (SC)** wherein it was held that a member accused of misconduct is entitled to a hearing by the Council when, on receipt of the report of the Disciplinary Committee, it proceeds to find whether he is or is not guilty.

6.4. Further, an identical issue of lack of opportunity by the AO came up before the Hon'ble Supreme Court in the case of **Tin Box Company vs CIT 249 ITR 216 (SC)**, wherein Hon'ble Supreme Court held as under:

"In an appeal by the assessee, the Appellate Tribunal found that the Income Tax Officer had not given to the assessee proper opportunity of being heard, but held that the assessee had opportunity before the Commissioner (Appeals) and went into the claim of the assessee on the merits and held that there was no merit. On a reference, the High Court held that there was no reason why the Tribunal should set aside the order of the Income Tax Officer merely because that officer did not grant all reasonable opportunities to the assessee. On appeal to the Supreme Court:

Held, reversing the decision of the High Court, that once the tribunal found that the ITO had not given to the assessee proper opportunity of being heard, that **the assessee could have placed the evidence before the appellate authority or before the Tribunal was really of no consequence for it was the assessment order that counted**, and that assessment order had to be made after the assessee had been given a reasonable opportunity of being heard.”

Thus, Hon'ble Supreme Court accordingly set aside the orders of the High Court, the Tribunal and the Commissioner (Appeals) and remanded the matter to the AO for fresh consideration, reversing the decision of the Delhi High Court.”

6.5. We thus find that, as per law the opportunity of hearing in the original assessment proceedings before the AO cannot be substituted by the Ld. CIT(A) , in absolute terms. In our considered opinion, if the assessee is able to demonstrate that there was lack of effective opportunity of hearing before the AO, he deserves fresh opportunity.

7. Apart from this, it has been submitted by the Ld. Counsel that on merits of the issue involved also, the order of Ld. CIT(A) has become contrary for the reasons that the sole case law relied by the Ld. CIT(A) while adjudicating the appeal has been reversed by the Hon'ble Tribunal on the basis of the judgment of the Hon'ble High Court, and therefore fresh adjudication of this case is required for this reason, as well.

7.1. We have considered this argument also. The brief facts of the case are that the assessee company was appointed by the Mumbai Nasik Expressway Limited (MNEL) to provide Project Advisory Services in respect of the Project for Improvement, Operation and Maintenance, Rehabilitation and Strengthening of existing two lane road and widening it to four lane in the state of Maharashtra on Building Operate and Transfer (BOT) basis, awarded to MNEL by National Highways Authority of India (NHAI). The assessee had received a sum of Rs.4,97,43,408/- as consideration from Mumbai Nasik Expressway Limited, out of which it excluded proportionate expenses of Rs.98,13,520/- and claimed deduction u/s 80IA on the balance sum of Rs.3,99,29,888/-, and filed its return of income on 31.10.2007 declaring total income at Rs.6,25,87,573/-. The assessment u/s 143(3) of the Act was completed on 29.12.2009 assessing the total income at Rs.10,25,17,460/- disallowing deduction u/s 80IA of the Act to the tune of Rs.3,99,28,888/-. The A.O did not agree with the contentions of the assessee in view of the Explanation inserted to section 80IA (4) of the Act with retrospective effect from 01.04.2000, on the ground that the assessee company had executed a sub-contract on behalf of Mumbai Nasik Expressway Ltd. and therefore the assessee company did not fulfil the condition laid down in clause (i)(b) to sub-section (4) of section 80IA of the Act. By relying on the decision of the Tribunal in the case of M/s B.T. Patil & Sons Belgaum vs ACIT, the AO denied the deduction u/s 80IA of the Act amounting to Rs.3,99,29,888/-

7.2. Being aggrieved, the assessee contested the appeal before the Ld. CIT(A), wherein it was submitted during the year under

consideration the assessee was engaged in the business of infrastructure development, operation and maintenance, providing of advisory services and investment in infrastructure development activities. But, Ld. CIT(A) did not accept the submissions of the assessee and confirmed the action of the AO in not giving benefit of section 80IA and explanation to section 80IA inserted by Finance Act, 2009 to section 80IA(13) with retrospective effect from 1.4.2000. After analysing the facts of the case, it was held by him that the nature of work carried out by the assessee in relation to development of the project was similar to a 'works contract' and that the nature of work carried out by the assessee company did not fulfil the requirement of section 80IA (4) of the Act. While holding so, he relied upon the decision of the Tribunal in B.T. Patil & Sons Belgaum Constructions Pvt. Ltd (supra). It was held by him that the ratio of this decision was squarely applicable to the facts of the case of the assessee and accordingly, the benefit of deduction u/s 80IA (4) was denied by him.

