

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. Nos. 1465/Ahd/2011 & 3266/Ahd/2011
(निर्धारण वर्ष / Assessment Years : 2006-07 & 2008-09)

Agarwal Joint Venture C/o. Dineshchandra R. Agarwal Infracon P. Ltd., Agarwal Complex, Nr. Lion's Hall, Deesa – 385535 ITO Ward-2, Palanpur	बनाम/ Vs. &	The Commissioner of Income Tax-IV Ahmedabad Agarwal Joint Venture C/o. Dineshchandra R. Agarwal Infracon Pvt. Ltd., Agarwal Complex, Nr. Lion's Hall, Deesa – 385535
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAAAA5696F		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by :	Shri M. K. Patel, AR
Revenue by :	Shri Anshu Prakash, CIT. D.R.

सुनवाई की तारीख / Date of Hearing	11/07/2023
घोषणा की तारीख /Date of Pronouncement	31/08/2023

ORDER

PER Ms. MADHUMITA ROY - JM:

The instant appeals filed at the behest of the assessee and Revenue are directed against the order dated 18.03.2011 passed by the Ld. Commissioner

of Income Tax-IV, Ahmedabad (in short 'CIT') under Section 263 of the Income Tax Act, 1961, (hereinafter referred to as 'the Act') arising out of the order dated 31.03.2009 passed by the ITO, Ward-2, Palanpur under Section 143(3) r.w.s. 147 of the Act for Assessment Year 2006-07 & order dated 13.10.2011 passed by the Ld. Commissioner of Income Tax (Appeals)-XX, Ahmedabad (in short 'CIT(A)') arising out of the order dated 23.12.2010 passed by the ITO, Ward-2, Palanpur under Section 143(3) of the Act for A.Y. 2008-09.

2. Since, both the appeals relate to the same assessee and the issue on merit are almost identical, these are heard analogously and are being disposed of by a common order for the sake of convenience.

ITA No. 1465/Ahd/2011 – A.Y. 2006-07 (Assessee's appeal)

3. The brief facts leading to the case is this that the assessee filed its original return of income on 30.01.2006 declaring NIL income. Further revised return on 19.02.2007 showing NIL income was filed assessment whereof was finalized upon acceptance of the return under Section 143(3) of the Act dated 10.04.2008 by the Ld. AO. Subsequently, re-assessment order under Section 147 of the Act was passed on 31.03.2009 computing NIL income allowing the deduction under Section 80IA(4) of the Act amounting to Rs.2,43,70,059/-. However, the Ld. PCIT issued a notice dated 01.03.2011 (appearing at Page No.55 of the paper book filed before us) under Section 263 of the Act opining that the work executed by the appellant was a contract work with the National Highway Authority of India and therefore not be eligible for the tax benefit under Section 80IA of the Act. Furthermore, ownership of the

development project etc. are required to be verified. Apart from that whether the AOP was the owner of the infrastructure facility or not, or that the AOP is in operation and maintaining infrastructure facility or that the AOP had secured operation as well as maintenance contract and the assets had been transferred to the AOP for such purpose or not were to be verified as of the opinion of the Ld. PCIT.

4. In that view of the matter, the order passed by the AO dated 31.03.2009 under Section 143(3) r.w.s. 147 of the Act was found to be erroneous and prejudicial to the interest of the Revenue. By the said notice dated 01.03.2011, the appellant was granted opportunity to reply the same. The assessee, thereafter, on 15.03.2011 replied to the said show cause issued by the Ld. PCIT. The main contention of the assessee, as it reflects from the said reply dated 15.03.2011 appearing at Page No.57 of the paper book filed before us is reproduced hereinbelow:

“The Original return of income is furnished on 30/12/2006 declaring total income of Rs. NIL. The revised return of income was furnished on 19/02/2007 declaring total income of Rs. NIL. The original order was passed u/s. 143(3) on 10/04/2008 determining total income at Rs. NIL. Thereafter the case was reopened u/s. 147 of the I.T. Act, 1961 and order u/s. 143(3) r.w.s. 147 of the IT Act, 1961 was passed on 31/03/2009 determining the total income at Rs. NIL.

The A.O. as per para 4 of the above order dated 31/03/2009 issued a show cause notice dated 20/03/2009 for the compliance of following issues.

- 1) *Status of the assessee claimed as Joint Venture.*
- 2) *Claim of deduction under section 80IA(4) of the Income Tax Act 1961.*
- 3) *Disallowance of interest expenses under section 40A (ia) of the Income Tax Act, 1961*
- 4) *Exemption of Receipt of Insurance claim under Income Tax Act, 1961.*

The assessee replied the above show cause notice by its letter dated 23/03/2000. Copy of which is enclosed herewith. The A.O. has considered the entire facts of the case and after carefully examining the submission, evidences etc. and after making proper inquiry has passed the order on 31/03/2008

The AO has considered all the points for which case was reopened u/s. 147 of the Act. Now there is no new material has been brought on record and which shows that order passed by A.O. u/s.143(3) r.w.s. 147 on 31/03/2000 is not erroneous and prejudicial to the interest of the revenue.

We also beg to rely upon the following judgements

- 1) *S.Sundaram Pillai & Others (AIR 1985 (SC) 582)*
- 2) *Mysore Minerals Ltd. 239 ITR 775 (SC)*
- 3) *Kerala State Industrial Development Corporation Ltd. 259 ITR 51 (SC)*
- 4) *Bajaj Tempo Ltd. 106 ITR 188 (SC)*
- 5) *Gujarat Industrial Development Corporation and Others 227 ITR 414 (SC)*
- 6) *Strawboard Manufacturing Co. Ltd 177 ITR 431 (SC)*
- 7) *Decision of Rajkot Bench, Rajkot given in case of M/s. Tarmat Bel (JV) KCL, Rajkot v The ITO Ward-1(4) Rajkot ITA No 1111/RJT/2010 AY 2007-08 dated 23/09/2010. This judgement is delivered after the insertion of explanation*
- 8) *Double Dot Finance Ltd v. Asstt. CIT (2010) 35 (11) ITCL 481 (Mum 'D' Trib)*
- 9) *Om Metals Infraprojects Ltd. v. CIT (2009) 30 (1) ITCL 240 (JP-Trib)*
- 10) *Ashoka Buildcon Ltd. v. Asstt. CIT (2010) 325 ITR 574 (Bom)*

In view of the above facts and in the circumstances of the case, the order passed by AO is neither erroneous nor prejudicial to the interest of revenue and as such notice issued by your honour u/s. 263 may kindly be cancelled.”

5. The above reply of the assessee was reproduced by Ld. PCIT in the order impugned dated 18.03.2011. The main contention of the assessee, therefore, is this that the status of the assessee claiming as joint venture, the claim of deduction under Section 80IA(4) of the Act, the disallowance of interest expenditure under Section 40(a)(ia) of the Act and exemption of receipt of insurance claim under the Act had been duly verified by the Ld. AO in the re-assessment proceeding itself which is clearly evident from the order

passed by the Ld. AO under Section 143(3) r.w.s. 147 of the Act. The relevant portion whereof is as follows:

“4. The assessee derived income from Road construction work secured from the National High way Authority. On verification of the revised return of income filed by the assessee on 19-2-2007, it is found that the assessee has furnished audit report in form No. 10CCB. Notice under section 143(2) was issued and served upon the assessee. In response to the above notice, Shri Samtaji Rajput accountant in the company of Shri Bakul I. Shah , C A., duly authorized attended from time to time and discussed. On scrutiny of the details, the following issues emerged which requires to be decide and a show cause notice dt. 20-03-2009 was issued to call for the compliance on the issues.

- (1) Status of the assessee claimed as Joint Venture.
- (2) Claim of deduction under section 80-IA(4) of the Income Tax Act, 1961.
- (3) Disallowance of interest expenses under section 40A(ia) of Income Tax Act 1961
- (4) Exemption on Receipt of Insurance claim under Income tax Act, 1961.

5. In response to the show cause notice, the assessee vide its letter dt. 23-03-2009 received on 26-3-2009, stated that :

(1) Status of the assessee.

The status of the assessee is not the joint Venture but the correct status is A.O.P. and the share of the members are known and determinate. The assessee furnished the copy of agreement mentioning the name of the members and share there of.

The contention of the assessee is verified and the status of the assessee adopted as A.O.P. (Specified.)

(2) The claim of deduction u/s 80IA(4) of the Income Tax Act, 1961.

The assessee is doing a business with consortium of two companies with a separate agreements in the form of Joint Venture with the separate determined the share of profit in both the venture. Both the companies engaged in the business of civil contracts i.e in the work of construction of roads, bridges, canals etc. During the year the assessee was engaged in the business activity of construction of infrastructure for Swaroopganj-Pindwara of NH-14 in the state of Rajasthan and Vadodara-Padra-Jambusar Road from the National Highway Authority of India, New Delhi and National Highway Circle, Vadodara respectively. The work was allotted by the Government authorities. The contention of the assessee is that all the construction work of the roads and other facilities were infrastructure projects and the assessee developed the same and therefore the assessee has claimed and

entitled the deduction u/s 80IA(4) of the Income tax Act in respect of profit earned from the execution/development of civil work.

The assessee also submitted the appellate order of ITAT, Rajkot Bench, Rajkot No. ITA No.153/RJT/2007 and group dt. 20-03-2009 in the case of DCIT Cir.2, Jamnagar V/s. Tacon Infrastructure Pvt. Ltd. of Porbandar.

After due discussion with the representative of the assessee, and relying on the decision of jurisdictional ITAT, the deduction u/s 80IA(4) is allowed on the profit earned from the infrastructure work.

(3) Disallowances of interest u/s 40A(ia)

The assessee has paid the interest of Rs.21,65,000/- to NHAI. This payment are made to the Government against the mobilization advance and the TDS provisions are not applicable. The assessee paid the interest of Rs.48,983/- to Citicorp Finance Ltd. The assessee stated that this payment are made to the financial institute and TDS provisions are not applicable. The assessee failed to the financial institute and TDS provisions are not applicable. The assessee failed to furnish any supporting evidence to prove that it is financial institute and TDS provisions are not applicable. In view of the above, the interest payment of Rs.48,983/- has been disallowed u/s 40A(ia) and added to the total income of the assessee out of interest payment GSHP/9A contract work.

(4) Exemption claimed on receipt of Insurance claim.

The assessee furnished the evidence in support of its claim for Insurance claim received of Rs.33,93,158/-. The same evidence are and accordingly, no addition is made on this count.

After discussion and keeping in mind the submission of the assessee total income is recomputed as under:

GSHP-9A.

