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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**Date of decision: 09.10.2012+ **ITA No.1186/2008**COMMISSIONER OF INCOME TAX DELHI IV Appellant
Through Mr. Sanjeev Rajpal, sr. standing counsel

VERSUS

INTERCONTINENTAL CONSULTANTS &
TECHNOCRATS P. LTD.Respondent
Through Mr. S. Krishnan, Adv.**CORAM:****MR. JUSTICE S. RAVINDRA BHAT****MR. JUSTICE R.V. EASWAR****R.V. EASWAR, J: (OPEN COURT)**

This is an appeal by the revenue. The respondent-assessee is a private limited company. In respect of the assessment year 2001-02, it filed a return of income on 31.10.2001 declaring total income of ₹2,83,46,223/-. In the return the assessee claimed deduction of ₹70,52,819/- under Section 80HHBA and ₹1,33,54,593/- under Section 80HHB. In the course of the assessment proceedings the assessing officer took the view that the essential condition for claiming the deduction under Section 80HHB is that the assessee shall derive profits from the business of execution of a foreign project undertaken by him pursuant to a contract entered into by him or execution of any work undertaken by him which forms part of a foreign project undertaken by another person pursuant to the contract entered into by such other person. Similarly he noticed



for the purpose of claiming deduction under Section 80HHBA the essential condition was that the assessee should have derived profits from the execution of a housing project awarded to him on the basis of a global tender and such project should have been aided by the World Bank. These conditions, according to the assessing officer were not satisfied in the assessee's case. Though the assessee was engaged in the business of engineering and technical consultants for roads, bridges, highways, airports and other infrastructure projects under contract with the Ministry of Surface Transport, National Highway Authority of India (NHAI), State PWD, Highways and other government departments both in India and abroad, its work merely involved ensuring that the construction of the road or bridge was undertaken in an economical and efficient manner in accordance with the contract conditions and this itself did not mean that the profits were derived from the "execution" of the foreign project or the housing project. According to the assessing officer, the limited obligation of the assessee was to provide supervisory and consultancy services such as design reviewing, supervision of construction, effectiveness of work and adherence to time schedule, submission of reports, relocation of services, material survey etc. He therefore, disallowed the claim for deductions under both the sections, summarizing his views as under :

"From the discussion above, it is evident that the assessee's role in the above works are of consultancy and supervisory nature which cannot be treated as an integral part of execution of any project. The consultancy and supervisory services may be treated as an essential aid in the modern age of advance technology but it cannot be an essential and integral part of any project. From the services of any consultant, the original agreement holder uses its resources to the optimal potential without wastage of time, manpower and terms of contracts and increases its efficiency to



some extent. It cannot be said that merely giving consultancy or supervising the design or making the work cost effective is the actual execution of any project. In view of this, the deductions u/s 80HHB & 80HHBA is disallowed.”

2. The CIT(Appeals), to whom the assessee appealed, examined the agreements and concluded that the role of the assessee constituted an integral part of the execution of the foreign projects or the World Bank aided projects. He noted that the assessee had undertaken foreign projects for construction of highways etc. pursuant to a contract entered into with the foreign governments/authorities. The primary condition of Section 80HHB was thus satisfied. Similarly, the CIT(Appeals) found that the assessee had undertaken housing projects aided by the World Bank pursuant to contracts entered into by it with the Government of India or other governmental authorities such as the NHAI, and thus the primary condition of Section 80HHBA was satisfied. The primary condition of both the sections having been found to have been fulfilled, the CIT(Appeals) proceeded to examine the correctness of the view expressed by the Assessing Officer that the assessee cannot be said to have undertaken the “execution” of the projects. He noted that the assessing officer had taken the view that the scope of the assessee’s work was limited to the various technical and engineering services rendered by the assessee pursuant to its independent contracts with the various authorities but did not extend physical activity of putting up a super-structure, machinery or plant etc. This view, according to the CIT(Appeals), was opposed to the law laid down by the Supreme Court in *Continental Construction Ltd. vs. Commissioner of Income Tax* (1992) 195 ITR 81 SC, which was brought to the notice of the Assessing Officer in the course of the assessment proceedings. The CIT(Appeals) felt that the assessee’s case was



