IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "A", HYDERABAD

BEFORE SMT. P.MADHAVI DEVI, ACCOUNTANT MEMBER
AND SHRI RIFAUR RAHAMAN, JUDICIAL MEMBER

ITA No. 1828/Hyd/2014
Assessment Year: 2009-10

Dy. Commissioner of Income-tax, Circle – 3(2), Hyderabad.	vs.	Sushee Infra Pvt. Ltd., Hyderabad PAN – AACCS8560Q
(Appellant)		(Respondent)

Revenue by : Shri Konda Ramesh
Assessee by : Shri S. Rama Rao

Date of hearing : 24-11-2015
Date of pronouncement : 04-12-2015

O R D E R

PER S. RIFAUR RAHMAN, A.M.:

This appeal is preferred by the Revenue against the order of CIT(A) - II, Hyderabad, dated 28/05/2015 for the AY 2009-10.

2. Briefly the facts of the case are, the assessee is engaged in the business of executing irrigation projects and development of infrastructure facility. The assessee filed return of income for the AY 2009-10, declaring total income of Rs. 26,89,66,421/- after claiming deduction u/s 80IA of Rs. 162,67,521/-. The scrutiny assessment was completed and the AO rejected the depreciation on building and rejected the deduction u/s 80IA of the Income-tax Act (in short 'Act). While rejecting the deduction u/s 80IA, AO observed as below:

> "a) *The assessee did not 'begin to operate' the infrastructure facility during the FY 2008-09 and hence cannot claim deduction u/s 80IA for the FY 2008-09 in view of the provisions of section 80IA (5).*

b) The assessee is a 'contractor' to the Government to execute the project and hence is not eligible for deduction u/s 80IA as per Explanation to section 80IA.

c) The assessee did not maintain separate books of account for 80IA claim project as required u/s 80IA(5)."

3. Aggrieved with the above order, assessee filed appeal before the CIT(A). The CIT(A) allowed the appeal of the assessee due to the fact that the coordinate bench of this tribunal had adjudicated in favour of the assessee for the similar findings of the AO in the earlier AYs 2005-06, 2006-07 and 2007-08 in ITA Nos. 269/hyd/2009, ITA No. 1165/H/09 and ITA No. 1171/Hyd/2010 respectively in the consolidated order dated 16/03/12 and for AY 2008-09 in ITA No. 414/Hyd/12 dated 17/06/13.

4. Aggrieved by the order of CIT(A), the revenue is in appeal before us raising the following grounds:

1. The learned CIT (A) erred in both in law and on facts of the case.

2. The learned CIT (A) ought not have allowed the assessee's claim of deduction u/s 80IA of the Act?

3. The learned CIT (A) ought not have allowed the assessee's claim of deduction u/s 80IA of the Act as the assessee has not satisfied the conditions of being a developer i.e, development, operating, maintenance, financial involvement, defect correction and liability period in the contract agreement?

4. The learned CIT (A) ought not have allowed the assessee's claim of deduction u/s 80IA of the Act worked out on pro rata basis of turnover, though the assessee had not maintained separate books of accounts, more so specifically in view of the Hon'ble Supreme Court judgment in the case of Arisudhana Spinning Mills Ltd Vs CIT, Ludhiana (dated 05/09/12"

5. Ld. DR relied on the order of AO.

6. Ld. AR submitted that the issue in dispute is covered in favour of the assessee by the decision of the Tribunal in assessee's own case for earlier AYs.

7. We have considered the arguments of both the parties and perused the material facts on record as well as the orders of revenue authorities. The first ground of revenue is general in nature The second and third grounds are covered in favour of the assessee by

the decision of the coordinate bench of this Tribunal wherein the coordinate bench adjudicated the same as under:

> *"31. Findings: We have considered the elaborate submissions made by both the parties and also perused the materials available on record. We have also gone through all the case laws cited by both the parties. We find that the provisions of Section 80IA (4) of the Act when introduced afresh by the Finance Act, 1999, the provisions under section 80IA (4A) of the Act were deleted from the Act. The deduction available for any enterpri se earlier under section 80IA (4A) are also made available under Section 80IA (4) itself. Further, the very fact that the legislature mentioned the words (i) "developing" or (ii) "operating and maintaining" or (iii) "developing, operating and maintaining" clearly indicates that any enterprise which carried on any of these three activities would become eligible for deduction. Therefore, there is no ambiguity in the Income-Tax Act. We find that where an assessee incurred expenditure for purchase of materials himself and executes the development work i.e., carries out the civil construction work, he will be eligible for tax benefit under section 80 IA of the Act. In contrast to this, a assessee, who enters into a contract with another person including Government or an undertaking or enterprise referred to in Section 80 IA of the Act, for executing works contract, will not be eligible for the tax benefit under section 80 IA of the Act. We find that the word "owned" in sub- clause (a) of clause (1) of sub section (4) of Section 80IA of the Act refer to the enterprise. By reading of the section, it is clears that the enterprises carrying on development of infrastructure development should be owned by the company and not that the infrastructure facility should be owned by a company. The provisions are made applicable to the person to whom such enterprise belongs to is explained in sub-clause (a). Therefore, the word "ownership" is attributable only to the enterprise carrying on the business which would mean that only companies are eligible for deduction under section 80IA (4) and not any other person like individual, HUF, Firm etc.*
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> *32. We also find that according to sub-clause (a), clause (i) of sub section (4) of Section 80-IA the word "it" denotes the enterprise carrying on the business. The word "it" cannot be related to the infrastructure facility, particularly in view of the fact that infrastructure facility includes Rail system, Highway project, Water treatment system, Irrigation project, a Port, an Airport or an Inland port which cannot be owned by any one. Even otherwise, the word "it" is used to denote an enterprise. Therefore, there is no requirement that the assessee should have been the owner of the infrastructure facility.*
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> *33. The next question is to be answered is whether the assessee is a developer or mere works contractor. The Revenue relied on the amendments brought in by the Finance Act 2007 and 2009 to mention that the activity undertaken by the assessee is akin to works contract and he is not eligible for deduction under section 80IA (4) of the Act. Whether the assessee is a developer or works contractor is purely depends on the nature of the work undertaken by the assessee. Each of the work undertaken has to be analyzed and a conclusion has to be drawn about the nature of the work undertaken by the assessee. The agreement entered into with the Government or the Government body may be a mere works contract or for development of infrastructure. It is to be seen from the agreements entered into by the assessee with the Government. We find that the Government handed over the possession of the premises of projects to the assessee for the development of infrastructure facility. It is the assessee's responsibility to do all acts till the possession of property is handed over to the Government. The first phase is to take over the existing premises of the projects and thereafter developing the same into infrastructure facility. Secondly, the assessee shall facilitate the people to use the available existing facility even while the process of development is in progress. Any loss to the public caused in the process would be the responsibility of the assessee. The assessee has to develop the infrastructure facility. In the process, all the works are to be executed by the assessee. It may be laying of a drainage system; may*

be construction of a project; provision of way for the cattle and bullock carts in the village; provision for traffic without any hindrance, the assessee's duty is to develop infrastructure whether it involves construction of a particular item as agreed to in the agreement or not. The agreement is not for a specific work, it is for development of facility as a whole. The assessee is not entrusted with any specific work to be done by the assessee. The material required is to be brought in by the assessee by sticking to the quality and quantity irrespective of the cost of such material. The Government does not provide any material to the assessee. It provides the works in packages and not as a works contract. The assessee utilizes its funds, its expertise, its employees and takes the responsibility of developing the infrastructure facility. The losses suffered either by the Govt. or the people in the process of such development would be that of the assessee. The assessee hands over the developed infrastructure facility to the Government on completion of the development. Thereafter, the assessee has to undertake maintenance of the said infrastructure for a period of 12 to 24 months. During this period, if any damages are occurred it shall be the responsibility of the assessee. Further, during this period, the entire infrastructure shall have to be maintained by the assessee alone without hindrance to the regular traffic. Therefore, it is clear that from an un-developed area, infrastructure is developed and handed over to the Government and as explained by the CBDT vide its Circular dated 18-05-2010, such activity is eligible for deduction under section 80IA (4) of the Act. This cannot be considered as a mere works contract but has to be considered as a development of infrastructure facility. Therefore, the assessee is a developer and not a works contractor as presumed by the Revenue. The circular issued by the Board, relied on by learned counsel for the assessee, clearly indicate that the assessee is eligible for deduction under section 80IA (4) of the Act. The department is not correct in holding that the assessee is a mere contractor of the work and not a developer.

34. We also find that as per the provisions of the section 80IA of the Act, a person being a company has to enter into an agreement with the Government or Government undertakings. Such an agreement is a contract and for the purpose of the agreement a person may be called as a contractor as he entered into a contract. But the word "contractor" is used to denote a person entering into an agreement for undertaking the development of infrastructure facility. Every agreement entered into is a contract. The word "contractor" is used to denote the person who enters into such contract. Even a person who enters into a contract for development of infrastructure facility is a contractor. Therefore, the contractor and the developer cannot be viewed differently. Every contractor may not be a developer but every developer developing infrastructure facility on behalf of the Government is a contractor.