Net profit as per Profit and Loss A/c Rs.1,95,64,706

Add: Disallowables:

(i) Out of interest expenses u/s 40A(ia) Rs. 48,983. Rs.1,96,13,689

RJ-1.

Net profit as per Profit and Loss A/c Rs. 47,56,370

Total Income... Rs. 2,43,70,059

Less: Deduction u/s 80IA(4) as discussed above Rs. 2,43,70,059

Total taxable Income. NIL

Assessed accordingly. ND. Issue demand notice.

Place: Palanpur.

Date: 31-3-2009”

6. Apart from this, the Ld. Counsel appearing for the assessee drew our attention to two different projects work executed by the assessee including development, operation and maintenance, details whereof appearing in the

Form No. 10CCB at Page Nos. 29 & 34 of the paper book filed before us namely in respect of “Project GSHP-9A” & “Project RJ-1”. It has been contended by the Ld. Counsel appearing for the assessee that when the four issues raised by the Ld. PCIT for alleged non verification by the Ld. AO had already been verified by the said AO in the re-assessment proceeding under Section 143(3) r.w.s. 147 of the Act and duly discussed in his order dated 31.03.2009 reproduction whereof has already been made in the forgoing paragraph, holding the said order erroneous and prejudicial to the interest of the Revenue is not proper. Such finding and / or formation of opinion made by the Ld. PCIT is not sustainable. Furthermore, verification is not a good ground for reopening of assessment under Section 263 of the Act as already held by different forums of law.

The Ld. DR relied upon the order passed by the Ld. PCIT. We have perused the entire set of documents and the order passed by the Revenue in three occasions and the evidences adduced by the assessee in different stages of assessment as asked for also appearing in the paper book filed before us.

7. It is evident from the records itself that the Ld. AO upon due application of mind verified the four above issues and allowed the same in respect of status of assessee claimed as joint venture, claim of deduction under Section 80IA(4) of the Act, disallowance of interest expenses under Section 40A(i)(a) of the Act and exemption of receipt of insurance claim under the Act but disallowed Rs.48,983/- on account of interest paid to Citycorp Finance Ltd. under Section 40(a)(ia) of the Act and added to the total income of the assessee out of interest payment GSHP-9A contract work which clearly establishes due application of mind by the Ld. AO. Moreso, the issues in

question, as raised by the Ld. PCIT has already been explained by the assessee.

8. The assessee further clarified that the assessee made substantial investment for developing the infrastructure facility with supporting financial documents. It was further mentioned that the entire investments were made by the appellant and no subsidy and/or assistance from any other prescribed authority was received; the explanation rendered by the assessee appearing at Page Nos. 50 & 51 of the paper book is reproduced hereinbelow:

- “6. *The developing facility of the respective work is carried out by our selves only. Substantial investment is made by us for developing the infrastructure facility. The following figures are self explanatory with regard to our investment in fixed assets alone.*

Addition during F.Y.: 2005-06

9A	:	1,2462,504/-	
RJ-1	:	<u>12,38,918/-</u>	<u>Rs.1,37,01,422/-</u>
		Total	<u>Rs.1,37,01,422/-</u>

The entire investment is made by us and we have not received any assistance / subsidy etc. from the government or any other prescribed authority. Thus we ourselves have participated by way of our own investment in development of the infrastructure facility.

7. *The condition of transferring infrastructure facility to the prescribed authority is removed as per Circular No.: 14 of 2001 dated 22/11/2001 (Expl.) (FA 2001).*
8. *We would also like to rely upon the following circulars. Circular No.: 7/2002 dated : 26/8/2002 (CLARJ).*
9. *We also beg to rely upon the judgment of Om, Metals Infra Projects vs. CIT (ITAT JAIPUR) Where in it has been held that even a contractor is a “Developer” for purpose of sec. 80IA(4). It was held that.*
- (i) *Though the Explanation to s. 80IA (4) inserted by the FA 2007 w.r.e.f. 01/04/2000 provides that s. 80-IA shall not apply to a person*

executing a works contract, the assessee was not a mere "contractor" The term "developer" means a person who makes things happen and as the assessee was mobilizing and synthesizing people, plans, technical expertise, supervision, co-ordination and control etc, it could be regarded as the developer. The term "contractor- is not essentially contradictory to the term "developer".

- (ii) The Explanation to s. 80IA does not apply to a works contract entered into by the Government and the enterprise. It only applies to a work contract entered into between the enterprise and other party's "sub-contractor". The amendment merely aims at denying deduction to the sub-contractor who executes a works contract with the enterprise;*
- (iii) It is not required that the developer should also "operate and maintain" the infrastructure facilities so as to be eligible for deduction.*

- 10. The CBDT Circular No.: 14(XL-35), dt. 11/4/1955 says that the assessing officer should while, considering the case of an assessee, take a liberal view in granting relief or allowing claim made by the assessee and the same should not be rejected on procedural or technical ground(s). In Shree Sajjan Mills Ltd. v. CIT & Anr. (1985) 585 (SC), it was observed that the mere fact that the tax statute ought to be strictly construed does not preclude the principle of reasonable construction being made to give effect to the intention of the legislature being apparent from the scheme envisaged in the Act.*

- 11. We hope, your honour would be satisfied with this explanation and requested your honour to allow the claim u/s. 80IA as per the return. However, in case your honour require some further information or details, kindly let us know and we will comply with your requirements promptly, on hearing from your office."*

9. We further find that while quashing the order passed by the Ld. AO under Section 143(3) r.w.s. 147 of the Act, the Ld. PCIT held the assessee, a contractor, executed work contract awarded by Centre/State Government and accordingly not found eligible for deduction under Section 80IA(4) of the Act and on the issue, the Ld. PCIT relied upon the judgment passed by the ITAT, Pune Bench in case of B. T. Patil & Sons Belgaum Constructions (P.) Ltd. vs. ACIT in ITA Nos. 1408 & 1409 (Pune) of 2003. However, judgment passed in the matter of B. T. Patil & Sons Belgaum Constructions (P.) Ltd. (supra) is

now cannot be said to be a good law in view of the order passed in the matter of CIT vs. ABG Heavy Industries Ltd., reported in [2010] 189 Taxman 54 (Bombay) by the Hon'ble Bombay High Court, a copy whereof has already been filed before us. It further reflects from the records that the assessee has executed the same project, which was also under consideration in the A.Y. 2007-08 and on merit, the Hon'ble Jurisdictional High Court, wherein the reopening of assessment under Section 147 of the Act on the ground that once the Ld. AO applied his mind to the materials made available by the appellant and allowed deduction as per his assessment order, quashed such reopening of assessment exercising power under Section 148 of the Act, a copy whereof has also been annexed herewith in the paper book filed before us. The relevant observation made therein is as follows:

“6.3 From the above facts and material on record, which was also before the Assessing Officer, it is evident that the necessary facts and material relating to the claim for deduction by the assessee under Section 80IA(4) made in the return of income were considered by the Assessing Officer. He applied his mind to those materials and allowed deduction as per his Assessment Order. It could neither be demonstrated, nor it is revealed that the Assessing Officer had any tangible material with him so as to validly exercise the powers of reopening. Once the Assessing Officer on the basis of material before him had applied his mind and granted deduction in the Assessment Order, it was not permissible for him to exercise powers under Section 147 on the same material on the ground that certain aspects were not considered or that they were overlooked.”

10. So far as the ownership of infrastructure facility for which the deduction in question was claimed and allowed by the Ld. AO which has further been found to be erroneous by the Ld. PCIT is concerned, the Ld. AR submitted before us that the same has also been considered in its proper perspective by the Hon'ble Gujarat High Court in the said judgment dated 09.08.2012 which has been duly considered by us.

11. The relevant observation in this regard is as follows:

“7.3 It is further stated in the reasons recorded that what was remained to be verified was whether the assessee was owner of the infrastructure facility for which the deduction in question was claimed. Learned advocate for the petitioner rightly submitted that the issue is answered in Liberty India (supra) wherein it is held that in order to eligible for deduction of profits from industrial undertaking under Sections 80I, 80IA, 80IB of the Act itself generation of profits from infrastructural activity that attracts incentives under the said provisions, and not ownership in the business. The relevant observations are as under:”

12. While dealing with the matter, the Hon’ble Jurisdictional High Court pleased to rely upon the judgment passed by the Hon’ble Supreme Court in case of Liberty India vs. CIT, reported in [2009] 317 ITR 213 (SC). It was held that in order to be eligible for deduction of profits from industrial undertaking under Section 80I, 80IA, 80IB of the Act itself generation of profits from infrastructural activity that attracts incentives under the said provisions and not ownership in the business. It is the main contention of the assessee that the verification of the issues upon considering the evidence adduced by the assessee had already been done by the Ld. AO in the re-assessment proceeding under Section 147 of the Act and the stood settled. Further that, no new material has been brought on record by Revenue which shows that the order passed by the Ld. AO was erroneous and prejudicial to the interest of Revenue. In this regard, we have relied upon the judgment passed by the Hon’ble Supreme Court in case of CIT vs. Max India Ltd., reported in (2000) 243 ITR 83. It was held therein that every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interest of the Revenue. Where two views are possible and the ITO took a view which the CIT does not agree, it cannot be treated as an erroneous order, prejudicial to the interest of the Revenue. We are

enlightened with such ratio laid down by the Hon'ble Apex Court. In the case in hand it is change of opinion but cannot be said to be erroneous. We also note that had there been no such verification of the issues raised by the Ld. PCIT in respect of item nos. 1, 2, 3, 4 of Paragraph 4 by the Ld. AO in re-assessment proceeding under Section 143(3) r.w.s. 147 of the Act, which is admitted fact in case in hand, the case may would have been otherwise. Thus, we have declined to accept the finding of the Ld. PCIT holding the order passed by the Ld. AO under Section 143(2) r.w.s. 147 of the Act is erroneous and prejudicial to the interest of the Revenue. Since the verification of the issues upon considering the evidences adduced by the appellant being an admitted fact which is also reflecting in the said order dated 31.03.2009 under Section 143(3) r.w.s. 147 of the Act, we decline to accept such contention made by the Ld. PCIT holding the order erroneous and prejudicial to the interest of the Revenue.

13. Moreso, in this particular case, the assessee is found to be on a better footing in regard to the observation and determination made by the Ld. AO in favour of the assessee as the same was made not only in the initial assessment under Section 143(3) of the Act accepting return filed by the assessee, rather in re-assessment proceeding under Section 147 r.w.s. 143(3) of the Act; the same view has been confirmed upon examination of sufficient details provided by the assessee in support of the case made out.