squarely covered by the observations of the Supreme Court in the judgment cited supra where it was held that the expression “business of execution of a foreign project” and the expression “the profits derived from the business” take in all the aspects of the business and all activities, commitments and obligations ancillary and incidental thereto. Therefore, the profits flowing from all these activities would qualify for deduction under Section 80HHB/80HHBA. In this view of the matter, the CIT (Appeals) accepted the assessee’s contentions and directed the assessing officer to allow the deductions under both the sections.

3. The revenue preferred an appeal to the Tribunal in ITA 1592/Del./2004 and the ground urged was that the CIT (Appeals) failed to appreciate the distinction between the meanings of the two different expressions “forming part of” and “in connection” appearing in Section 80HHBA. Placing strong reliance on the judgment of the Supreme Court in the case of *Continental Constructions Ltd.* (supra) the Tribunal opined as follows:

“8. *It is seen that the assessee is engaged in the business of engineering and technical consultants for roads, bridges, highways or airports and other infrastructural project under contract with the Ministry of Surface “Transport, National Highway Authority of India, State PW highways and other Government departments both in India and abroad. There appears to be no dispute that the assessee was awarded a contract on the basis of global tender and the said project is aided by the World Bank. The National Highway Authority of India entered into two contracts for the execution of NH-2 highway, one contract was with the contractor for supply of material, equipment and labour and other contract was with the assessee as Engineers to the project. Thus, as per said agreement the assessee was required to provide engineering and technical inputs for the said construction of the Highway. The expression “execution of housing project” would include all the necessary activities for the execution and completion of the project such as*



survey, design, engineering supervision for construction work. The design consultancy and engineering supervisions are considered to be the most important part of execution of the project. Therefore, the engineering and consultancy are considered as an integral part of any project. We, therefore, find ourselves in agreement with the Ld CIT(A) that the assessee is to provide the engineering and technical inputs and supervise the contractor's day-to-day execution of the contract i.e. day-to-day progress of construction of highway, namely, whether it was adhering to and was in consonance with design and technical specifications. The assessee's job was a continuing one and was coterminous with the contractor's work. Thus, from the start of the project till its conclusion the assessee company was integral part of the execution of project. Thus, we are of the view that the Assessing Officer has failed to appreciate the nature of the assessee's role in execution of project while holding that its role in project is that of a consultancy and supervisory nature which was not an integral part of the execution of the project inasmuch as the day-to-day work of the contractor was to be executed under the strict supervision of the assessee as engineers. It may be mentioned that the Hon'ble Supreme Court in the case of Continental Constructions Ltd. 195 ITR 81(SC) while dealing with the Section 80HHB has observed as under :

“The definition cannot be restricted to the mere physical activity of putting up a superstructure, machinery or plant but should be understood to take within its fold all utilisation of technical knowledge or rendering of technical services necessary to bring about the construction, assembly and installation..... It is perhaps possible to envisage cases where while undertaking a foreign project, separate contracts are entered into for two different sets of activities involved viz (i) construction of works and assembly or installation of plant and machinery and (ii) the transfer of rights and know-how, the imparting of technical knowledge or information and the rendering of technical services.....”



The Tribunal further noted that the revenue had accepted the assessee's claim under Section 80HHBA in the earlier years, implying that the rule of consistency that the same view should be taken in the later years also should be applied. The Tribunal also referred to the fact that the revenue did not appeal against the decision of the CIT(Appeals) with reference to Section 80HHB, where the work of the assessee was identical in respect of the foreign project as it was for the housing project for the purpose of Section 80HHBA. In the aforesaid view of the matter, the Tribunal dismissed the appeal of the revenue upholding the order of the CIT(Appeals).