7.3. It is thus noted that both the authorities below had relied upon the judgment in B.T. Patil & Sons Belgaum Constructions Pvt. Ltd (supra), while deciding this issue against the assessee. In a subsequent development, this judgment has been changed at the stage of Tribunal itself. In fact, an appeal was filed against the earlier order of the Tribunal before the Hon'ble Bombay High Court by the aforesaid company namely B.T. Patil & Sons Belgaum Constructions Pvt. Ltd (supra). Hon'ble High Court sent the matter back to the Tribunal and directed that while considering the matter

afresh the Tribunal will take into consideration all the decisions including that of Bombay High Court in the matter of CIT vs ABG Heavy Industries Limited (2010) 322 ITR 323 (Bom) and all the contentions of the said assessee were kept open. Subsequently, fresh order was passed by the Tribunal in B.T. Patil & Sons Belgaum Constructions Pvt. Ltd(supra) dated 28.2.2013, wherein it was held by the Tribunal that the assessee was eligible for benefit of deduction u/s 80IA, thus, taking view contrary to the view taken by the Tribunal in its earlier order. The relevant para of the Tribunal's order is reproduced below for the sake of convenience:

"14. In this background, the assessee could certainly claim the deductions under the provision of Section 80IA. One has to see the substance and not the Form. Essentially, though it was a Joint Venture, it was converted into assessee's venture. The Other Venturer withdrew and the entire work was executed by the assessee though in the name of Joint Venture. The Joint Venture is nothing but the venture of the assessee company and the other person not being a party after withdrawing the question of Joint Venture does not arise. The Venture was fully carried out by the assessee and it was entirely executed by the assessee company. Taking the substance of the transaction, the assessee are entitled to all the profits in respect of the contract executed by them, hence the assessee would certainly be entitled to deduction under the provisions of 80IA as they have fulfilled all the other conditions. This view gets strength from decision in the case of ITAT, Indore Bench, in case of Ayush Ajay Constructions Ltd. (supra). Thus, while giving effect

to the opinion of Third Member u/s 255(4) of the Act, we take view in conformity with order of jurisdictional High Court in case of ABG Heavy Industries Ltd. (supra) available at this time though contrary to the opinion expressed by the Third Member. So in view of above discussion, following the ratio of jurisdictional High Court in case of ABG Heavy Industries Ltd. (supra), the Assessing Officer is directed to allow deduction u/s 80IA(4) of the Act to the assessee with regard to the projects in question for both the years. The matter is disposed off accordingly.”

7.4. It is further noted by us that the Hon’ble Jurisdictional High Court in the case of ABG Heavy Industries Limited (supra) has also taken the view in favour of the assessee on this issue.

7.5. From the above said discussions, it is clear that the crucial developments have taken place having a material bearing on the legal position as considered by the Ld. CIT(A) on the basis of judgment available at that point of time. In our considered opinion, this matter needs fresh application of mind and hence we send this matter back to the file of AO for fresh adjudication of the matter. The AO shall give sufficient opportunity to the assessee as per law. He will take into consideration all the relevant facts as well as the judgment available at that point of time including the judgment of jurisdictional High Court in the case of ABG Heavy Industries Limited (supra) and the decision in B.T. Patil & Sons Belgaum Constructions Pvt. Ltd (supra). The assessee is also directed to extend requisite co-

operation in speedy disposal of the matter. The assessee is also directed to place all the requisite material and documents as called for by the AO and AO will take decision as per law.

8. In the result, the appeal filed assessee is allowed for statistical purposes.

Pronounced accordingly on 16th December, 2015.

घोषणा खुले न्यायालय में दिनांक: 16th December, 2015 को की गई

Sd/-

(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-

(ASHWANI TANEJA)
ACCOUNTANT MEMBER

मुंबई Mumbai: 16th Dec, 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
गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

यक पंजीकार (Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai