

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 11th April, 2012.

% Date of Decision : 11th May, 2012.

+ ITA NO.1411/2009

CONTAINER CORPORATION OF INDIA LTD. ...Appellant
Through Mr.S.Krishnan, Advocate

VERSUS

ASSISTANT COMMISSIONER OF INCOME TAX ...Respondent
Through Mr. Sanjeev Rajpal, Advocate

+ ITA NO.967/2011

CONTAINER CORPORATION OF INDIA LTD. ...Appellant
Through Mr.S.Krishnan, Advocate

VERSUS

CIT ...Respondent
Through Mr. Sanjeev Rajpal, Advocate

+ ITA NO.968/2011

CONTAINER CORPORATION OF INDIA LTD. ...Appellant
Through Mr.S.Krishnan, Advocate

VERSUS

CIT ...Respondent
Through Mr. Sanjeev Rajpal, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest? Yes

R.V. EASWAR, J.:

These are three appeals filed by the assessee under Section 260A of the Income Tax Act, 1961, which is hereinafter referred to as the Act. On 28th November, 2011, we framed the following common substantial question of law:-

“Whether the Income Tax Appellate Tribunal is right in law in holding that the appellant-assessee is not entitled to deduction under Section 80-IA of the Income Tax Act, 1961 as the activities undertaken by the appellant do not fall within Clause(d) of the Explanation defining the term infrastructure facilities?”

2. The appeals involve a short question regarding the entitlement of the assessee to the deduction under Section 80-IA(4) of the Act. We are concerned with the assessment years 2003-04 to 2005-06. The assessee is a public sector undertaking, registered as a company under Section 617 of the Companies Act, 1956 and is functioning

under the direct administrative control of the Ministry of Railways. It is engaged in the business of handling and transportation of containerised cargo. The activity of the assessee is carried out mainly on its Inland Container Depots (ICDs), Central Freight Stations(CFSS) and Port Container Terminals (PCTs) which are spread all over the country. It would appear that the assessee has a total of 45 ICDs.

3. Before we proceed further, it would be useful to appreciate the nature of the business activity of the assessee. Before the advent of the ICD, the transportation of containerised cargo to and from industrial centres used to face bottlenecks at the sea ports due to logistical and handling issues and issues relating to customs. For instance, the exporter of handicrafts at Jaipur had to organize for the transport of his cargo to Mumbai Port where customs formalities would be completed and the cargo would then be loaded into containers which would be loaded into the ship for export. The advent of ICD permitted the exporter to complete the handling and customs formalities at the assessee's ICD at Jaipur, from where customs-sealed containers would proceed seamlessly to the export destination. Similarly a steel plant located at Jamshedpur which imports machinery from Germany, could give instructions to the shipping company and receive its cargo at Jamshedpur itself,

complete the customs formalities at Jamshedpur and take delivery of the machinery much closer to its place of business. The important feature to be noted here is that the ICDs are located on land and in land-locked areas which are generally at a distance from the sea ports. But all the formalities relating to the customs, either for export or for import, are completed at the ICD itself. The containers which contain the goods are then loaded to the railway wagons which thereafter travel to the sea ports and the containers are loaded directly from the wagons into the ships.

4. Necessary amendments were made by the Finance Act, 1983 to Section 2(12) of the Customs Act, 1962 and by inserting clause (aa) sub-section (1) of Section 7 of the said Act, with the advent of ICDs in India. Under Section 2(12) of the Customs Act, “customs port” means any port appointed under clause (a) of Section 7 to be a customs port and includes a place appointed under clause (aa) of that Section to be an Inland Container Depot. Under Section 7(1)(aa) of the Act, the Central Board of Excise and Customs had the power, by notification in the official gazette, to appoint the places which alone shall be Inland Container Depots for the unloading of imported goods and the loading of exports goods or any class of such goods. It may also be mentioned that CONCOR, the assessee herein, was a pioneer in India for establishing ICDs. These ICDs function for the

benefit of exporters and importers located in industrial centers which are situated at a distance from sea ports. After the advent of the ICDs, the bottlenecks at the sea ports due to handling and customs formalities were reduced, so also the expenditure.