4. The revenue has filed the present appeal against the order of the Tribunal. For the sake of completeness of the record we may mention that the appeal was earlier disposed of by a Division Bench of this Court on 11.12.2008, upholding the view of the Tribunal on the basis of the rule of consistency alone, without examining the merits. Against the order of the High Court, the revenue filed Civil Appeal No.8509/2011 to the Supreme Court. By order dated 10.10.2011 the Supreme Court directed the High Court to give an authoritative pronouncement on the scope of Sections 80HHB and 80HHBA Act and to deal with the claim of the assessee *de novo*.

5. It is pursuant to the above order of the Supreme Court that the matter has come now before us. The substantial question of law which arises under section 260A is this: -

“Whether the Tribunal was right in law in holding, for the purposes of Section 80HHB and 80HHBA, that the services rendered by the assessee fell within the scope of the expressions “execution of a foreign project” or “execution of a housing



project” and the profits derived from such services are eligible for the deduction under those sections?”

6. Section 80HHB provides for deduction in respect of the profits and gains from projects outside India. It was inserted by the Finance Act, 1982 w.e.f. 1.4.1983. It applies to an assessee who is resident in India. If such an assessee derives profits and gains from the business of (a) the execution of a foreign project undertaken by the assessee in pursuance to a contract entered into by him or (b) the execution of any work undertaken by him and forming part of the foreign project undertaken by any other person in pursuance of a contract entered into by such other person, he would be entitled to a deduction from such profits and gains at a percentage thereof, as prescribed in the Section. The deduction was taken away from the assessment year 2005-06. The grant of the deduction depended on certain conditions prescribed in the section. There is no dispute about the fulfillment of these conditions. The dispute centers around the scope of the expression “the execution of a foreign project” and “the execution of any work undertaken by him and forming part of a foreign project”.

7. Section 80HHBA provides for deduction in respect of profits and gains from housing projects in certain cases. The deduction is available to a resident-assessee. If the gross total income of such an assessee includes any profits and gains “derived from the execution of a housing project awarded to the assessee on the basis of global tender and such project is aided by the World Bank”, the assessee would be entitled to a deduction from the profits at the prescribed percentage thereof. This Section was introduced by the Finance (2) Act, 1998



w.e.f. 1.4.1999 and was removed from the assessment year 2005-06. The Explanation to sub-section 4 defined a housing project in the following manner:

(a) "housing project" means a project for –

(i) the construction of any building, road, bridge or other structure in any part of India;

(b) "World Bank" means the International Bank for Reconstruction and Development Bank referred to in the International Monetary Fund and Bank Act, 1945."

There is no dispute about the fulfillment of other conditions mentioned in sub-section 2. The entire dispute centers around the scope of the expression "execution of a housing project".

8. The contention of the assessee right through was that the definition of the word "project" cannot be restricted to the mere physical activity of putting up the super-structure, plant and machinery, but should be expansively understood to take within its fold of utilisation of technical knowledge or rendering of technical services necessary to bring about the construction, assembly and installation. It is urged that in any project there are two sets of activities i.e. (1) construction of the work or assembly or installation of the plant and machinery or putting up the super-structure and (2) utilisation of the technical knowhow, imparting technical knowledge or information and also rendering all technical services including drawings, designs etc. A project, according to the assessee, takes within its fold both the activities namely, the physical as well as the technological aspects and the word "project" appearing in both the sections should be construed accordingly. The dictionary meaning of the "project" was relied upon to show that it includes not only the actual



execution but also the planning, designing or devising the project or doing of such technical or technological things which are incidental and necessary to put in place the physical aspect of the project. In making these submissions strong reliance has been placed on the judgment of the Supreme Court in the case of *Continental Constructions Ltd.* (supra).

9. The contention of the revenue on the other hand is that the expression used in both the sections is “execution of the project” or “execution of a housing project” and not merely “project” and therefore, the word “execution” would merely involve the physical activity or aspect of the project and cannot take in the technical or technological aspect. It is accordingly contended that the activities of the assessee, in so far as they relate only to the provision of consultancy services or the provision of technical services, cannot qualify for the deduction.