14. There is no iota of doubt that the Ld. AO has made a detailed enquiry in the case of the assessee in the scrutiny proceeding, particularly, in regard to the issue raised by the Ld. PCIT in the order impugned. Upon making the exhaustive enquiry and excessive documents so placed by the assessee before

the Ld. AO, the return of income filed by the assessee had been accepted. We would like to mention that though the PCIT sought to justify his point of view in holding the order passed by the Ld. AO erroneous so as to be prejudicial to the interest of the Revenue due to lack of enquiry, such finding is totally found to be non-application of mind and a colorable exercise of power. We find that in this case proper and adequate enquiry has been conducted by the Ld. AO. Thus, the order passed by the Ld. PCIT quashing the order passed by the Ld. AO holding it erroneous and prejudicial to the interest of the Revenue due to lack of adequate enquiry is not sustainable in the eye of law. In that view of the matter, under the particular facts and circumstances of the case, when record reveals sufficient enquiry has been conducted by the Ld. AO in coming to a conclusion and completing the assessment, the impugned order purportedly invoking the provision of Section 263 of the Act in a mechanical and stereo type manner without taking into consideration the factual matrix of the matter, is found to be not sustainable in law and thus quashed.

ITA No. 3266/Ahd/2011 – A.Y. 2008-09 (Revenue's appeal)

15. Allowing the disallowance of claim of deduction of Rs.18,52,57,748/- under Section 80IA(4) of the Act is subject matter before us.

16. The brief facts leading to the case is this that the assessee company engaged in the civil construction work mainly laying roads, dams, bridges, a developer of infrastructural facility upon making investment of its own capital as well as borrowed funds in the form of plant and machinery, structures at sites, working capital, human resources, technical expertise etc. entrusted by the State Government/Central Government on various projects. The assessee

possesses its own technical knowledge of how to develop and lay roads, dams, bridge etc. and it has own technical as well as managerial post of manpower for the same. The appellant claimed deduction under Section 80(IA)(4) of the Act on eligible projects. The appellant filed its return of income for the year under consideration on 25.09.2008 declaring total income at NIL. Upon selection of the case for scrutiny notice under Section 143(2) of the Act dated 03.03.2009 was served upon the assessee on 04.03.2009. Subsequently, on 26.06.2009, a notice under Section 143(2) and 142(1) of the Act calling for certain details was issued and served upon the assessee on 10.08.2009. The explanation was also directed to be given by the assessee in the form of show cause as to how the claim under Section 80IA(4) of the Act of Rs.18,52,57,747/- in the return of income would not be disallowed. Alongwith the submission dated 26.02.2009, the assessee furnished requisite details and supporting vouchers, the audited books of accounts as per provision of Section 44AB of the Act, the necessary audit report in the form of 3CB & 3CD alongwith the P&L account, balance sheet, capital account and all other details were duly furnished before the Ld. AO. It is further contended by the assessee that the activities carried out by the assessee involved development of project, engagement of various agencies, raising all finances and investment from its own funds in the construction of project, undertaken risk cannot to be said to be a contractor and being a developer the assessee is entitled to the claim made under Section 80IA(4) of the Act. In support of such contention made by the assessee following judgments relied upon by the assessee as it appears from the order passed by the Ld. AO:

1. *K.P. Varghese v. ITO [1981] 131 ITR 597 (SC).*
2. *CIT Vs J.H. Golta 156 ITR 323(SC)*
3. *Mysore Minerals Ltd Vs CIT 239 ITR 775(SC)*

4. *Kerala State Industrial Development Corpn Ltd Vs CIT 259 ITR 51(SC)*
5. *Bajaj Tempo Ltd Vs CIT 196 ITR 188(SC)*
6. *Gujarat Industrial Development Corporation and Others Vs CIT 227 ITR 414(SC)*
7. *CIT Vs Strawboard Manufacturing Co Ltd 177 ITR 431(SC)*

17. However, the Ld. AO was of the view that the assessee is not a developer rather a work contractor and therefore not entitled to claim under Section 80IA(4) of the Act as for the year under consideration. The explanation so rendered by the assessee was found to be not acceptable and the deduction under Section 80IA(4) of the Act was found to be inadmissible on the sole ground that the assessee is a contractor and engaged in the contract business. The claim of the assessee, thus, denied by the Ld. AO which was, in turn, reversed by the Ld. CIT(A) being a developer of infrastructure projects. Hence, the appeal preferred by the Revenue.

18. The Ld. DR supported the order passed by the Ld. AO and vehemently argued that the assessee is not a developer but a work contractor and the relief granted to the assessee wrongly by the Ld. CIT(A) finding him eligible for exemption for the eligible unit under Section 80IA(4) of the Act is liable to be quashed.

19. Before the Ld. CIT(A), the assessee submitted the following:

"Disallowance of claim of deduction under section 80LA(4) of the I.T.Act, 1961 of Rs. 18,52,57,748-00.

(1) That the A.O. has erred in disallowing the claim of the appellant us.801A (4) of the I.T.Act, 1961 contrary to the facts and evidence on record & against the correct principles of interpretation of statute.

(2) Then the learned A.O. erred in not properly appreciating the reply of the Appellant dated 26/08/2009 04/02/2010, 13/02/2010, 26/02/2010 and 06/12/2010. Copy of the replies are submitted herewith

(3) That the learned 4.O. failed to appreciate the following facts which entitles the appellant for deduction u/s. 8014(4).

(i) The appellant is in direct contract with Government Authorities for both the

(ii) Projects and not a rib-contractor

(iii) The learned Assessing Officer's interpretation of Section 80IA of the Act is against the basic principles of interpretation since he is comparing the suppliers of Iron and Bricks being entitled to deduction in "trading" activity putting them at par with appellant's nature of work which is actual construction of infrastructure facilities by entering directly into agreement/ contract with Government authorities.

(iv) Moreover, the learned Assessing Officer has grievously erred in referring to inapplicable Circular No. 717 and others and has conveniently ignored the latest Board's Circular showing the liberalization of the eligibility of deduction under section SOLA(4) of the Act. The said Circular issued by the Board vide Circular No 4/2010 /F.No. 178/14/2010-ITA II dated 18.05.2010 is reproduced as under:

"Reference have been received by the Board as to whether widening of existing roads consider creation of new Infrastructure facility for the purpose of section 80IA(4)(i) of the Income-tax Act, 1961.

Section 80IA(4)) provides for a deduction to an undertaking engaged in developing, or operating and maintaining, or developing, operating and maintaining any infrastructure facility subject to satisfaction of the conditions laid down in the section. The Explanation to sub-section 80IA(4)(i) states that for the purpose of this clause, infrastructure facility means inter alia:-

"(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) The issue has been examined by the Board. It has been decided that widening of an existing road by constructing additional lanes as a part of a highway project by an undertaking would be regarded as a new infrastructure facility for the purpose of section 801A(4)(i). However, simply relaying of an existing road would not be classifiable as a new infrastructure facility for this purpose."

(v) It is the contention of the department that the assessee being engaged only as a works contractor under contracts awarded to it by Govt. it has carried only works contract and hence it was covered by the newly inverted Explanation which disentitled it from the deduction under sub-section (4).

However, considering the nature of the business of the assessee in proper perspective, this contention of the AO is wrong. The business carried on by the assessee has many elements of the nature of developing (emphasis supplied) of new infrastructure facility in view of the facts on record which are uncontroverted and more so when same kind of nature of business was carried on by the assessee in earlier years wherein similar deduction has been allowed after due consideration.

- (vi) The learned Assessing Officer has further erred in making the percentage of bill basis a factor for disallowance under section 8014(4) of the Act though it is a recognized method as per Accounting Standard. It is further submitted that TDS is a statutory duty and that cannot be a basis for rejection of claim under section 80LA(4) of the Act*
- (vii) The appellant respectfully submits that the amended Explanation by Finance (No.2) Act, 2009 is itself a subject matter of challenge by way of challenge to virus of the same before the Hon'ble Gujarat High Court by the assessee and its group companies. The Hon'ble High Court has issued Rule with appropriate Interim relief.*
- (viii) In earlier years, the appellant has acted as developer of infrastructure facility and the fact that it was engaged in development thereof has been know to and has come to be upheld by the Dept. in earlier years. This factual position clearly goes to show that when the assessee has been held to be a developer all along in past, under same set of facts and with identical kind of business as in present year also and hence, the assessee does not cease to be a developer merely by virtue of insertion of an Explanation on the statute. From A.Y. 2006-07 in particular, the claim of the assessee on identical facts has been admitted and allowed by the Dept and no change in the nature of business has been pointed out by the AO during all succeeding assessments which was completed u/s 143 (3)e scrutiny assessment*
- (ix) The Explanation does not in any way create an artificial fiction about the nature of business of the undertaking but it only states that no deduction shall be admissible in the case where an assessee carries on business in the nature of a works contract. This clearly means that if the nature of business is not just a works contract but something more, the assessee cannot be hit by the rigours of the Explanation. As far as the assessee and its facts on record of Revenue are concerned, the nature of business carried on by it, albeit under a contract with the State Govt. or local authority, is not just of a works contract but it also has many shades, colors, hues and trappings of developing of new infrastructure facility and for this reason itself, the deduction cannot be denied to the assessee this year notwithstanding the insertion of the explanation.*

- (x) *The learned Assessing Officer is in error in relying upon the withdrawal of claim under section 80IA(4) of the Act for the A.Y. 2009- 10. The fact is that the appellant has cautiously undertaken this exercise and also clearly stated in the Special Civil Application before the Hon'ble Gujarat High Court that if the appellant succeeds, it shall claim the same on settled position of law after the disposal of the petition by the Hon'ble High Court of Gujarat. Therefore, there is no question of any inaccurate claim or wrong claim under section 80IA(4) of the Act by the appellant.*
- (xi) *That the assessee also carried on activities by way of developing of infrastructure facility is also patent from its financial statements. The assessee has made huge investments of own as well as borrowed funds and has invested the same in all kinds of resources for its business, namely plant and machineries, structures sites, working capital, human resources, technical expertise etc. The assessee possesses its own technical knowledge of how to develop and lay roads, dams, bridges etc. and it has its own technical as well as managerial pool of manpower for the same. Proofs regarding technical and financial capacity of the contractor are required to be furnished to the Govt in some cases, even the design of the infrastructure project is first prepared by the assessee and then submitted to the Govt. the assessee has purchased and employed its own materials for development and construction of the infrastructure facility. Although, it was required to act under a contract, it has done so as it is required to honour a contractual obligation with the Govt, but at the same time, neither the contract nor the Govt. imparted the technical know-how or resources to the assessee, as all these factors of business development have been factually imparted and looked after by the assessee itself under its own acumen as an entrepreneur. The entire planning of its business as also the work has been done by the assessee and not by the Govt. the specifications of the work may have been prescribed in the contract in advance, but however building of infrastructure facilities requires the assessee itself to possess technical and engineering know-how as to how to construct etc. The assessee also purchased many materials of construction which went into the infrastructure built by it. If the person awarding the contracts, and entering of contracts is required by the section itself, lays down certain conditions and specifications in the contract as the principal, the existence of pre-decided contractual specifications cannot be held as a factor against the assessee becoming a developer. According to the assessee all these aspects put together clearly show that the assessee was not merely a works contractor but was also a developer.*
- (xii) *Merely because the assessee has acted under a Govt contract, it cannot be denied deduction nor can it be held that it has acted only as a works contractor. This is more so because one of the fundamental pre- conditions of Sec. 80-1A(4) is that the infrastructure facility must have been developed or developed, operated and maintained by entering into a contract with the Govt. therefore, contract with the Govt is a sine qua non for becoming*

eligible for the deduction. Therefore, contracting by itself cannot make the assessee a works contractor. In our country, all lands and infrastructure other than those privately owned belongs to the State and hence one can develop infrastructure facility only under a government mandate which is given in the form of a contract. Once there is a contract for a new facility, there are bound to be obligations under the contract which include obligations of, inter alia, observing the specifications of the infrastructure facility. Hence, although there may be such pre-decided specifications in the contract, the execution thereof for building and creating the infrastructure leaves much scope and freedom to the person carrying out the contract, by way of its planning designing know-how, funds, risks, human resources etc., all of which are carried out at the sole risk of the assessee.

- (xiii) *The Explanation to any section has to sub-serve the main provisions of the statute and it cannot be read to curtail it or override it, as held by the Supreme Court in many cases such as Sunderram Pillai AIR 1985 (SC) 582. Therefore, if the assessee continues to be eligible under the substantive provisions of sub-section (4) as having acted as a developer, the Explanation cannot take away the benefit of the Section. That the assessee has been held to be eligible for deduction in past not merely because of the absence of the impugned Explanation in earlier years but also because its business has been held to be that of a developer of infrastructure. There being no material change in the nature of business, the insertion of an Explanation cannot take away the benefit or able to it. Moreover, the Explanation cannot be applied to y type of contract, otherwise it will lead to absurdity and irrationality more so when all infrastructures basically belongs to Govt. and without contracts being awarded by the Govt., no infrastructure facility can be created under the private participation policy adopted by the Grote in current times in India.*
- (x) *The words "development" and "developer" have been defined in dictionaries and in law lexicon as follows, and the appellant satisfies these definitions too.*

From Webster

Development

a. To realize the potential of

b. To aid in the growth of: STRENGTHEN develop the biceps

To bring into being make active (develop a business)

To convert (a tract of land) for specific purpose, as by building

From Law Lexicon.

Development: 1. The act, process of result of developing or growing or causing to grow, the state of being developed; 2 happening

Development of land: The expression "Development" means the realization of the potentialities of land or territory by building or mining Sadruddin Suleman vs. JH Patwadlen, AIR 1965 Bo 224, 242 (constitution of Indian, Article 31),

The Webster's Encyclopedia defines the term "develop" as to bring out the capabilities or possibilities of bring to a more advance or effective state; to develop natural resources.

- (xv) *The well established the rule of consistency also lay down that if deduction has been granted in earlier years after due opilotion mind, the same should not be disturbed ordinarily. For this propositio the assessee placed reliance on several decisions of High Courts in Tribunals reported at 104 TTJ 881 (Del), 289 ITR 318 (Del), 243 1 492 (Del), 311 ITR 436 (P&H). The assessee also draw your attenti to the decision of the Apex Court in the case of Radhasoami Satsang CIT. 193 ITR 321 (SC) wherein the Hon'ble Court has stated that in absence of any material change in circumstances of the case, a differ view then that taken in earlier years, could not be taken. The assessee claiming relief u/s 801A (4) since many years and claim is accepted the department as all the condition laid down by the IT Act have L fulfilled. Till date, majority assessments were finalized u/s 143 (3) of t T Act and assessee's claim u/s 801A (4) accepted.*
- (xvi) *The decision of the Mumbai Bench in the case of BT, Patil & (supra) cited and relied upon by the department does not operate ag the appellant in the present case because the facts of that case show the assessee therein was employed as a sub-contractor by an contractor to carry out civil work and it was the other contracto had entered into the contracts with the Govt. and it is in view particular facts of that case that the tribunal came to the conclusic the assessee in that case not being a developer, it was covered Explanation as inserted by Finance No.2 Act, 2009 whereas present case, the facts as also the accepted history shows the appellant is not only a works contractor but is also a develop hence the insertion of the said Explanation does not make any difference to the claim of the appellant*
- (xvii) *At regards other conditions for eligibility u/s.80-IA(4) which aspect has been held against the assessee by the department, that once the assessee becomes an eligible undertaking under the substantive and primary provisions of sub-section (4), namely that of developing of new infrastructure facility, it cannot be denied deduction on the ground of operating and maintaining of*

the same. In this contest, the assessee relied upon decision in the case of Om Metals Infraprojects Lad (2009) 26 DTR (p) 359.

- (xviii) *The main e in controversy which is the subject matter of appeal is, whether the claim of the assesses-appellant for deduction of its profits and gains can be said to be admissible in law, in view of the specific provisions of Sec. 80-1A(4) read with the impugned Explanation on applied to the facts and circumstances of the case. While answering this question, it would first be relevant and appropriate for department to examine the past records of assessments of the assessee and of other similar cases dealt with by department and involving similar kinds of businesses. In this context, there is no dispute from either side in this regard. That the issue regarding nature of business in our case come to be examined by the department in various assessment years on the issue concerning deduction u/s 80-14(4) and other connected issues, the department have already upheld the claims for deduction u/s. 80-1A (4) of the Act after duly examining the nature of businesses. Beside, our assessments were completed us 143(3) of the Act under which the impugned deduction was granted. During the year under consideration AO is of the view that the assessee is contractors and not developers. The assessee is of the view that although the assessee had entered agreements with Got for infrastructure facilities, the same were in the nature of development by the assesses within the ambit of infrastructure facility, which aspect can also noted from the accounts of the assessee and it must be held that the assessee is being developers and are entitled to deduction us 80-14(4) of the Act In the case of Gujarat Industrial Development Corporation and Others 227 ITR 414 has considered the meaning of Developer and has held that the word "Development should be understood in its wider sense and that development, means the realization of potentiality of land or territory by building or mining In this contest therefore, based on facts on record and after examining the nature of businen, it must be held that the aneneer is developers and not mere contractors carrying out works contract only Your honour can find that in the present case, the facts relating to nature of trainees are not shown to be different than those already examined by the department earlier. That being the case, even if the impugned Explanation is to be considered for the year under present appeal, your honour will find that the explanation clearly refers to the business in the nature of works contract. This clearly implies that the explanation is limited in its scoper and as the nature of business of the present assessee, both in view of the facts for the year under appeal as also for the view already taken by department in similar cases for earlier year, the assessee being developer of infrastructure facility. The deduction under sub-section (4) cannot be on the ground of said Explanation. The factual position regarding nature of business being same as in earlier years even it has not been controverted by the department. Hence, in assessee's view, although it is held that the principle of resjudicata does not apply to proceedings, at the same time, the equally well-established rule of*

consistency also cannot be overlooked. In the case of *Radasoami Satsang vs CIT 193 ITR 321 (SC)* the Hon'ble Supreme Court has laid down the principle which is well accepted all along that absence of any material change, a different view than that taken in earlier years, could not be taken in later years. The assessee is of the view that this proposition of law read with the rule of consistency in tax proceedings has been applied all the more while granting various deductions from total income in the light of another well recognized proposition that any provision granting rebate or benefit to the assessee should be liberally construed generally in favour of the assessee. If the present case is viewed in the light aforesaid perspectives and judicial propositions laid down by the highest Court of land, your honour will find that the intention behind granting such deductions is for creation of infrastructure facilities in the country as a special benefit or rebate to eligible persons and therefore even if there could be more than one view regarding the particular nature of business the assessee, the view favourable to the assessee can be taken.

- (xix) The learned 40 relied upon the decision of the Hon'ble Mumbai Bench in the case cited supra. If your honour will go through said judgment and from the facts narrated therein, in this context, in our case it is nobody's case the appellant is a sub-contractor. The appellant is stated to be the person who entered into the contract with the Govt. in respect of infrastructure facility and directly was involved in executing the same. The entering into a contract and that too with the Govt. only is a pre-condition u/s. 80-1A(4) and hence merely because there is a contract between the Govt. and the assessee, that does not make the assessee a contractor for the purpose of works contract only. Any person carrying on business may be required to carry some work the other in course of pursuing its overall business objectives. But does not that such a person does not cannot carry out something more than such work only. In our case, we although entered into a contract with Govt, the contract part the primary condition Sec. 80-1A(4) further the nature of work carried shows that the appellant not only directly (and indirectly) carried out as the but employed various resources of own machineries, technical knowledge. Technical and other manpower, materials etc, and funded the same out of own and borrowings. Appellant required to furnish guarantees including maintenance of infrastructure facilities. All factors combined clearly go to show that appellant also assumed considerable risk the capacity of a businessman and the work as undertaken, although under a contract mandated by Section, would require skills planning of work, employing technical know-how to execute the work face the consequences of attendant risks. Further, the risks upon the assessee and upon Govt, these elements are generally missing in the case of a sub-contractor. Here, the appellant engaged in performing its functions further, in case of *Om Metals Infra projects Ltd CIT-J, Jaipur ITAT*, held that if assessee mobilizing people, plants, technical expertise etc., the assessee can be said to be developer and the assessee be denied deduction from the profits of developing infrastructure facility

though it may not operate or maintain the same, particularly in view of the insertion of the word “or” in Sec. 80-IA(4).