5. We may now notice the relevance of Section 80IA of the Act. The Finance Act, 1995, with effect from 1/4/1996, for the first time brought in a provision under which a percentage of the profits derived from the operation of any “infrastructure facility” was allowed a deduction in computing the income of the assessee. This was allowed for a period of ten consecutive assessment years. According to circular No.717 dated 14th August, 1995 reported in (1995) 215 ITR St.17, which explained the rationale behind the provision, the following was the objective:-

“34.2 Industrial modernisation requires a massive expansion of, and qualitative improvement in infrastructure. Our country is very deficient in infrastructure such as expressways, highways, airports, ports and rapid urban rail transport systems. Additional resources are needed to fulfil the requirements of the country within a reasonable time frame. In many countries the BOT (build-operate-transfer) or the BOOT (build-own-operate-transfer) concepts have been utilised for developing new infrastructure.

34.3 Applying commercial principles in the operation of infrastructure facilities can provide both managerial and financial efficiency. In view of this, a ten-year concession including a five-year tax holiday has been allowed for any enterprise which develops, maintains and operates any new infrastructure facility such as roads, highways, expressways, bridges, airports, ports and rail systems or any other public facility of similar nature as may be notified by the Board on BOT or BOOT or similar other basis (where there is an ultimate transfer of the facility to a Government or public authority). The enterprise has to enter into an agreement with the Central or State Government or a local authority or any other statutory authority for this purpose. The period within which the infrastructure facility has to be transferred needs to be stipulated in the agreement between the undertaking and the Government concerned. The enterprise has to be owned by a company registered in India or a consortium of such companies. The tax holiday will be in respect of income derived from the use of the infrastructure facilities developed by them.”

The term “infrastructure facility” was defined in Section 80IA(12)(ca) to mean a road, highway, bridge, airport, port or rail system or any other public facility of a similar nature as may be notified by the CBDT in the official gazette.

6. The Finance (No.2) Act, 1996 expanded the definition of the “infrastructure facility”, to include water supply project, irrigation project, sanitation and sewerage system. The Income Tax (Amendment) Act, 1998 made several changes all of which are not relevant for our purpose. It may only be noted that again the definition of “infrastructure facility” was expanded to include a highway project including housing or other activities being integral part of the highway project.

7. The Finance (No.2) Act, 1998 for the first time included the words ‘inland water ways and inland ports’ in the definition of “infrastructure facility” in sub-section (12), clause (ca), with effect from 1.4.1999. Thus the relevant clause, after the amendment, read as under:-

“Infrastructure facility”- means (i) a road, bridge, airport, port, inland waterways and inland ports, rail system by any other public facility by a similar nature as may be notified by the board in this behalf in the official gazette.”

In paragraph 43 of circular No.772 dated 23rd December, 1995 reported in (1999) 235 ITR St. 35, the Board explained the inclusion of “inland waterways and inland ports” in the definition of “infrastructure facility” as follows:-

“43. Inland port and waterways regarded as infrastructure facility. – 43.1 Under the existing provisions of section 80-IA, roads, highways, bridge, airport, port and rail system are regarded as infrastructure facilities and the undertakings engaged in developing, maintaining or operating such infrastructure facility are entitled to a tax holiday for 5 years and a deduction of 30 per cent of profits for the next 5 years. These companies have the choice of availing of such benefits in any 10 consecutive years out of initial 12 years from the year in which they commence production.

43.2 The Government has identified national waterways, the fourth mode of transport, for improving the transport infrastructure in the country. Inland waterways and inland ports play a vital role in improving a country’s infrastructure. With the objective of improving the transport infrastructure, the Act has included inland waterways and inland ports in the definition of “infrastructure facility” as given in section 80-IA. The undertakings engaged in the development of such infrastructure would be entitled to two-tier fiscal benefits as outlined above.”

