

# ***Strengthening and maintaining of existing roads does not create a new infrastructure facility for section 80-IA deduction***

December 10, 2018

## ***In brief***

Recently, the Bangalore bench of the Income-tax Appellate Tribunal<sup>1</sup> (Tribunal) held that strengthening and maintaining of existing roads does not bring into existence a new infrastructure facility, and thus, denied deduction under section 80-IA of the Income-tax Act, 1961 (Act).

## ***In detail***

### ***Facts***

- The taxpayer had entered into a Concession Agreement (CA) for two separate activities of strengthening existing four lanes including construction of service roads and widening two lanes to four lanes with the National Highway Authority of India (NHAI) on a Build Operate and Transfer basis.
- The taxpayer claimed 100% deduction under section 80-IA of the Act in relation to the profit derived from implementing, operating and maintaining the project during the concession period.

- The tax officer (TO) disallowed the deduction claimed by the taxpayer on the ground that strengthening of existing roads was nothing but “relaying”, and was not eligible for deduction under section 80-IA of the Act.
- On appeal, the Commissioner of Income-tax (Appeals) [CIT(A)] disallowed the deduction under section 80-IA of the Act in relation to the activity of strengthening existing roads, and instead allowed deduction with respect to strengthening and widening of the two lanes to four lanes.

### ***Issues before the Tribunal***

- Whether income from the activity of strengthening

existing four lane road is eligible for deduction under section 80-IA of the Act?

- Following the principle of consistency (deduction allowed by TO in earlier years), whether the deduction claimed by taxpayer would be allowed?

### ***Taxpayer's contentions***

- The strengthening of the existing road in such an integrated CA, could in no way be considered as relaying, and if such a narrow meaning was given, it would defeat the purpose of tax concession allowed and would be contrary to the legislative intent and Central Board of Direct Taxes circular<sup>2</sup>.
- The taxpayer relied on judicial

<sup>1</sup> ITA Nos. 545, 546, 1130, 1131/BANG/2018

<sup>2</sup> Circular No. 4 of 2010 dated 18 May, 2010

precedents<sup>3</sup> that work involving strengthening, improving and widening of existing roads is a new infrastructure facility and is entitled to deduction under section 80-IA of the Act.

- Applying the “Principle of Consistency,” since the taxpayer was allowed deduction in previous years, the taxpayer was eligible for deduction under section 80-IA of the Act for the year under consideration for the activity of strengthening of existing road.

#### **Revenue’s contentions**

- There is a distinction between laying an additional road and strengthening an existing road.
- The repair and maintenance activity on the existing road and constructing a service road (which cannot be equated with the main line of road) falls outside the purview of section 80-IA of the Act.
- As per the CA, one of the essential purposes of awarding the contract was the maintenance of existing four-lane road; therefore, the tax benefit on such activities should not be available.

#### **Tribunal’s ruling**

- The introduction of section 80-IA of the Act was to

encourage and accelerate the development of new infrastructure facilities.

- A clear distinction can be made between widening an existing road by constructing additional lanes as part of the highway project *vis-à-vis* improving, maintaining and refurbishing an existing road.
- For a specific patch of road, as the taxpayer was only operating and maintaining an already existing four lane road by strengthening it, no new infrastructure facility came into existence.
- Laying a service road and laying a main line were two different activities and laying a service road could not be termed as a new infrastructure facility, to claim deduction under section 80-IA of the Act.
- The “Principle of Consistency” is merely a guiding factor to decide the issue in the absence of higher wisdom available in the form of binding decision of a superior court. Once there is a binding judgement of the jurisdiction High Court and applicable to the facts of the case, there was no purpose of perpetuating the error committed by the TO/ CIT(A) in earlier years.
- The Tribunal held that the income attributable to the

activity of strengthening existing road should not be eligible for deduction under section 80-IA of the Act.

- However, the Tribunal regarded the activity of widening the road from two lanes to four lanes as creation of a new infrastructure facility and therefore allowed deduction under section 80-IA of the Act.
- The Tribunal directed the CIT(A) to determine the deduction under section 80-IA of the Act by requesting for specific records from NHAI and evaluate factors that may have been considered for determining annuity for strengthening of existing four lanes *vis-à-vis* widening of two lanes to four lanes.

#### **The takeaways**

The ruling addresses the issue on eligibility of deduction in case of composite and integrated contracts entered by taxpayers in the infrastructure sector and lays down a mechanism to determine what could be considered as a new infrastructure facility, and therefore deduction available for such contracts.

#### **Let’s talk**

For a deeper discussion of how this issue might affect your business, please contact your local PwC advisor

<sup>3</sup> Kotarki Construction (P) Limited v. ACIT [2018] 89 taxmann.com 265 (Karnataka), Rohan & Rajdeep Infrastructure, Pune v.

ACIT [ITA No. 1214/PUNE/2010] and ACIT v. Rajahmundry Expressway Limited [ITA No. 253/MUM/2012]

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