35. We find that the decision relied on by the learned counsel for the assessee in the case of CIT vs. Laxmi Civil Engineering works [supra] squarely applicable to the issue under dispute which is in favour of the assessee wherein it was held that mere development of a infrastructure facility is an eligible activity for claiming deduction under section 80IA of the Act after considering the Judgement of the Mumbai High Court in the case of ABG Heavy Engineering [supra]. The case of ABG is not the pure developer whereas, in the present case, the assessee is the pure developer. We also find that Section 80IA of the Act, intended to cover the entities carrying out developing, operating and maintaining the infrastructure facility keeping in mind the present business models and intend to grant the incentives to such entities. The CBDT, on several occasions, clarified that pure developer should also be eligible to claim deduction under section 80IA of the Act, which ultimately culminated into Amendment under section 80IA of the Act, in the Finance Act 2001, to give effect to the aforesaid circulars issued by the CBDT. We also find that, to avoid misuse of the aforesaid amendment, an Explanation was inserted in Section 80IA of the Act, in the Finance Act-2007 and 2009, to clarify that mere works contract would not be eligible for deductions under section 80IA of the Act. But, certainly, the Explanation cannot be read to do away with the eligibility of the developer; otherwise, the parliament would have simply reversed the Amendment made in the Finance Act, 2001. Thus, the aforesaid Explanation was inserted, certainly, to deny the tax holiday to the entities who does

only mere works contact or sub-contract as distinct from the developer. This is clear from the express intension of the parliament while introducing the Explanation. The explanatory memorandum to Finance Act 2007 states that the purpose of the tax benefit has all along been to encourage investment in development of infrastructure sector and not for the persons who merely execute the civil construction work. It categorically states that the deduction under section 80IA of the Act is available to developers who undertakes entrepreneurial and investment risk and not for the contractors, who undertakes only business risk. Without any doubt, the learned counsel for the assessee clearly demonstrated before us that the assessee at present has undertaken huge risks in terms of deployment of technical personnel, plant and machinery, technical knowhow, expertise and financial resources. Further, the order of Tribunal in the case of B.T.Patil cited supra is prior to amendment to sec 80IA(4), after the amendment the section 80IA(4) read as (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility, prior to amendment the "or" between three activities was not there, after the amendment "or" has been inserted w.e.f. 1-4-2002 by Finance Act 2001. Therefore, in our considered view, the assessee should not be denied the deduction under section 80IA of the Act as the contracts involves, development, operating, maintenance, financial involvement, and defect correction and liability period, then such contracts cannot be called as simple works contract. In our opinion the contracts which contain above features to be segregated and on this deduction u/s. 80-IA has to be granted and the other agreements which are pure works contracts hit by the explanation section 80IA(13), those work are not entitle for deduction u/s 80IA of the Act. The profit from such contracts which involves development, operating, maintenance, financial involvement, and defect correction and liability period is to be computed by assessing officer on pro-rata basis of turnover. The assessing officer is directed to examine and grant deduction on eligible turnover as directed above. It is needless to say that in similar circumstances, similar view has been taken by the Chennai Bench of the Tribunal and deduction u/s. 80IA was granted in the case of M/s. Chettinad Lignite Transport Services (P) Ltd., in ITA No. 2287/Mds/06 order dated 27th July, 2007 for the assessment year 2004-05. Later in ITA No. 1179/Mds/08 vide order dated 26th February, 2010 the Tribunal has taken the same view by inter-alia holding as follows:

"7. Moreover, the reasons for introducing the Explanation were clarified as providing a tax benefit because modernisation requires a massive expansion and qualitative improvement in infrastructures like expressways, highways, airports, ports and rapid urban rail transport systems. For that purpose, 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 work contract has been encouraged by giving tax benefits. Thus the provisions of section 80IA shall not apply to a person who executes a works contract entered into with the undertaking or enterprise referred to in the section but where a person makes the investment and himself executes the development work, he carries out the civil construction work, he will be eligible for the tax benefit under section 80IA."

36. The above order was followed in subsequent assessment years 2007- 2008 & 2008-09 in ITA Nos. 1312 & 1313/Mds/2011 vide order dated 18.11.2011 in the case of the same assessee. Further, in similar circumstances, this Tribunal in the case of M/s. GVPR Engineers Ltd. Hyderabad in ITA No. 347/H/08 & others vide order dated 29th February 2012 has taken similar view and granted deduction under section 80IA of the act.

37. Further, we make it clear that where the assessee has carried out the development of infrastructure work in Consortium and not as a subcontractor, then also the assessee is entitled for deduction u/s 80IA of the Act. The same is applicable in case of work allotted by Government Corporation/Government Bodies. 38. Further in the case of R.R. Constructions, the Chennai Bench of the Tribunal in its order dated 3.10.2011 in I.T.A. No. 2061/Mds/2010 for assessment year 2007-08 held as follows:

"3. We have heard rival submissions and have carefully perused the entire record. The first issue of the appeal is regarding claim of deduction under section 80IA(4) of the Act. The case of the revenue is that the assessee is a 'works contractor' and not a 'developer' as stipulated under section 80IA(4) of the Act. The section 80IA(4) applies to any enterprise, which carries on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facilities, which fulfil all the above conditions. There cannot be any question of providing a condition for such an enterprise to start operating and maintaining the infrastructure facility on or after 01.04.1995. From the assessment year 2000-01, deduction is available if the assessee is carrying out the business of any one of the above mentioned three types of activities. When an assessee is only developing an infrastructure facility project and is not maintaining nor operating it, obviously such an assessee will be paid for the cost incurred by it; otherwise, how will the person, who develops the infrastructure facility project, realize its cost? If the infrastructure facility, just after its development, is transferred to the Government, naturally the cost would be paid by the Government. Therefore, merely because the transferee had paid for the development of infrastructure facility carried out by the assessee, it cannot be said that the assessee did not develop the infrastructure facility. If the interpretation done by the Assessing Officer is accepted, no enterprise carrying on the business of only developing he infrastructure facility would be entitled to deduction under section 80IA(4), which is not the intention of the law. An enterprise, who develop the infrastructure facility is not paid by the Government, the entire cost of development would be a loss in the hands of the developer as he is not operating the infrastructure facility. The legislature has provided that the income of the developer of the infrastructure project would be eligible for deduction, it presupposes that there can be income to developer i.e. to the person who is carrying on the activity of only development infrastructure facility. Ostensibly, a developer would have income only if he is paid for the development of infrastructure facility, for the simple reason that he is not having the right/authorization to operate the infrastructure facility and to collect toll there from, has no other source of recoupment of his cost of development. While filing the return, the assessee had made claim under section 80IA(4) of the Act.

4. The assessee has also produced all six agreements regarding six projects undertaken before the Assessing Officer, whose copies are available before us also. It is a fact that even after taking a contract from the Government, if the assessee develops infrastructure facilities, it would be regarded as a 'developer' and not as a 'works contractor'. The assessee firm has carried on entire construction/development of the infrastructure facilities and satisfy all the conditions of section 80IA(4)(i)(a). It is undeniable fact that the assessee has taken development of infrastructure facility agreement from the State Government/local authority. A contractor who develops the infrastructure facility becomes a developer to claim exemption under section 80IA(4). The Hon'ble Bombay Bench of ITAT while deciding the case of Patel Engineering Ltd. vs. DCIT in ITA No.1221/Mum/2004 has gone to the extent of holding that the assessee, a civil contractor, having executed a part of contracts of irrigation and water supply on 'build and transfer' basis and handed over them to contractee Governments, was eligible for deduction under section 80IA(4).

5. We have also taken a similar view in ITA No. 554/Meds/2010 in the case of East Coast Constructions & Industries Ltd v. DCIT vide order dated 13.09.2011 and relevant paras from 9 to 14 are reproduced hereunder:

"9. After considering the rival submissions, we can safely say that the benefit of section 80IA is available only to a 'developer' who carries on business of 'developing of infrastructure facility'. A person who enters into contract with another person for executing 'works contracts' is not eligible for such a benefit. Explanation to section 80IA was inserted by Finance Act, 2007 with retrospective effect from 1.4.2000 which has further been amended by Finance (No. 2) Act, 2009 with retrospective effect from 1.4.2000. The amendment in this Explanation was necessitated due to contrary judicial decision on this issue. Thus, we can unequivocally now say that any

undertaking or enterprise which executes the infrastructure development project, as referred to in sub-section(4) as a works contract awarded by any person including the Central or State Government, is not eligible for tax benefit u/s 80IA(4). Having said that, now we examine the facts of this case. The assessee company was given this benefit in assessment year 2003-04 by the Department on identical facts after considering the Explanation and amendment thereto. To trace the history of this deduction, we find that originally, in the provision of section 80IA, there was no mention of any development of 'infrastructure facility'. It is only with effect from 1.4.2000, this section was divided into two portions 80IA and 80IB. Section 80IA(4) prescribes about the deduction available to a developer who develops infrastructure facilities. In view of the amendment inserted by the Finance Act, 2007, with retrospective effect from 1.4.2000, the deduction u/s 80IA is available to those assessees who are 'investing and developing infrastructure facility' and not to persons who simply executes 'works- contracts'. Explanation in question, as it stands today, reads as under:

"Explanation - For the removal of doubts, it is hereby declared that nothing contained in this section(i.e. 80IA) shall apply to a person who executes a works contract entered into with the undertaking or enterprise, as the case may be."

In contrast to this, a person who enters into a contract with another person (i.e., undertaking or enterprise referred to in section 80-IA) for executing works contract, will not be eligible for tax benefit under section 80- IA.

10. We have found that the assessee-company is a works contractor, who has entered into agreement with the local bodies to execute certain part of the work awarded to it through contract for infrastructure facility. It is true that where a person who makes infrastructure and himself executes development work and carries out civil work will be eligible for tax benefit u/s 80IA of the Act. In contrast to this, a person who enters into a contract with another person for executing works contract, will not be eligible for tax benefit u/s 80IA. It was clarified by the Circular No. 3 of 2008 dated 12.3.2008 that the provisions of section 80IA shall not apply to a person who executes only work contracts and only those who make the development work will be eligible for tax benefit u/s 80IA of the Act. Be that as it may, when we apply this provision in its letters and spirit, we find that this assessee is verily eligible for deduction u/s 80IA, as the assessee-company fulfils all the relevant conditions. The facts of this case go to prove that the assessee is a 'developer' of infrastructure facilities. The reasons for our above conclusion are given in the following paras. Firstly, the assessee-company not only designs but also creates new products. The assessee had undertaken four projects during the relevant year and executed, constructed, delivered and maintained by it. As per the definition of Advanced Law Lexicon [placed at page 533 of the paper book] "Developer" means - a person engaged in development or operation or maintenance of Special economic Zone, and also includes any person authorized for such purpose by any such developer. The "works contract" means an agreement in writing for the execution of any work relating to construction, repair, or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, workshop, powerhouse, transformers or such other works of the State Government or public undertakings as the State Government may be by notification, specify in this behalf at any of its stages entered into by the State Government or by an official of the State Government or public undertaking and includes an agreement for the supply of goods or material and all other matters relating to execution of any of the said works. The case of ACIT vs Indwell Lianings Pvt. Ltd (supra), on which the Assessing Officer has placed reliance is also relevant and we extract certain relevant portion of this decision for ready reference:

Vide Finance Act, 2007, an Explanation was inserted with retrospective effect from April, 2000 after sub-section (13) of section 80- IA, 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."

According to Attorney's Pocket Dictionary, in relation to a corporation or business, the term "undertaking" denotes its whole enterprise and the word "enterprise" connotes all the related activities performed either through unified operation or common control by any person or persons for a common business purpose.

The mens legis with reference to developer of infrastructure facility can be gathered from the memorandum explaining the provisions in the Finance Bill, 2007, reported in [2007] 289 ITR (St.) 292 at page 312, which reads as under :

"Section 80-IA, inter alia, provides for a ten-year tax benefit to an enterprise or an undertaking engaged in development of infrastructure facilities, industrial parks and special economic zones.

The tax benefit was introduced for the reason that industrial modernization requires a passive 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.

Accordingly, it is proposed to clarify that the provisions of section 80-IA shall not apply to a person who executes a works contract entered into with the undertaking or enterprise referred to in the said section. Thus, in a case where a person makes the investment and himself executes the development work, i.e., carries out the civil construction work, he will be eligible for tax benefit under section 80- lA. In contrast to this, a person who enters into a contract with another person (i.e., undertaking or enterprise referred to in section 80-IA) for executing works contract, will not be eligible for tax benefit under section 80- IA.

This amendment will take retrospective effect from April I, 2000 and will accordingly apply in relation to the assessment year 2000-01 and subsequent years."

It is made abundantly clear that the prescription of section 80- IA shall not apply to a person who executes work contracts entered into with an undertaking or enterprise. Thus, in a case where a person who makes investment and himself executes development works and carries out civil works, will be eligible for tax benefit under section 80- IA of the Act. In contrast to this, a person who enters into a contract with another person for executing works contract will not be eligible for the tax benefit under section 80-IA of the Act.

In the present case, we find that the assessee was doing only contract works of in situ cement lining for water supply project of the Gujarat Water Supply and Sewerage Board. As such, the benefit of section 80-IA cannot be extended to the assessee. The decisions relied upon by the assessee were rendered prior to the amendment and as such not relevant for deciding this issue. We, therefore, restore the order of the Assessing Officer and reverse the order of the Commissioner of Income-tax (Appeals)."

11. To further elaborate the discussion on this issue, paras 5 & 6 of the decision of ITAT Pune Bench rendered in the case of Laxmi Civil Engg. P. Ltd vs Addl. CIT,order dated 8.6.2011 are being extracted herein below:

5. We heard both the parties and perused the orders of the revenue. The contentious issues before us are (i) whether the contractor is synonymous with the developer within the meaning of section 80IA (4)(i) of the Act; (ii) whether the condition

placed in clause (c) is applicable to the case of a developer, who is not carrying on business of operating and maintaining the infrastructural facilities. In our opinion, the answer to these question are provided by the judgment of the Bombay High Court in the case of ABG Heavy Engg Ltd (supra). In this regard, we perused the above cited para-22 of the said judgment and for the sake of completeness, the said paragraph is reproduced as under:-

"22. The submission which was urged on behalf of the Revenue is that 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 1st April, 1995. The same requirement is embodied in sub clause (1) of sub-clause (4) of the amended provisions. It was urged that since the assessee was not operating and maintaining the facility, he did not fulfil the condition. The submission is fallacious both in fact and in law. "

That the assessee was maintaining the facility is not in dispute. The facility was commenced after 1st April, 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 1st April, 1995. After Section 80IA was amended by the Finance Act, 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 enterprises by a company registered in India or by a consortiums; (II) an agreement with the central or State Government, local authority or statutory body; and (III) the Start of operation and maintenance of the infrastructure facility should commence after 1st April, 1995. The requirement that operation and maintenance of the infrastructure facility should commence after 1st April, 1995 has to be harmoniously construed with the main provision under which deduction is available to an assessee who develops or operates and maintains, or develops, operates and maintains an infrastructure facility".

A harmonious reading of the provisions in its entirety would lead to the conclusion that the deduction is available to an enterprise which (i) develops, or operates and maintains; or (iii) develops, maintain and operates that infrastructure facility. However, the commencement of the operation and maintenance: of the infrastructure facility should be after 1" April, 1995. In the present case the assessee clearly fulfilled this condition ".

Before the amendment that was brought about by parliament by Finance Act, 2001 we have already noted that the consistent line of circulars of the Board postulated the same position. The amendment made by Parliament to S. 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

6. The above judgment of the Hon'ble High Court is delivered in the case of ABG Heavy Engg Ltd (supra), who is a contractor for the INP Trust and that contactor, assessee is found to be an eligible developer for making claim of deduction u/s section 80IA (4) of the Act. From the above, it is evident that the person who only develops the infrastructure do not have the occasion to operate and maintain the infrastructure. It is further evident that the harmonious reading is necessary and mandatory in view of High Court's judgment in the case of an enterprise carrying on business or developing which is the case of the assessee, all the conditions referred to clause (i) of section 80IA (4) should refer to the conditions as applicable to the developer. In other words, the developer who is only developing the infrastructure facilities since he does not operate and maintain Infrastructural facilities, cannot ITA be expected to fulfil the condition at sub clause (c) which is an impossibility and the requirements to fulfil the said condition shall amount to absurdity and therefore uncalled for. Therefore, we find requirement of harmonious reading of sub-clause (c) vis-à-vis of clause (i) of section 80IA (4) of the Act. Thus, the discussion in High Court's decision in paragraph-22 extracted above, is

directly applicable to the facts of the case and eventually is entitled for the deduction under section 80IA (4) of the Act. Accordingly, the modified ground, which is common in all the four appeals is allowed in favour of the assessee. "

12. Let us remind ourselves that the Hon'ble Supreme Court in the case of Bajaj Tempo Ltd vs CIT, 196 ITR 188, has ordained that taxing statute granting incentives for promoting growth and development should be liberally construed.

13. Now, the question arises as to whether the term 'contractor' is not essentially contradictory to the term 'developer'. In fact, in every development the term 'developer' will definitely be a 'works contractor' but every works contractor may not be a 'developer'. A 'developer' is a specific kind of works contractor to be eligible for deduction u/s 80IA(4) who fulfils all the conditions namely, if the assessee develops the infrastructure facility if it operates the infrastructure facility and if it maintains the infrastructure facility or to put it in simpler terms, the harmonious reading of the provisions in its entirety would lead to the conclusion that this deduction is available to an enterprise who - develops or operates and also maintains; or develops, maintains and operates that infrastructure facility. The provision for giving the impugned incentives has been examined, re-examined, modified and amended after giving conscious and deliberate discussions by the concerned law makers. To our great chagrin even after this conscious exercise an entity who executes the works contract entered into between local authority/Central or State Government and makes a development of an infrastructure has not been excluded from the scope of this provision. And rightly so, because what infrastructure is required in public domain is the outlook/duty of a local authority or of a Central/State government. When a certain infrastructure is needed, the concerned authorities have a broader picture in their mind aiming at acquiring certain facility for which infrastructure development is required. So, to say, when any assessee/enterprise agrees under a contract to develop such an infrastructure facility, it cannot straight away be dubbed as not the brainchild of that enterprise, but only of the authority in question. Therefore, again this provision in so far as the conditions required to be fulfilled to be eligible for this incentive had to be provided by the juridical forums dealing with this issue. After in-depth deliberations, discussions and examination of these provisions, finally, it has been resolved that if an enterprise even after entering into a contract with a local authority or the Governments, may be Central or State, in case it constructs the infrastructure facility, operates it and also maintains the same, it would be eligible for this deduction

14. Now, let us examine the facts of the given case. It is an undeniable fact that the assessee is engaged in the civil construction work like construction of flyover, bridge underpass, sewerage, water supply etc. for various local bodies, railways, Central/State Governments. In fact, as per the terms of agreement, even the initial proposals formulated by the Department which are stated to be tentative, the assessee has the liberty to make different proposals without detrimental to the general features of the Departmental proposal, like Road level/bottom of deck level, MFL, Sill level, Linear water way, width of the bridge etc. Right from the drawings to the work of construction has been done by this assessee and has borne the cost itself. The company has constructed, delivered and maintained and security is also maintained thereafter. So, this is a case of transfer of property in chattel and not a contract of service. A 'developer' as per the Advanced Law Lexicon means "a person engaged in development or operation or maintenance of Special Economic Zone, and also includes any person authorized for such purpose by any such developer". In the case of ACIT vs Bharat Udyog Ltd, 'F' Bench of ITAT Mumbai, has concluded that any assessee who is engaged in developing the infrastructure facility and also operating and maintaining the same, is entitled to the benefit of deduction u/s 80IA(4). A copy of this decision is enclosed at page 139 of the paper book. In the case of Patel Engineering Ltd vs Dy. CIT, 84 TTJ (Mumbai) 646 [copy enclosed at page No. 145 of the paper book], it has been held that a person, who enters into a contract with another person will be treated as a 'contractor' undoubtedly; and that assessee having entered into an agreement with the Government of Maharashtra and also with APSEB for development of the

infrastructure projects, is obviously a contractor but does not derogate the assessee from being a 'developer' as well. The term 'contractor' is not necessarily contradictory to the term 'developer'. On the other hand, rather section 80IA(4) itself provides that assessee should develop the infrastructure facility as per the agreement with the Central Government, State Government or a Local Authority. So, entering into a lawful agreement and thereby becoming a contractor should in no way be a bar to the one being a 'developer'. The assessee has developed infrastructure facility as per the agreement with Maharashtra Government/APSEB, therefore, merely because in the agreement for development of infrastructure facility the assessee is referred to as a contractor or because some basic specifications are laid down, it does not detract the assessee from the position of being a 'developer'; nor will it debar the assessee from claiming deduction u/s 80IA(4). The facts of the present case are exactly identical to the facts of that case rendered by ITAT Mumbai Bench in which under identical facts and circumstances, the assessee has been held to be eligible for deduction u/s 80IA(4). Section 80IA(4)(i)(b) requires development of infrastructure facility and transfer thereof as per agreement and it cannot be disputed in view of the material on record that the assessee has transferred the infrastructure facility developed by it by handing over the possession thereof to the concerned authority as required by the agreement. The handing over of the possession of developed infrastructure facility/project is the transfer of the infrastructure facility/project by the assessee to the authority. The handing over of the infrastructure facility/project by the developer to the Government or authority takes place after recoupment of the developer's costs whether it be "BT' or 'BOT' or 'BOOT' because in 'BOT' and 'BOOT' this recoupment is by way of collection of toll there from whereas in 'BT' it is by way of periodical payment by the Government/Authority. The land involved in infrastructure facility/project always belongs to the Government/Local authority etc., whether it be the case of 'BOT' or 'BOOT' and it is handed over by the Government/Authority to the developer for development of infrastructure facility/Project. The same has been the position in the given case as well. So, deduction u/s 80IA(4) is also available to this assessee which has undertaken work of a mere 'developer'. Rather, the statutory provision as contained in section 80IA which provides for deduction of infrastructure facility no way provides that entire infrastructure facility project has to be developed by one enterprise. Thus, as per section 80IA the assessee should develop the infrastructure facility as per the agreement with the Central/State Government/Local Authority. Entering into a lawful agreement and thereby becoming should, in no way be a bar to the one being a 'developer'. In this regard, as we have already stated, the decision of ACIT vs Bharat Udyog Ltd, 118 ITD 336 and Patel Engineering Ltd vs Dy. CIT, 84 TTJ 646, are relevant. As per Circular No. 4/2010[F.No. 178/14/2010-ITA-I] dated 18.5.2010, widening of existing roads constitutes creation of new infrastructure facility for the purpose of section 80IA(4)(i) . The assessee is not required to develop the entire road in order to qualify for deduction u/s 80IA as has been held by the Hon'ble Bombay High Court in the case of CIT vs ABG Heavy industries Ltd, 322 ITR 323. The newly inserted Explanation 2 to section 80IA vide Finance Act, 2007, does not apply to a works contract entered into by the Government and the enterprise. It applies to a work contract entered into between the enterprise and other party 'the sub-contractor'. The amendment aims at denying deduction to the sub contractor who executes a work contract with the enterprise as held by the ITAT, Jaipur 'A' Bench in the case of Om Metal Infra projects Ltd vs CIT-I, Jaipur, in I.T.A. No. 722 & 723/JP/2008 dated 31.12.2008. The reliance by the ld. CIT(A) on the decision of ITAT, Chennai Bench in the case of ACIT vs Indwell Lianings Pvt. Ltd, 313 ITR(AT) 118, has been enlarged in its finding by the ITAT, Mumbai 'F' Bench in its decision rendered in the case of ACIT vs Bharat Udyog Ltd , by holding that such a deduction is only to be denied to a sub-contractor and not a mini contractor. Similar view has been taken by the ITAT Chennai Bench in the case of ACIT vs Smt. C. Rajini (supra) in which both of us constituted the Bench. In this decision the definition and difference between works contractor and a developer has been examined in detail. The main thrust of the decision is that a developer need not be the owner of the land on which development is made. Although that decision was rendered in the context of a developer of buildings and the deduction was in respect of 80IB(10), but the definition of 'developer' given in that case is also relevant for this purpose. Moreover, we are in agreement that in

incentive provisions, the construction should be liberally given as held by the Hon'ble Supreme Court rendered in the case of Bajaj Tempo Ltd vs CIT, 196 ITR 188. Thus, when the assessee makes investment and himself executes development work and carries out civil works, he is eligible for tax benefit u/s 80IA of the Act. Accordingly, with the foregoing discussion, we hold that the assessee is entitled to deduction u/s 80IA(4) of the Act, and therefore, we order to delete the addition made in this respect."

6. Therefore, by following the above arguments and reasoning, we confirm the findings of the ld. CIT(A) and do not find any valid merit in the Revenue's appeal. Accordingly, the appeal stands dismissed. 39. In view of the above discussion, we are inclined to partly allow the ground relating to claiming of deduction u/s. 80IA.of the Act in all these appeals."

On careful consideration of the rival submissions in the light of the material on record, we find that the assessee should succeed on this ground. A careful reading of the order of this Tribunal dated 16.3.2012, relevant portion of which has been extracted above, clearly indicates that the Tribunal has decided the issue in favour of the assessee. That being so, the Assessing Officer is not entitled, in the consequential proceedings, the scope of which is confined to giving effect to the order of the Tribunal, to sit in judgment over the view taken by the Tribunal on the issue in dispute, and if at all there is any grievance on account of the finding given by the Tribunal on the point at dispute, it should pursue the other appellate legal remedies provided in the statute itself, but cannot dilute the direction of the Tribunal. Accordingly, respectfully following the said order of the Tribunal dated 16.3.2012, we are inclined to hold that the assessee is entitled to deduction under S.80IA of the Act. We hold accordingly and allow the ground of the assessee on this issue."

Following the above findings of the coordinate bench, we dismiss the grounds of revenue.

8. As regards the 4th ground of revenue, it is observed that the assessee had not maintained separate books of account to claim benefit u/s 80IA, hence, the assessee cannot claim deduction u/s 80IA relying on the Apex Court judgment in case of Arisudhana Spinning Mills Ltd. Vs. CIT. In the above case, the assessee had not maintained separate books for manufacturing and trading activities. The Apex Court upheld the findings of the Hon'ble High Court and ITAT that assessee should have maintained separate books for trading activities. The manufacturing and trading are two different activities and as per the apex court decision, assessee should have maintained separate books to claim deduction u/s 80IA. Whereas in the present case, the assessee is in infra development activity, the nature of expenditures are similar and it is maintaining the books on contract basis and the revenue is recognized from long term construction contracts on the percentage of completion method as

mentioned in Accounting Standard (AS) – 7 'Construction Contracts' notified by the Companies Accounting Standard Rules, 2006. Percentage of completion is determined on the basis of surveys performed (Refer page 19 of the paper book). From the above, the profit generated by each project can be determined by applying the percentage of completion method under projects eligible for deduction u/s 80IA or non eligible projects. In our considered view, this cannot be the reason to deny the benefit to the assessee u/s 80IA of the Act. On analyzing the assessment order, AO had inferred from sub-section (5) of section 80IA of the Act, stated that to claim deduction u/s 80IA, the profit of eligible business should be computed as if such eligible business was only source of the income of the assessee during the previous year relevant to the AY. Thus, according to AO, the assessee is bound to maintain separate accounts for the works. Since the assessee is dealing in the numerous projects at the same time and also the projects are not time bound, it is impractical to present books of account on project wise and year wise. The method adopted by the assessee is based on the accounting standard approved by the ICAI. These standards are tested and proven method. Considering the above findings, we observe that assessee is following the proper method of accounting and appropriate books to claim deduction u/s 80IA of the Act. Therefore, we dismiss the 4th ground of the revenue.

9. In the result, appeal of the revenue is dismissed.

Pronounced in the open court on 4th December, 2015.

Sd/-	**Sd/-**
(P. MADHAVI DEVI)	**(RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Hyderabad, Dated: 4th December, 2015

kv

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The Departmental Representative, I.T.A.T., Hyderabad.

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1.	Draft dictated on			Sr.P.S.
2.	Draft placed before author			Sr.P.S
3	Draft proposed & placed before the second Member			AM
4	Draft discussed/approved by second Member			VP
5	Approved Draft comes to the Sr.P.S./PS			Sr.P.S.
6.	Kept for pronouncement on			Sr.P S.
7.	File sent to the Bench Clerk			Sr.P.S.
8	Date on which file goes to the Head Clerk			
9	Date of Dispatch of order			