(underlining ours)

8. Thus it was for the first time from the assessment year 1999-2000 that inland ports started enjoying the deduction under Section 80IA as an “infrastructure facility”. The object of the Government was to strengthen and improve the country’s infrastructure in general and the transport infrastructure in particular. Inland ports facilitate

the transport infrastructure by taking care of the transport of the customs-cleared goods meant for export from the ICD to the sea-port and the imported goods directly from the sea-port to the ICD where they can be customs-cleared. When the entire Section was recast by the Finance Act, 1999 with effect from 1.4.2000 and even after several amendments were thereafter made to the Section, inland ports continued to enjoy the deduction as infrastructure facility.

9. The question before us is whether the income from ICDs qualify for the deduction under Section 80IA(4)(i) of the Act read with the Explanation (d). We may first notice that out of the total of 45 ICDs operated by the assessee, except two ICDs, all others were notified by the CBDT vide notification No.S.O.744(E) issued on 1st September, 1998 for the purpose of Section 80IA(12)(ca). It may be recalled that under this provision, the Board had the power to notify an infrastructure facility for the purpose of the Section. The notification is reported in (1999) 233 ITR St. 126 and is reproduced below:-

“Notification No.S.O.744(E), September 1st, 1998 – Income-tax Act, 1961: Notification under section 80 – IA(12) (ca) : Inland Container Depot and Central Freight Station notified as infrastructure facility.

In exercise of the powers conferred by clause (ca) of sub-section (12) of section 80-IA of the Income-tax Act, 1961

(43 of 1961), the Central Board of Direct Taxes hereby notifies Inland Container Depot (ICD) and Central Freight Station (CFS) as infrastructure facility :

Provided that such places are notified as Inland Container Depot and Central Freight Station under section 7(aa) of the Customs Act, 1962.”

10. The power to notify infrastructure facilities for the purpose of the Section was taken away from the CBDT with effect from 1.4.2002. The first argument of the learned counsel for the assessee is that once the ICDs have been notified validly by the CBDT by virtue of the powers conferred upon them, the fact that at a later point of time the power was taken away does not put an end to the validity or effect of the notification and as per the relevant Section as it stood at the time when the notification was issued, the assessee was eligible for the deduction for a period of 10 successive assessment years which covers the assessment years 2003-04 to 2005-06 which are the years under appeal.

11. We have examined the contention. Prior to the amendment made with effect from 1.4.2002 by the Finance Act, 2001, as noticed earlier, the Board was empowered to notify any public facility of a similar nature, other than what was mentioned as infrastructure facility. But an amendment was made and the power to notify was

dropped. There was no provision made in the Act saying that the notification issued earlier would cease to have effect from 1.4.2002. Since the notification continued to have effect even beyond 1.4.2002, there is merit in the contention of the learned counsel for the assessee. Circular No.7/2002, dated 26th August, 2002, reported in (2002) 257 ITR (St.) 28 clarified as under:

“Such projects, for which agreements have been entered into on or after April 1, 1995, but on or before March 31, 2001, and which have been notified by the Board on or before March 31, 2001, would continue to be exempt, subject to the fulfillment of the conditions prescribed in section 80-IA(4)(i)(b), as it existed prior to its substitution by the Finance Act, 2001.”

This circular fortifies the assessee's claim.

12. The next question that arises is whether the ICDs can be considered to be inland ports. There is no definition of an inland port in the Act. However, a “port”, which also qualifies for the deduction is defined in Section 3(4) of the Indian Ports Act, 1908(Act 15 of 1908) to include “also any part of a river or channel” in which the said Act is for the time being in force. The word “port” is defined in T.Ramanatha Aiyar's Law Lexicon, 4th Edition (2010) in a number of ways. The most general meaning which is given is that it denotes a harbour or shelter to the vessels from a storm or as a

place with a harbour where ships load or unload. It has also been defined in the commercial sense as an enclosed place where vessels load and unload goods for export or import. Commercially considered, “a port is a place where vessels are in the habit of loading and unloading goods”. The law lexicon also refers to a judgment of the Bombay High Court in the case of ***Amarship Management Pvt. Ltd. v. UOI, 1996 (86) ELT 15***. The Bombay High Court has explained the word “port” as under:-