10. It is difficult to accept the view point of the revenue, having regard to the judgment of the Supreme Court cited above. The assessee is engaged in the business of engineers, technical consultants and engineering supervisor for the execution of projects for construction of roads, highways, bridges, airports etc. both in India as well as abroad. The agreements entered into by the assessee for the execution of the projects, some of which were placed before the CIT (Appeals), have been examined by him and the finding recorded is that the assessee was not merely providing consultancy services, but was also providing engineering services to the projects namely, construction, supervision and other engineering services in the execution of highway projects. From a specimen agreement entered into with NHAI for the Bihar state road project, it was found that the NHAI had entered into two contracts, one with a contractor (other than



the assessee) for supply of material equipment and labour and the other contract was with the assessee as engineers to the project. While the other contractor was to carry out the physical activities such as supply of labour, material and equipment which are to be approved by the assessee as engineers, for the construction of the highway, which was the physical aspect, the assessee was to provide engineering and technical/technological services/inputs for the construction. The assessee was also to supervise the day-to-day work executed by the other contractor. It was thus found that the assessee was actually involved in the execution of the foreign projects as well as the World Bank housing projects on a day-to-day basis, or to apply a modern terminology, “hands-on” basis. The CIT (Appeals) also found that the agreement, besides detailing the nature of the services to be rendered by the assessee, also gives comprehensive details of the specific services to be rendered on site by the assessee’s staff. These staff are to work at site on full time basis with full involvement in the project right from inception to completion. In other words, the finding is that there is a combination of efforts of both the contractor who would supply the material and labour and the services in the technical/consultancy/supervision field rendered by the assessee, in the fruition of the project. The interdependence of both the aspects is essential for the completion of the project and one cannot stand without the other. It is therefore, impossible to say that the assessee company is not involved in the execution of the project, both for the purpose of Section 80HHB and for the purpose of Section 80HHBA. Even taking into consideration the argument of the revenue that the expression to be interpreted is “execution of a project” or “execution of a housing project” for the purpose of these two sections, the



assessee was, in our opinion involved in not only the project in an abstract or remote sense but was involved therein directly and indispensably.

11. None of findings recorded by the CIT (Appeals) on the basis of the examination of the agreements has been disputed either before the Tribunal or before us. The role of the assessee company which according to it was vital for the execution of the project was outlined in the assessee's letter dated 25.8.2003 filed before the Assessing Officer to which he has also made reference. The duties and responsibilities of the engineers employed by the assessee in the execution of the several projects have been detailed in this letter. Even the Assessing Officer accepted that it was the duty of the assessee to ensure that the construction of the project is undertaken in an economical and efficient manner in accordance with the conditions of the contract, technical specifications and engineering drawings and any amendments thereto, to optimize the use of the available resources and to minimize the cost, maximize the quality of the work, to expedite the construction so as to meet the completion deadlines, to ensure that there is no cost over-run etc. This can be ensured by the assessee only by an active involvement in execution of the project. As already pointed out, the supply of material and labour which constitute the physical aspects of the project cannot by itself ensure the execution or completion of the project; it has to be complemented by an equally important aspect of the supply of the designs, drawings and such other technical or technological inputs as well as supervisory and engineering services rendered by the assessee company. Both the physical as well as technical aspects of the project are equally important and one cannot be separated from the other.



12. In the aforesaid view of the matter we are in agreement with the decision of the CIT (Appeals) and affirmed by the Tribunal that the assessee is entitled to the deduction both under Section 80HHB and under Section 80HHBA. The substantial question of law framed by us is answered in the affirmative, in favour of the assessee and against the revenue. The appeal of the revenue is accordingly dismissed with no order as to costs.

R.V.EASWAR, J

S. RAVINDRA BHAT, J

OCTOBER 09, 2012

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