(xx) The learned Assessing Officer has further erred in not following the binding decision of Hon'ble Rajkot Bench of Tribunal in the case of Tormat Bel (JV), KCL Rajkot in ITA No. 111/RJT2010 dated 23.09.2010 (Copy enclosed) When appeal of the Tribunal becomes final writ of Mandamus can be granted on refusal of the ITO to carry out and implement the appellate order [40 ITR 618 (SC)-BHOPAL SUGAR INDUSTRIES LTD]

In UNION OF INDIA vs. KAMALAKSHI FINANCE CORPORATION LTD u/s 53 ELT 433, Hon'ble Supreme Court held as under

"Judicial propriety demands that the order of the Tribunal should be followed by a lower authority. If the authority subordinate to the Tribunal is allowed to pick up holes, gaps or some infirmities or is of the view that different lines of thinking is possible then there will be judicial chaos and there will not be any finality to litigation

This process if permitted will lead to try harm to the tax payers which is not envisaged by the statute nor permitted by law. The CIT(A) is duty bound to follow the decision of the Tribunal. It is well settled that the decision of the higher authorities is binding on a lower authority in judicial hierarchy the decision of the Tribunal is binding on the Revenue Authority which they should scrupulously follow (xx) Considering the totality of the facts on record as also the development of law concerning the granting of deductions from gross total income, the assessee are of the considered view that the appellant is entitled to deduction u/s 50- IA(4) of the Act as it has been found to have fulfilled all conditions of eligibility,

(xxii) Accordingly, looking to the above facts and submission, we request to your honour, please allow our claim u/s 80IA of Rs.18,52,57,748=00."

20. Before us, the Ld. Counsel for the assessee reiterated the submissions as were made before the Revenue authorities. He further submitted that the assessee had executed construction and development of infrastructure facilities by entering into agreement with State / Central Government, local authority, statutory body etc. These activities include flyover, Roadways etc. He also contended that the assessee has fulfilled all the conditions as mentioned in section 80IA(4) of the Act and in denying the claim of the assessee, the AO wrongly construed that assessee is a 'contractor' and not carried out any

development activity. He further submitted that for the Asst. Year 2007-08 the similar claim of the assessee was ultimately allowed. It was further contended that though the expression ‘works contract’ has not been defined in the Act but various judicial pronouncements examined the issue and held that the term has wider meaning so as to state that if the activities carried out by the assessee involve development of project, engagement of various agencies, undertaking risk element, raises own finances and invests its own funds in the construction of the project, then the case of the assessee falls within the meaning of expression “developer”. A perusal of the tender documents clearly shows that the assessee has to arrange own finances, purchase own plant & machinery and purchase all materials at own cost, deploy qualified personnel for construction and development of infra projects. The authorities gave only general specifications for the project. However, for the specific drawings & designs recommended by the assessee, the same has to be approved by the competent authority and becomes part of the tender. Further that once the tender is awarded, the assessee has to pay earnest money, security deposits, performance guarantee by placing fixed deposits with banks. The assessee is also liable for liquidated damages/penalty, free maintenance and repair during defect liability period. During the construction of project, the assessee has to make all the arrangements and is liable for procurement of water, electricity, all materials, skilled, semi-skilled staff, labourers, plant & machinery, equipments & tools, and also wellbeing of the staff/labourers including taking care in case of injury of workmen and insurance against accident to workmen. A perusal of the books of accounts reveals that the assessee has arranged own finance and fixed assets shown on plant & machinery, profit & loss account also demonstrates purchase and consumption of material as contended by the Ld. AR. He submitted that the assessee is

always burdened with financial risk to carry out the project work on own cost with the fixed rate specified in the tender. The payment would be made by the competent authority only after successful completion of the project, project certification etc. and that too after deduction of the retention money. The construction and development of infrastructure projects is highly technical and required special skill, adherence to quality. Moreso, the assessee is not compensated for increase in prices of materials, cost of labourers, overhead expenses etc. in various projects. These facts clearly demonstrate that the financial and other risk, responsibility, obligations is timely undertaken by the assessee in construction and development of the various infrastructure projects. Hence, as per the ratio of the jurisdictional High Court in the case of Radhe Developers, the assessee is not merely a works contractor, but engaged in development of project as a whole, and therefore, entitled to the claim of deduction under section 80IA(4) of the Act. The Ld. Counsel for the assessee further relied on the following decisions to support his case:

- “1. *Vijay M. Mistry Construction Pvt. Ltd. in ITA Nos. 2938/Ahd/2011 & Ors.*
2. *Patel Infrastructure (Rajkot ITAT)*
ITA No.627/Ahd/2014, Dated 30/07/2020
3. *Katira Construction Ltd.(Rajkot ITAT) [2020] 119 taxmann.com 489(Rjt)*
4. *S.Sugam Construction P.Ltd.(And ITAT) (2013) 30 taxmann.com 331 (Ahd)*
5. *Bhinmal Contractor Property and Land Developers P.Ltd.(Mumbai ITAT) [2018] 93 taxmann.com 296 (Mum)*
6. *Rohan & Rajdeep Infrastructure (Pune ITAT) [2013] 40 tax.com 136 (Pune)*

7. *ABG Heavy Industries Ltd.(BOM HC) [2010] 189 taxman.com 54 (Bom)*
8. *Koya& Co. Construction P.Ltd. [2012] 21 taxmann.com 35 (Hyd.ITAT)*
9. *GVPR Engineers Ltd. [2012] 21 taxmann.com 25 (Hyd ITAT)*
10. *B.T. Patil & Sons Belgaum Construction P.Ltd. [2013] 34 taxmann.com 97 (Pune ITAT)”*

21. It also appears that the assessee filed further submission before the First Appellate Authority with following certain details:

- i. Consolidated contract account, P&L account and balance sheet for the year 2008-09 establishing the fact that members have made substantial investment amounting to Rs.10,89,18,709/- in carrying out the business of development of infrastructure facility.
- ii. Form No.10CCB claiming deduction under Section 80IA(4) of the Act along with copy of work duly exhibited.

22. At this juncture, therefore, deliberation is required on the main issue as to whether the assessee is entitled to the deduction claimed under section 80IA(4) of the Act even after the Explanation inserted after sub-section 13 of section 80IA of the Act by the Finance (No.2) Act 2009 w.e.f. 1-4-2000. The Explanation reads as follows:

Explanation.—For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub-section (1).

23. The above explanation has denied the benefit of deduction under section 80IA(4) of the Act to a person who executes a project which is in the nature of works contract. In that view of the matter, the first and foremost condition imposed upon an assessee is to establish that he worked not as 'works contractor', but as a 'developer'.

24. On the other hand, a 'contractor' is a person who undertakes work on a contract basis. He does not assume risks and responsibilities like that of a developer. He merely carries out the work as has been instructed to him by the principal. Moreover, in case of such work, the contractor gets fixed amount of revenue for executing such work and is not entitled to any share of profit from revenue generated by the developer/land owner. In other words, the developer acts as a principal whereas the contractor acts as an agent in performing the functions as required by the developer. The developers, in true sense, are the persons who are carrying out the business of developing or operating and maintaining or developing, operating and maintaining the infrastructure facility whereas the contractors are those persons who merely execute part of these functions on behalf of developer and do not own any risks and responsibilities of the work. In such cases, the contractors may not be eligible for the deduction under section 80-IA of the Act as they are not developing any infrastructure facility but only providing assistance to the actual developers.

25. We have also considered the submissions made by the Ld. DR. The Ld. DR has relied upon the history and legislative intent of insertion and different amendment of the provision of Section 80IA(iv) of the Act in the following manner:

i. As regards the question of **eligible business**, from a plain reading of the subsection, it emerges that for the purposes of admissibility of claim of deduction of profits u/s 80IA, the eligible business has to be one of the following:

- business of developing or
- business of operating and maintaining or
- business of developing, operating and maintaining

ii. Before going into the issue on and, we need to analyse the provision of section 80 IA(4) of the Act. The section was first introduced by the Finance Act 1991 for providing deduction to industrial undertaking. The purpose of providing such deduction was modernisation and expansion of industrial undertaking.

iii. However the provisions of this section was amended by Finance Act, 1995 for the reason that the legislature realised that the modernisation of industrial undertaking requires development of infrastructure facility. This fact can be verified from the memorandum (Circular No. 717, dated 14-8-1995) explaining the amendment in the section as reproduced below:

“...34.1

*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. Finance Act, 1995*

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. Finance Act, 1995*

34.4 It will apply in respect of infrastructure facilities becoming operational on or after 1-4-1995...”

iv. Thus, a clear declaration about the kind of profits eligible for deduction under Section 80IA(4)(i) comes from the aforementioned memorandum. The legislature leaves no scope of misconstruction as to the nature of income eligible for deduction. It is only such income as is derived from the use of the infrastructure facility so developed by the assessee that is eligible for the claim of deduction.

v. Thus, the essential requirement to be eligible for deduction under the Section 80IA(4) is that the assessee should have undertaken the work of development as an investment augmenting partner and should have derived profits from the use of the infrastructure facility so developed and not from the activity of construction per se. As would be elaborated subsequently in this submission, the assessee has merely participated as a contractor simplicitor rather than by way of investment.

vi. It is clear that the Government envisaged nation-wide infrastructure development through the participation of the private sector. The investment required for these projects were huge and the gestation period of these projects were also quite high. The Government with a view to encourage the private participation in these developmental projects offered various business, models like BOOT, BOLT & BOT.

BOOT means Build Own Operate & Transfer

Under this scheme the private participant will get an opportunity to own and operate the facility for some time and during this period the developer can commercially exploit the facility so developed. After the specified period the facility would be transferred to the Government.

BOLT means Build Own Lease & Transfer

The Private participant will lease the facility to the Government and the Government will pay the lease charges for a specific period and on the completion of the lease period the facility is transferred to the Government.