“Port is a place for loading and unloading of cargoes of vessels. The word “port” must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking. It does not mean the physical port. On this basis, it has been held that an oil rig stationed outside territorial waters is a port where ships call for loading or unloading the goods. *Amarship Management Pvt. Ltd. v. UOI, 1996 (86) ELT 15 (Bom).*”

13. It is interesting to note that the word “port approaches” is defined as those ports of the navigable channels leading to the port in which the Indian Ports Act is in force. There are several other definitions such as port call, port charges, port mark, port of arrival, port of entry, port of departure, port of call and so on and so forth.

The whole emphasis however is that whenever the word “port” is used, it carries with it a maritime connection or connotation. That is perhaps why the Section refers separately to airport. An airport does not have a maritime connection. But an airport is also a place where customs clearance are made both for import and export. It would be difficult to put the assessee’s case as falling within the word “port” having regard to the fact that the word carries with it a maritime connotation. The ICDs are land-locked and it is nobody’s case that they are located in such a place where ships or vessels have direct access to them. The goods which are either removed from or brought into the ICDs are brought or taken away either by railway wagons or by container trucks, as the case may be. But it is common ground that customs clearances take place in the ICDs.

14. It is, therefore, for consideration as to whether the ICDs can be said to be “inland ports” for the purposes of the Explanation (d) below sub-section (4) of Section 80IA. We were not able to find a definition of the words “inland port” in any of the dictionaries. But the words “inland container depot” were introduced in Section 2(12) of the Customs Act, 1962, which defines “customs port”. This was by way of an amendment made by the Finance Act, 1983 with effect from 13th May, 1983. Simultaneously clause (aa) was inserted in Section 7(1) of the said Act under which the CBEC was empowered

to issue notification appointing the places which alone shall be considered as inland container depots for the unloading of imported goods and the loading of exported goods. On 24th April, 2007 the following clarification was issued by the Central Board of Excise and Customs apparently in response to a query raised by the assessee:

“F.No.450/24/2007-Cus.IV
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs
New Delhi,

April 24th, 2007

To,
Ms P. Alli Rani,
Executive Director (Finance),
Container Corporation of India Limited,
CONCOR Bhawan,
C-3, Mathura Road, Opp. Appolo Hospital,
New Delhi-110076.

**Subject : Clarification regarding ‘Inland Port’ –
regarding**

Kindly refer to your letter CON/FA/128/Vol-2/80IA/2003-04 dated 18.04.2007 seeking clarification regarding ‘Inland Port’.

2. It is stated that as per Customs Act, 1962 section 2(12) defines “Customs port” as any port appointed under clause (a) of section 7 to be a customs port and

includes Inland Container Depot (ICD) appointed under clause (aa) of section 7. Container Freight Stations (CFSs) are 'Customs area' attached to a 'port'. The work related to Customs is performed at these ICDs/CFSs. Accordingly, ICDs and CFSs (i.e. Customs area of port) are 'Inland Ports'.

(M.M. Parthiban)
Director (Customs)
Ph-23093908

Copy to,
Shri Jagdeep Goel,
Director ITA-I,
CBDT.”

15. On 25th May, 2009 an office memorandum was issued by the Infrastructural Division, Department of Commerce, Ministry of Commerce and Industry of the Government of India which is as follows:-

“No.16/9/2009-Infra-I
Government of India
Ministry of Commerce & Industry
Department of Commerce
Infrastructure Division

New Delhi,
The 21st May, 2009

Officer Memorandum

Subject : Reference from CONCOR and CFS Association of India regarding confirming that ICDs/CFSs are Inland Ports regarding

The undersigned is directed to refer to this Department's O.M. of even number dated 01.09.2008 on the above subject. In this regard, CONCOR and CFS Association of India have represented that in order to accord tax benefit under section 80IA of Income Tax Act, 1961 Ministry of Finance required a more specific reply clarifying the status of ICDs/CFSs in the country. A copy of the representation is enclosed.

