

Can captive use desalination plant claim S.80-IA deduction?

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Issue:

Whether a desalination plant, whose output is captively used, satisfies the provisions of S.80-IA(4) and is therefore eligible for deduction under S.80-IA of the Income Tax Act, 1961?

Provision involved:

Section 80-IA of the Income Tax Act, 1961 grants deductions with respect to profits and gains from industrial undertakings or enterprises engaged in infrastructural development and the like. Section 80-IA(4) of the Act provides certain conditions that need to be fulfilled for Section 80-IA to apply.

S.80-IA reads as follows:

“”80-IA(4) *This section applies to—*

(i) any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfils all the following conditions, namely :—

(a) it is owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;

(b) it has 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;

(c) it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995:

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Explanation – For the purposes of this clause, “infrastructure facility” means -

(a) a road including toll road, a bridge or a rail system;

(b) a highway project including housing or other activities being an integral part of the highway project;

(c) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;

(d) a port, airport, inland waterway, inland port or navigational channel in the sea.””””

Arguments:

With respect to the conditions under Section 80-IA(4), the Department usually questions its applicability on the following grounds:

(1) That using the undertaking for captive use and public use would not tantamount to “infrastructural facility” under Section 80-IA(4) of the Act.

(2) That there is no “agreement” with central as required under Section 80-IA(4) of the Act.

With respect to contention (1) by the Department as to whether the desalination plant falls within the meaning of “infrastructural facility” as under Section 80-IA(4) of the Act, it is clear that (c) of the Explanation refers to water treatment system which includes desalination plant and in fact the Depreciation schedule of the Act specifically mentions desalination plant. Thus it is clear that desalination plant is an industrial facility.

Further, the deduction u/S 80IA would not be affected because the desalination plant was used for captive consumption. In *CIT v. Tanfac Industries Ltd. ((2009) 319 ITR (St) 8)*, the Supreme Court observed that steam used for captive consumption would be entitled to deduction under Section 80-IA of the Act. This view is also espoused in *Tamilnadu Petroproducts Ltd. v. ACIT (338 ITR 643 (Mad. HC))* where the Court held that even captive consumption of electricity would fall within the meaning of Section 80-IA(4) of the Act.

In the case of *Veolia Eau- Compagnie Generale Des Eaux v. The Additional Director of Income-tax (ITA No. 2131/Mds/2010)* which concerned a different issue, the definition of “infrastructure facility” under Section 80-IA(4) is imported to Section 10(6A) and the captive desalination plant in question was considered as an infrastructural facility as under Water Supply Project. Therefore, the same would apply in the instant matter as well.

Further, Section 80-IA(8) which iterates on transfer of any goods or services held for the purpose of an eligible business to any other business carried on by the assessee also includes

undertakings involved in infrastructure development which uses it for captive consumption. This shows the intention of the application of Section 80-IA(4), which would not exclude within its purview captive consumption altogether.

Moreover, there is no application of the provision to public facilities alone, and the Department may have inferred the same from the earlier version of the Act. As per the Finance Bill, 2002, the phrase “or any other public facility of a similar nature” has been removed from Explanation 1 to Section 80-IA(4) of the Act, which shows the intention to not restrict the Section to facilities that are of the nature of public facilities alone. Further the fact is that the desalination plant would indirectly benefit the general public, considering that the investment in the desalination plant that could have otherwise been enabled by the relevant Metro Water & Sewerage Supply Board will now be available to the public as well.

With regards to contention (2) by the Department about the existence of an agreement with the Central Government or a State Government or a local authority or any statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility, the assessee has to obtain a large number of approvals from various regulators such as the Central Pollution Control Boards clearance, Coastal Zone Regulation clearance for the developing of the desalination plant, which shall constitute an agreement. This fact that the approval to go ahead with the plant tantamounts to an agreement was specifically upheld in the case of *CIT v. A.L. Logistics Pvt. Ltd. (96 CCH 45 (Mad))* where it was held that an approval by the Government for container freight station would be considered as an agreement as required under Section 80-IA(4) of the Act. Similarly, It is noted that recently a differing view was taken by ITAT Hyderabad in *DCIT vs Ramky Energy and Environment Ltd. (ITA NO 774 & 775/Hyd/2020 for AY 2013-14, 14-15 dated 30.8.2022)* wherein the ITAT Hyd referred AL Logistics (supra) but held it was on different facts and surprisingly went ahead relying on the ration of *PCIT vs. Wipro Ltd (140 taxmann.com 223 SC)* rendered in the context of 10A/10B stating that strict compliance of provision of law whenever any exemption of income or deduction is claimed by assessee. With due respect, it would be impractical on one hand to allow 80-IA for captive consumption as the SC itself has done while on the other hand requiring an agreement with a governmental authority. Further, the context of the SC decision in Wipro was entirely different relating to the presence of a specific proviso which the Court held that said proviso has to be applied without leeway and in fact noted the exceptions where such specific provisions are not available. Thus, the decision of *AL Logistics (supra)* of the Madras HC ought to prevail in our view.