BOT means Build Operate & Transfer

Under this scheme the private participant will not be owning the facility. The private participant would be entitled to operate the facility for a specific period during which the revenues from the operation would be shared between the private participant and the Government or the Government will be paid lease charges by the private participant. On completion of the specified time the facility will be transferred to the Government.

vii. It is, thus, assesses who undertake development of infrastructure on BOOT, BOLT or BOT model or a similar arrangement are eligible of the benefit of deduction u/s 80IA(4)(i). They make initial investment and the income derived from the use or commercial exploitation of the project so developed alone is eligible profit.

viii. Thus, the only objective behind this scheme of deduction is to encourage private investment in development and augmentation of

infrastructure facilities. However, the legislature came to realise how the benefit of deduction was being misused for purposes other than those envisaged by the enactment inasmuch as even activities in the nature of works contract also claimed and were allowed the benefit of deduction. To prohibit such misuse and unintended consequence, the legislature brought in a clarificatory amendment in the year 2007. An Explanation below Section 80 IA(13) was inserted with retrospective effect from 01.04.2000, which reads as under:

“..For the removal of doubts, it is hereby declared that nothing contained in this section shall apply to a person who executes a works contract entered into with the undertaking or enterprise, as the case may be..”

ix. The legislature clarified the real legislative intent behind this scheme of deduction by way of Circular No.3/2008 dated 12/03/2008 being the Explanatory Notes to the Finance Act, 2007. The relevant portion of the Circular is reproduced hereunder for ready reference:

*“... 34.2 The tax benefit was introduced for the reason that industrial modernization requires a massive expansion of, and qualitative improvement in, infrastructure (viz., expressways, highways, airports, ports and rapid urban rail transport systems) which was lacking in our country. **The purpose of the tax benefit has all along been for encouraging private sector participation by way of investment in development of the infrastructure sector and not for the persons who merely execute the civil construction work or any other works contract...**”*

x. The legislature, thus, always directed the benefit of the deduction only to those assessee who are in the business of development of infrastructure facility by way of investment and only to such profits as derived from the use of such infrastructure facility. The explanatory memorandum is categorical in carving out a clear exclusion for businesses of works contract, even if by way

of ordinary parlance, such enterprises may also perceive their business as that of development. The legislature has, thus, made a conscious distinction between a business of development as envisaged by the Section 80IA and a business of construction/works contract that might have some semblance of development in the ordinary parlance. It, therefore, cannot be over-emphasised that for an enterprise to be eligible for admissibility of deduction u/s 80IA, a non-negotiable precondition is participation in the project as a developer assuming investment risk and entrepreneurial risk. In other words, investment risk is the litmus test for discerning the eligibility of a developer as envisaged in the scheme of Section 80IA vis-à-vis a developer understood in common parlance.

xi. The clarificatory amendment of 2009

The amendment of 2007 intended to plug the possibility of misuse by assesses who entered into a mere works contract with the undertaking or enterprise. However, the misuse of the deduction still continued by the undertaking or enterprise which were awarded the works contract directly by the contractee governments. In order to prohibit this misuse of tax holiday, the legislature, by Finance Act 2009, substituted the erstwhile Explanation (2007) by a new Explanation with retrospective effect from 01.04.2000 to make it clear that even those undertakings/enterprises which are direct recipients of contract from the government, shall not be entitled for the benefit of deduction for profits derived from such contract business. The clarificatory Explanation is as under:

*“..For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to **a business referred to in sub-section (4) which is in the nature of a works contract** awarded by any*

person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub-section (1)..”

xii. Restricting the benefit of deduction only to the class of developers bearing investment and entrepreneurial risk is, therefore, a conscious legislative action and is not open to slightest of inferential latitude. The clarificatory amendments represent a fine example of legislative discretion and parliamentary discernment and leave no scope for any attempt at interpretation, liberal or otherwise. It is a settled doctrine of jurisprudence that scope of interpretation does not exist where the language of the law is clear and words are unambiguous.

xiii. The A.R. of the assessee has argued that BOLT, BOOT or BOT or similar manner which were the basis of investment augmentation is no more a good law as the only developer are also entitled to claim deduction u/s. 80IA(4) and it is not necessary to operate or maintain the infrastructure facility for claiming deduction in view of amendment made in Finance Act, 2001 w.e.f. 01.04.2002.

In this regard, it is submitted that though the condition was relaxed vide amendment made in 2001 but the condition that it has to be built from the fund of the assessee as per BOT or BOOT or similar arrangement has not been relaxed. Only the Enterprise which has built the infrastructure project on BOT or BOOT or similar arrangement has been provided on exit route by way of this amendment and it is not necessary for them to operate and maintain the infrastructure facility developed by them. Therefore, simultaneously amendment have been made in sub clause (b) of clause (i) of section 80IA(4) and the transferee Enterprise were allowed to claim the

deduction for unexpired period during which the transferor Enterprise would have been entitled to claim the deduction.

Therefore, the infrastructure facility has to be developed on BOT, BOOT or BOLT or similar arrangement where the investee Enterprise bears the financial and investment risks.

The nature of contracts entered by the assessee company does not reflect that it has brought investment and bear the financial and investment risk. It only bears the contractual risks which is true for any construction contracts.

The above legislative intent has been clarified many times by Parliament as per clarificatory amendments made in 2007 and 2009.”

26. Thus, the sum and substance of the prayer of the department is this that the assessee cannot be found to be eligible for deduction as he worked as a mere contractor and not a developer within the meaning and scope of Section 80IA(4) of the Act., particularly, for the fact that the assessee appointed various sub-contractors as per Annexure “B” to 3CD report for TDS deducted and paid showing deduction as per the rate applicable to sub-contractor. The income from contract activities are shown on percentage of bill basis and the fixed asset does not show any investment in time infrastructure projects as the contention made by the Ld. DR which is reflecting in the order of denial of claim of the assessee by the Ld. AO.

27. Having regard to this particular observation made by the Ld. DR, in order to ascertain whether a civil construction work is assigned on development basis or contract basis only on the assessee, the terms and conditions of the agreement needs to be considered by us. Only on the basis of

the terms and conditions and the scope, ambit and nature of the contract assigned to the assessee it could be ascertained whether it is a "works contract" or a "development contract".

The right and obligations of the assessee in the projects implemented by the assessee on behalf of the Government entities is also required to be examined. Our this approach has also been strengthened by the observation made by the Rajkot Bench in the matter of Patel Infrastructure Pvt. Ltd. Vs. DCIT, ITA No.627/Ahd/2014, Asst.Year 2010-11. We, therefore proceed to analyse the facts of the present case to find out whether the appellant acted as a "Developer or "Works Contractor".

28. The tender clauses demonstrates the financial involvement / risk factors / liabilities involved in the Projects undertaken by the appellant for Construction and Development of Road - Infrastructure Projects.

i. BASIC QUALIFICATION OF ASSESSEE

Appellant company is registered as Category AA Contractor with Government of Gujarat for construction & development of infrastructure projects.

ii. ELIGIBILITY FOR BIDDING OF TENDER

Contractor must have necessary experience, facilities, ability, financial resources, specified turnover, specific experience in construction of Roads, Qualified Key personnel, plant & machinery & equipments, etc to perform the work as it appears from Section VIII: Schedule B, Schedule C, and Section IX of Tender documents appearing at Page Nos. 84 to 99 of PB-II filed before us.

iii. DRAWINGS & SPECIFICATIONS

The general specifications are given by the respective Authorities. However, the specific drawings & designs are recommended by the Contractor which shall be approved by the Competent Authority and shall form part of the accepted Tender, which is appearing from clause 6.1 & 7.2 of tender documents at Page Nos. 118 & 119 of PB-II filed before us.

iv. MATERIALS:

The Contractor shall, with due care and diligence, design (to the extent provided by the Contractor), execute and complete the Works and remedy any defects therein in accordance with the provisions of the contract. The contractor shall provide all superintendence, labour, materials, plant, contractor's equipments and all other things, whether of a temporary or permanent nature at its own cost. The same is appearing from Clause 8.1 of Tender documents at Page 119 of PB-II filed before us.

Site 1: Audited Accounts P&L account- Page 25 of PB-I. Total Contract Expenses incurred during the year are of Rs. 62,85,43,029/- and creditors for goods are of Rs 3,09,53,357/-. The same is appearing from Schedule B of Balance Sheet at Page Nos.29 & 30 of PB-I filed before us.

Site 2: Audited Accounts P&L account- Page 34 of PB-I Total Contract Expenses incurred during the year are of Rs 3,63,03,463/- and creditors

for goods are of Rs 38,89,015/-, the same is appearing from Schedule B of Balance Sheet at Page Nos. 38 of PB-I filed before us.

The various materials, Plants, Samples etc. are got to be tested by the Contractor at its own cost from time to time as appearing from Clauses 36.1 to 36.3 of Tender documents at Page No. 128 of PB II filed before us.

v. FINANCE:

The assessee has to arrange own finance by raising adequate capital, reserves & surplus, secured & unsecured loans

SITE 1: Balance Sheet, which is appearing from Page No.27 of PB-I filed before us. The total amount raised is of Rs. 7,07,37,951/- (Capital) and Rs 2,87,95,363/- (Secured & Unsecured Loans).

SITE 2: Balance Sheet, which is appearing at Page 35 of PB-I filed before us. The total amount raised is of Rs. 3,81,80,758/- (Capital) and Rs. 19,43,213/- (Secured & Unsecured Loans)

vi. PLANT & MACHINERY

The assessee has to use and invest heavily in purchasing own P & M, Equipments etc. in order to be eligible to bid for Tender and carry out the development of various projects –

SITE 1: Schedule of fixed assets, which is appearing at Page 33 of PB-I filed before us. The gross block of assets as on 31-03-2008 are to the tune of Rs. 8,19,29,849/-

SITE 2: Schedule of fixed assets, which is appearing on Page 39 of PB-I filed before us. The gross block of assets as on 31-03-2008 are to the tune of Rs. 23,77,453/-

vii. PERSONELL:

The assessee has to employ own team of experienced and qualified Project Manager, Highway Engineer, Bridge Engineer, Material Engineer, Survey Engineer etc. The same is appearing at Section VIII Schedule C of Tender documents at Page 86 of PB-II filed before us.

viii. SECURITY DEPOSIT

Appellant has to pay Performance Security Deposit at 10% of contract price. Page- 104 of PB-II, Appendix to Bid, Clause-1 of Tender.

Performance Security Deposits are to be valid for 14 days from the date of expiry of the Defect Liability Period. The same is reflecting at Page 120 of PB-II, Clause 10.2 of Tender.

ix. RETENTION MONEY:

Retention money shall be deducted @ 5% from current bills and shall be released 50% on completion of the Works and remaining 50% after the end of the Defect liability period. The same is appearing at Clause 60.3 of Tender documents from page 143 of PB-II filed before us.

x. LIQUIDATED DAMAGES/PENALTY

If the contractor fails to complete contract by the stipulated date, he shall pay penalty of 1/2000th of the contract price per day from the date

of delaying said work up to the date of completion and handing over to contract upto maximum of 10% of contract price. The same is appearing at Appendix to Bid, clause 7 & 8 and Clause 47.1 of Tender documents from Page 104 & 133 of PB-II filed before us.

xi. DEFECT LIABILITY PERIOD

365 days free maintenance and guarantee period from the certified date of completion of work – The same is appearing from Appendix to Bid, clause 9 & clause 49.1 of Tender documents at Page 104 & Page 134 of PB-11 filed before us.

xii. TERMS OF ADVANCE PAYMENT/ MOBILIZATION ADVANCE

Advance payment/ mobilisation advance will be given, which will be interest bearing up to 5% of the contract price at commencement of work, and payment of additional interest bearing advance up to 5% of the contract price after the contractor has achieved a financial progress of 10% of the contract price and the rate of interest shall be 10% per annum. The same is appearing from Appendix to Bid. Clause 11 at Page 104 of PB-II filed before us.

xiii. TERMS OF PAYMENTS:

The Contractor shall submit monthly statements of estimated value of work completed, and it will be subject to final Certification, determination and approval by the Engineer and that too after deductions like payments, retention, other recoveries, taxes etc. The

same is appearing from clause 60.1 & 602 of Tender documents at page 143 of PB-II filed before us.

xiv. PROCUREMENT & SAFETY OF LABOURERS

The assessee has to arrange for labour and is also responsible their payments, housing, feeding and transport and for safety of all concerned. The same is appearing from Clause 34. 1 of Tender documents at page 128 of PB II filed before us. The assessee has to take Workmen compensation insurance & is liable to pay Compensation and abide by all Labour Laws, which is appearing from Clauses 23.1 to 25.4 of tender documents at Page 125 of PB-II filed before us.

xv. SAFETY OF ALL ACTIVITIES:

Contractor will be responsible for all activities on the Site, safety of all persons on site, provide and maintain at his own cost all lights, guards, fencing, warning signs etc. For protection of works and convenience of Public, take all reasonable steps to protect the environment on and off the site and avoid damage to all. The same is appearing from clause 19.1 of Tender documents at Page 122 of PB-II filed before us.

xvi. CONSEQUENCES OF DEFAULT:

If the assessee defaults in work or violates any terms of contract, it shall be liable to penalty in terms of lien of Government over the plant, machinery, equipments, etc, forfeiture of security deposit etc. The same is appearing from Clause 63.1 of Tender document at Page 146 of PB-II filed before us.