3. The matter has been examined in this Department and it is clarified that ICDs/CFSs are inland ports. CBDT may accordingly take decision for the purpose of exemption of ICDs/CFSs of CONCOR or a private party u/s 80 IA of Income Tax Act.

(S.G. Sood)

Under Secretary to the
Govt. of India
Department of Revenue

(Shri Padam Singh, Under Secretary (ITA-I))

CBDT,
North Block,
New Delhi.

Fax : 23095417”

16. It is significant to note that copies of both the aforesaid communications have been marked to the CBDT. The position therefore has been put beyond doubt by these communications.

17. The learned counsel for the assessee has drawn our attention to the definition of “dry port” as per “Handbook on the management and operations of dry ports” published by UNCTAD(Union Nations Conference on Trade and Development). In this handbook, an ICD has also been defined. The extracts from this book have been given at page 253 (annexure 15) of the paper book and the same is reproduced below:-

“DRY PORT – Customs Clearance Depot located inland away from Seaport (s) giving maritime access to it (see also ICD).

ICD – Inland Clearance Depot-a terminal located in the hinterland of a Gateway Port serving as a Dry Port for Customs Examination and Clearance of cargoes, thereby eliminating Customs formalities at the Sea Port. Alternatively also known as “Inland Customs Depot” (see also Dry Port).

It further goes on to give a more elaborate definition under the heading “Dry Ports Defined” as under:

An early definition of dry port which appeared in a United Nations text in 1982 was:

“An Inland Terminal to which Shipping Companies issue their own Import bills Of Lading for Import Cargoes assuming full responsibility of costs and conditions and from which Shipping Companies issue their own bills of lading for Export Cargoes”.

It further goes to add as under :

Recently a Dry port or Inland Clearance Depot (ICD) was defined as :

“A Common user Facility with Public Authority Status, equipped with fixed installations and offering services of handling and temporary storage of any kinds of goods (including Containers) carried under Customs Transit by any applicable mode of transport, placed under Customs Control and with Customs and other agencies competent to clear goods for home use, Warehousing, temporary admissions, re-export, temporary storage for onward transit and outright exports.”

(ECE/UNCTAD/CCC)”

The above extracts from the hand book supports the claim of the assessee.

18. We have also been able to find that the words ‘Inland Port’ are defined in Chapter 277B of the Inland Port Authority Act of the State of Nevada, U.S.A. as under:-

“an area located away from traditional borders but having direct access to highway, railway and air

transport facilities and, if applicable, intermodal facilities.”

This definition also supports the assessee’s claim.

19. The Tribunal erred in holding that because of the change made by the Finance Act, 2001 with effect from 1st April, 2002 by dropping the power of the CBDT to notify any other public facility of similar nature for the purpose of Section 80IA of the Act, the ICD cannot be considered as Inland Port. The error committed by the Tribunal is to overlook that both before and after the above amendment, Inland Ports were specifically mentioned as an infrastructure facility in the statutory provision and in the understanding of the CBEC, which administers the Customs Act, an Inland Container Depot was actually an Inland Port. There is also no dispute that even in 1983 amendments had been made to the Customs Act by treating the Inland Container Depots as part of the customs port for purpose of customs formalities and clearances. In these circumstances, the real question was not whether the CBDT notified the ICD as an Inland Port but whether the ICD can be considered to be an Inland Port. In our opinion having regard to the provisions of the Customs Act, the communications issued by the CBEC as well as the Ministry of Commerce and Industry, the object

of including “inland port” as an infrastructure facility and also having regard to the fact that customs clearance also takes place in the ICD, the assessee’s claim that the ICDs are Inland Ports under Explanation (d) of Section 80IA(4) requires to be upheld.

20. The actual computation of the profits of the Inland Port have to be made in accordance with the notification issued by the Customs Department with regard to the different ICDs located at different places. This is a matter of computation and calculation in accordance with the area that has been specifically notified by the Customs Department as ICD. The Assessing Officer will compute the deduction in accordance with the relevant notification.

21. The appeals are allowed in the above terms with no order as to costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

11th May, 2012
Bisht