29. We have carefully considered the different clauses in the tender notice in respect of projects undertaken by the appellant in rehabilitation and upgradation of Swaroopganj, Pindwara Section (Km 249.70 to km 264.00) of NH -14 and Pindwara – Bekaria Section (Km 0.00 to Km 29.00) of NH 76 I the State of Rajasthan – East West Corridors for Execution, completion and maintenance of the Project awarded by National Highway Authority of India for A.Y. 2008-09.

30. We make it clear that from the records available before us, we find that the terms and condition of the tender documents in respect of both the projects are identical. We have considered the further case of the assessee that the claim of the assessee under Section 80IA(4) of the Act for A.Y. 2006-07 was allowed by and under assessment made under Section 143(3) of the Act for on 10.04.2008 which was further confirmed by and under the order passed by the Ld. AO on 31.03.2009 under Section 143(3) r.w.s. 147 of the Act. The same relief was also granted to the assessee for A.Y. 2007-08 on 13.04.2009 by the Ld. AO by and under assessment made under Section 143(3) of the Act. Relevant to mention that all the orders passed in assessee's own case as mentioned hereinabove have been perused by us as been duly furnished by the appellant before us.

31. As to whether the assessee can be termed as “developer” or a “contractor” as contended by the Revenue in its submissions, we find, in fact, it only attempts to give a general meaning of the term “contractor” and “developer”. In the cases in hand, we find that in terms of tender documents, audited accounts and facts on record suggest that the assessee has fully undertaken the work of development of various infrastructure projects as a

whole by undertaking the risk & responsibility, arranged own finances, materials, personnel, labour, machinery, other equipments etc. and thereby fulfilled the test of being a “developer” as per the principles laid down by Hon’ble Gujarat High Court in the case of Radhe Developers, 341 ITR 403 (Guj). It is imperative upon us to take note of the relevant portion of the above judgments for better understanding of the issue on hand.

“34. We have reproduced relevant terms of development agreements in both the sets of cases. It can be seen from the terms and conditions that the assessee had taken full responsibilities for execution of the development projects. Under the agreements, the assessee had full authority to develop the land as per his discretion. The assessee could engage professional help for designing and architectural work. Assessee would enroll members and collect charges. Profit or loss which may result from execution of the project belonged entirely to the assessee. It can thus be seen that the assessee had developed the housing project. The fact that the assessee may not have owned the land would be of no consequence.

35. With respect to the question whether the assessee had acquired the ownership of the land for the purposes of the Income Tax Act and, in particular, Section 80IB(10) of the Act and to examine the effect of Explanation to Section 80IB(10) introduced with retrospective effect from 1.4.2001, since several aspects overlap, it would be convenient to discuss the same together.

36. We have noted at some length, the relevant terms and conditions of the development agreements between the assessee and the land owners in case of Radhe Developers. We also noted the terms of the agreement of sale entered into between the parties. Such conditions would immediately reveal that the owner of the land had received part of sale consideration. In lieu thereof he had granted development permission to the assessee. He had also parted with the possession of the land. The development of the land was to be done entirely by the assessee by constructing residential units thereon as per the plans approved by the local authority. It was specified that the assessee would bring in technical knowledge and skill required for execution of such project. The assessee had to pay the fees to the Architects and Engineers. Additionally, assessee was also authorized to appoint any other Architect or Engineer, legal adviser and other professionals. He would appoint Sub-contractor or labour contractor for execution of the work. The assessee was authorized to admit the persons willing to join the scheme. The assessee was authorised to receive the contributions and other deposits and also raise demands from the members for dues and execute such demands through legal procedure. In case, for some reason, the member already admitted is deleted, the assessee would have the full right to include new member in place of outgoing member. He had to make necessary financial arrangements for which purpose he could raise funds from the financial institutions, banks etc. The land owners agreed to give necessary signatures, agreements, and even power of attorney to facilitate the work of the developer. In short, the assessee had undertaken the entire task of development, construction and sale of the housing units to be located on the land belonging

to the original land owners. It was also agreed between the parties that the assessee would be entitled to use the full FSI as per the existing rules and regulations. However, in future, rules be amended and additional FSI be available, the assessee would have the full right to use the same also. The sale proceeds of the units allotted by the assessee in favour of the members enrolled would be appropriated towards the land price. Eventually after paying off the land owner and the erstwhile proposed purchasers, the surplus amount would remain with the assessee. Such terms and conditions under which the assessee undertook the development project and took over the possession of the land from the original owner, leaves little doubt in our mind that the assessee had total and complete control over the land in question. The assessee could put the land to use as agreed between the parties. The assessee had full authority and also responsibility to develop the housing project by not only putting up the construction but by carrying out various other activities including enrolling members, accepting members, carrying out modifications engaging professional agencies and so on. Most significantly, the risk element was entirely that of the assessee. The land owner agreed to accept only a fixed price for the land in question. The assessee agreed to pay off the land owner first before appropriating any part of the sale consideration of the housing units for his benefit. In short, assessee took the full risk of executing the housing project and thereby making profit or loss as the case may be. The assessee invested its own funds in the cost of construction and engagement of several agencies.

32. The provisions of section 80IA(4) of the Act provides that deduction would be available to any enterprise which carries on the business of –

(i) developing or

(ii) operating and maintaining or

(iii) developing, operating and maintaining any infrastructure facility which fulfills the conditions prescribed therein.

33. As per the Explanation, even a road and bridge is an infrastructure facility for the purposes of section 80-IA(4). The primary condition is that the enterprise must carry on the work of "developing" an infrastructure facility. As mentioned above, Explanation under sub-section (13) of section 80-IA clarifies that this section will not apply to any business which is in the nature of a "works contract". In other words, the essence of this section is that, the benefit of section 80-IA(4) would be available to a developer and not to a contractor simplicitor. In the present case the Ld. AO had denied the

benefit of section 80-IA(4) to the appellant-company on the assumption that the appellant-company is engaged in executing merely a work contract and it is not carrying on the business of developing an infrastructure facility. But we find that the assessee has undertaken entirely and exclusively the projects awarded by the Government authorities, as it is evident from the records as explained and already narrated hereinabove and therefore, there is hardly any basis for assuming that it is merely a contractor executing a works contract. The difference between a "developer" and a "contractor" has to be properly analyzed and understood. This issue has come up before the Hon'ble ITAT, Amritsar Bench in the case of M/s. TRG Industries P. Ltd. in ITA Nos. 433 etc./Asr/2009. The Tribunal after relying various case laws has laid down the following parameters when to treat an assessee as a developer or contractor:

- (i) The assessee does not have to develop the entire infrastructure facility to qualify for deduction u/s.80-IA(4) and if only a part of the infrastructure facility is developed, the assessee would be eligible for deduction.
- (ii) The three requirements of section 80-IA(4) viz. development, operation and maintenance are not cumulative. Thus, an enterprise which only develops facility would also be entitled to the benefit of section 80-IA(4).
- (iii) Merely because the assessee is referred to as a contractor in the agreement, it would not debar it from claiming deduction.
- (iv) Direct agreement between the transferee-assessee and the specified authority is not a mandatory requirement u/s.80-IA(4) of the I.T. Act.

Needless to mention that the assessee qualified all the criterion fixed by the Amritsar Bench.

34. We have already dealt with relevant clauses of the tender documents stipulating various conditions viz. financial involvements, risks, obligations and responsibilities of the assessee in developing, operating and maintaining of infrastructure facilities, which clearly makes out the case of the assessee within the scope and ambit of section 80IA(4) of the Act so as to claim the impugned deduction.

35. The terms and conditions of tender documents / agreements / work order and comprehensive view of the activities undertaken by the assessee as discussed above clearly demonstrates that the assessee-company has undertaken substantial activities in respect of various projects awarded by various statutory bodies, which makes the assessee to qualify as a developer of Infra facility and to make claim necessary benefits under section 80IA(4) of the Act.

36. However, we have further considered the judgments relied upon by the Ld. AR in the matter of CIT vs. ABG Heavy Industries Ltd. [2010] 189 Taxman 54 (Bombay). The paragraph 22 of the said judgment suggests that in the particular facts and circumstances of the case in hand, the assessee is entitled to relief claimed under Section 80IA(4) of the Act. The first and foremost condition imposed by the statutory provision is that the enterprise must start operating and maintaining the infrastructure facility on or after 01.04.1995. Thereafter, time-to-time the provision though has been amended under this particular condition enunciated therein, that the assessee has to be granted conditions stipulated, fulfilling of which the assessee said to be a developer and entitled to the claim under Section 80IA of the Act. The view has been narrated in the said judgment in the following manner:

“22. Another submission which was urged on behalf of the revenue is that under clause (iii) of sub-section (4A) of section 80-IA, one of the conditions imposed was that the enterprise must start operating and maintaining the infrastructure facility on or after 1-4-1995. The same requirement is embodied in sub-clause (c) of clause (i) of sub-section (4) of the amended provisions of section 80-IA. On this basis, it was urged that since the assessee was not operating and maintaining the facility, he did not fulfil the condition. This submission is fallacious both in fact and in law. As a matter of fact, the Tribunal has entered a finding that the assessee was operating the facility and this finding has been confirmed earlier in this judgment. That the assessee was maintaining the facility is not in dispute. The facility was commenced after 1-4-1995. Therefore, the requirement was met in fact. Moreover, as a matter of law, what the condition essentially means is that the infrastructure facility should have been operational after 1-4-1995. After section 80-IA was amended by the Finance Act of 2001, the section applies to an enterprise carrying on the business of (i) developing; or (ii) operating and maintaining; or (iii) developing, operating and maintaining any infrastructure facility which fulfils certain conditions. Those conditions are : (i) Ownership of the enterprise by a Company registered in India or by a consortium; (ii) An agreement with the Central or State Government, local authority or statutory body; (iii) The start of operation and maintenance of the infrastructure facility on or after 1-4-1995. The requirement that the operation and maintenance of the infrastructure facility should commence after 1-4-1995 has to be harmoniously construed with the main provision under which a deduction is available to an assessee who develops; or operates and maintains; or develops, operates and maintains an infrastructure facility. Unless both the provisions are harmoniously construed, the object and intent underlying the amendment of the provision by the Finance Act of 2001 would be defeated. A harmonious reading of the provision in its entirety would lead to the conclusion that the deduction is available to an enterprise which (i) develops; or (ii) operates and maintains; or (iii) develops, maintains and operates that infrastructure facility. However, the commencement of the operation and maintenance of the infrastructure facility should be after 1-4-1995. In the present case, the assessee clearly fulfilled this condition.

23. In the view which we have taken, all the assessment years in question to which this batch of appeals relates would be governed by the same principle. The subsequent amendment of section 80-IA(4A) of the Act to clarify that the provision would apply to an enterprise engaged in (i) developing; or (a) operating and maintaining; or (iii) developing, operating and maintaining an infrastructure facility was reflective of a position which was always construed to hold the field. Before the amendment that was brought about by Parliament by the Finance Act of 2001, we have already noted that the consistent line of circulars of the Board postulated the same position. The amendment made by Parliament to section 80-IA(4) of the Act set the matter beyond any controversy by stipulating that the three conditions for development, operation and maintenance were not intended to be cumulative in nature.”

37. It is contended by Revenue that the profit element is already embedded in the tender price quoted by the assessee. Moreso, there is no financial risk

involved as the assessee was getting the payment for the construction done by him from time to time as one of the major remarks and/submissions made by the Ld. DR while making argument.

We have carefully considered this particular aspect of the matter. If the contention of the Revenue is encouraged then possibly none of the developers will be entitled to the claim made under Section 80IA(4) of the Act. Our this view has been strengthened by the observation and the ratio laid down by the Hon'ble Delhi High Court in the case of CIT vs. VRM India Ltd., reported in [2015] 57 taxmann.com 325 (Delhi). While dealing with this particular aspect of the matter the Hon'ble Court has been pleased to observe as follows:

“15. Since the assessee developed an infrastructure facility/project and was not required to maintain or operate, it was entitled to cost, plus the margin of income or profit; not to expect this treatment would render one who develops an infrastructure facility project, unable to realise its cost. If the infrastructure facility is, after its development, transferred to the Government, naturally the cost would be paid by the Government. Therefore, the mere circumstance that the Indian Railways or DDA paid for development of a housing project carried out by the assessee, did not mean that the assessee did not develop the residential complex. If the revenue's interpretation is accepted, no enterprise, carrying on the business of only developing the infrastructure facility, would be entitled to deduction under section 80-IB (10). The conclusions of the ITAT in this context were rendered after a detailed analysis of the facts and the contracts entered into by the assessee with IRWO and DDA. The narrow ground on which the AO concluded that the projects were "owned" by IRWO or DDA and that the assessee was only a works contracts, was unwarranted.”

We, therefore, do not have any doubt in regard to the admissibility of the claim made by the assessee and to entertain the same by giving relief to that effect.

38. Before parting with the matter we would like to mention that we have considered the judgments relied upon by the Ld. AR passed by different judicial forums including the judgment passed in the matter of Patel infrastructure and Katira construction (supra) passed by the Rajkot Bench and

Katira construction passed by the Hon'ble jurisdictional High Court wherein the constitutional validity of insertion of explanation below sub Section 13 of Section 80 IA of the Act was challenged. The Ld. Representative appearing for the Revenue vehemently argued on this point that the jurisdictional High Court in the said matter already decided the issue against the assessee. Fact remains that the jurisdictional High Court in that particular matter dealt with the constitutional validity of the insertion of explanation as mentioned hereinabove and decided the same in favour of the revenue to this effect that such explanation brought with retrospective effect from 01.04.2000 by the Finance Act No. 2 of 2009 was very well within the competence of Parliament. As such there was no issue whether the assessee is acting as a developer or contractor was raised before the Hon'ble Jurisdictional High Court neither the said has been decided in the said judgment.

39. We note that considering the case of the appellant, the Ld. CIT(A) with the following observation allowed the appeal upon granting relief holding the appellant entitled to deduction under Section 80IA(4) of the Act:

"3.3 As seen from the assessment order AO held that appellant is a contractor (and not a developer) and relying on the 3 member decision in the case of M/s. B.T.Patil & Sons Belgam Construction Pvt.Ltd. Vs. ACIT reported at 126 TTJ 577, AO held that appellant is not entitled to deduction u/s.801A(4).

3.4 The contentions of the learned AR in brief are that the appellant is a developer of infrastructural facility; it made investment of its own as well as borrowed funds in the form of Plant & Machinery, structures at sites, working capital, human resources, technical expertise etc.; it has technical knowledge of developing and laying roads, dams, bridges etc; it cannot be held that appellant acted as only works contractor, the issue involved in the case relied on by the AO was whether sub-contractor was eligible for deduction u/s.801A(4); the facts of the appellant's case are different in the sense that it is not sub-contractor but the main contractor, the decision of the Rajkot Tribunal in the case of Tarmat Bel (JV)KCL, Rajkot in ITA No.1111/Rjt/2010 dated 23-9-2010 supports appellant's case; in the 3 preceding years deduction u/s.801A(4) was allowed to the appellant in the orders passed u/s.143(3); Pune Tribunal's decision dt. 08-06-

2011 in ITA No.766/PN/09 in the case of Laxmi Civil Engineering Pvt.Ltd. Vs. Addl.CIT(which in turn relied on the decision of Bombay High Court in the case of ABG Hany Engineering Ltd. 37 DTR 233) also supports the appellant's case.

3.5 As seen from the assessment order, the deduction was disallowed for the first time in the year under consideration mainly relying on the Third member decision of Mumbai tribunal cited at 126 TTI 577. In this connection, it is seen that the said decision was recalled by the Tribunal by order dated 18-2-2011 in view of the Bombay High Court decision dated 15-2-2010 cited at 37 DTR 233. In the case of Laxmi Civil Engineering Pvt.Ltd. Vs. Addl.CIT, Pune Tribunal, vide its order dated 8-6-2011, allowed the appeals of the assessee for 4 assessment years from 2003-04 to 2006-07. Similarly, Vishakhapatnam Tribunal in the case of Ms. Transmory (India) Lat. Gunter ITO Wd.2(2), Guntur, allowed the assessee's appeal vide its order dated 14-7-2011 for A Y. 2006-07. Further, it is seen that Bombay High Court in the case of Mahalaxmi Infra Project Ltd. Vs. ACIT, in Income-tax Appeal No.4610 of 2010, vide its order dated 30-8-2011, quashed the Tribunal's order and restored it to the file of the Tribunal thereby allowing the assessee's appeal. Given the facts of the appellant's case, and the case laws referred to above, I hold that appellant is entitled to deduction w/s.80IA(4). AO is directed to allow the claim. This ground of appeal is allowed.”

40. We have further considered the judgment as relied upon by the Ld. AR passed in the case of Vijay M. Mistry (supra), which was passed by the Co-ordinate Bench on 23.12.2022 wherein the assessee had undertaken infrastructure facilities, such as, development of roads, bridges, water treatment plants, canals, siphon work (irrigation projects), sewage treatment plant etc. by entering into contract with various Government authorities. In fact, we find that the clauses stipulated in the Tender document is almost akin to the clauses mentioned in the Tender document in respect of the assessee before us. Relevant to mention that though the assessee has taken different projects, the clauses mentioned mostly in all tendered documents are in respect of different projects entrusted upon assessee by the statutory authorities in different years are identical. We find that on the identical facts and circumstances of the case, the assessee was found to be eligible for claiming deduction under Section 80IB(4) of the Act taking into consideration the overall aspect of works undertaken by the assessee therein. We are

inspired by the ratio laid down by the Co-ordinate Bench in the said judgment Vijay M. Mistry (supra) holding the assessee eligible under the identical facts and circumstances of the case.

41. In the light of the above discussion and perusal of various clauses of Tender documents and case laws relied upon by both the parties, it reveals that the tender work under consideration are not for a specific work, rather they are for development facility as a whole. The responsibility is fully assigned to the developer for execution and completion of the work. Various stipulations contained in the Tender documents demonstrate various risks undertaken by the assessee for execution of the project work awarded by the competent authority in terms of financial resources, manpower deployment, both technical and administrative expertise, drawing and designing of the project specifications and getting approval from the competent authority, safety and security of project and human resources, compliances of various statutory rules and laws. Therefore, merely because in the agreement for development of infrastructure facility, the assessee is referred to as contractor or just because some basic specifications are laid down, it does not detract the assessee from the position of being a developer, nor will deprive the assessee from claiming deduction u/s.80IA(4) of the Act. As such, looking to the overall aspects of work undertaken by the assessee we can safely come to the conclusion that the assessee is engaged in development of the infrastructure facility and therefore, a developer, which confers right of eligibility to the assessee to claim benefits under section 80IA(4) of the Act.

42. We also find that the assessee's identical issue was decided for A.Y. 2006-07 under Section 143(3) of the Act in their favour by the authorities

below. The same was reopened under Section 147 of the Act and on 31.03.2009 again confirmed the eligibility of claim made by the assessee under Section 80IA(4) of the Act as accepted under the original assessment dated 10.04.2008 under Section 143(3) of the Act. Further that, in A.Y. 2007-08 on 13.04.2009, the identical relief was also granted under Section 143(3) of the Act in favour of the assessee. Thus, taking into consideration the entire aspect of the matter, we find that the claim of deduction under Section 80IA(4) of the Act has rightly been allowed in favour of the assessee by the Ld. CIT(A). The same is found be just and proper so as to warrant interference. In that view of the matter, the appeal filed by the Revenue is found to be devoid of any merit and, thus, dismissed.

43. In the combined result, appeal preferred by the assessee is allowed and appeal preferred by the Revenue is dismissed.

This Order pronounced on	31/08/2023
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Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER
Ahmedabad; Dated 31/08/2023

sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER

S. K. SINHA

True Copy

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad