

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH "A" KOLKATA**

Before **Shri N.V.Vasudevan, Judicial Member** and  
**Shri Waseem Ahmed, Accountant Member**

<b>ITA No.2777/Kol/2013</b> Assessment Year :2007-08
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DCIT, Circle-12, P-7, Chowringhee Square, Aayakar Bhawan, 7 <sup>th</sup> Flor, Kolkata-69	<b>V/s.</b>	M/s Simplex Infrastructure Ltd., 27, Shakespeare Sarani, Kolkata-700 017 [ <b>PAN No.AAECS 0765 R</b> ]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर स/By Appellant	Avinash Mishra, CIT-DR
प्रत्यर्थी की ओर स/By Respondent	Shri Ravi Tulsian, FCA
सुनवाई की तारीख/Date of Hearing	17-01-2017
घोषणा की तारीख/Date of Pronouncement	10-03-2017

**आदेश /ORDER**

**PER Waseem Ahmed, Accountant Member:-**

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals)-XII, Kolkata dated 18.09.2013. Assessment was framed by ITO Ward-12(2), Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 30.12.2009 for assessment year 2007-08.

Shri Avinash Mishra, Ld. Departmental Representative represented on behalf of Revenue and Shri Ravi Tulsian, Ld. Authorized Representative appeared on behalf of assessee.

2. The only grievance of the Revenue is that whether the Ld CIT(A) is justified in allowing the deduction claimed u/s 80IA(4) of the Act though the assessee does not fulfill conditions u/s 80-IA of the Act.

3. The facts in brief are that assessee in the present case is a Limited Company and engaged in the business of contract work as observed from the assessment order. During the year under consideration, assessee has claimed deduction u/s 80-IA of the Act in respect of the following projects:-

Sl. No	Contract No.	Name of the party for whom the assessee worked	Description of project	Amount of deduction claimed u/s. 80IA
1	C2067-2068	Kolkata Municipal Corporation	Sewerage	Rs.3,04,74,858/-
2	C2094-2104	Govt. of Assam	Flyover	Rs.17,08,66,992/-
3	C2130	Executive Engineer (Project), Bangalore	Construction of flyover	Rs.44,59,568/-
4	C2137	Haldia Dock Complex	Construction of one multipurpose berth within the impounded dock basin with heavy duty pavement, concrete road and drainage network at Haldia Dock Complex	Rs.22,29,536/-
5	C2175	Paradip Port Trust	Creation of additional facilities for oil jetty at Paradip Port	Rs.54,67,876/-
6	C2115	Airport Authority of India	Airport	Rs.11,66,613/-
7	C2124	National Highways Authority of India	Widening & strengthening to 4-lane of existing signal/intermediate lane carriageway of NH No.57 section from k. 159.357 to k. 174.382 in the state o Bihar on East West corridor under NHDP,Phase-II	Rs.2,11,90,048/-
8	C2172	Airport Authority of India	Construction of new International Terminal	Rs.50,34,767/-
				Rs.24,08,90,257

3.1 The aforesaid projects were awarded by Central / State Government / Local Authority / Statutory Body on turnkey basis. The Assessing Officer, during the course of assessment proceedings observed that assessee is acting as a contractor. Accordingly, AO opined that assessee is executing the projects as works contractor within the meaning of Explanation to Sec. 80IA of

the Act. On question by the AO for the non-deduction of deduction under section 80IA of the Act, the assessee submitted that the writ petition has been filed challenging explanation to Section 80IA of the Act in the Hon'ble jurisdictional High Court and further requested not to consider the effect of the explanation to Section 80IA of the Act till the disposal of writ petition. However, the AO observed that no further details was submitted by the assessee Hence, AO disallowed the deduction claim u/s 80-IA(4) for an amount of ₹15,98,85,0511/- and added to the total income of assessee.

4. Aggrieved, assessee preferred an appeal before the Ld CIT(A) who has allowed the deduction under section 80-IA of the Act by observing as under:-

*“Now, keeping in view the scheme of the tax holiday under sec. 80-1a and the provisions of the Act, the details furnished in respect of the work carried out by the appellant company during the year under consideration have been perused. The nature of work executed, including work relating to ports, air-ports, highway ad municipal corporation, all coming in the category of infrastructure facility from the perusal of the terms and conditions of all the agreements, it is abundantly clear that it is not a case where the appellant was provided with the establishment and materials required to execute the work, which happens in case of works contract where the contractor gets the material and other requisites from the client and all he has to do is employ labour. The appellant in the given case was to procure raw material, make arrangements for power, water, plant & machinery, obtain statutory clearances etc., and conduct all the other activities needed for construction to bring into existence an infrastructure facility. Further it was exposed to various risks like risk of damage of property, risk of accidents etc. therefore, having regard to the fact, and emerging legal position, in my view, the Assessing Officer was not justified in holding that the appellant company was merely executing works contract and therefore it was not entitled for the tax holiday benefit under section 80-IA(4) of the Act.*

*It my also be noted here that in the case of Patel Engineering Ltd. V. CIT [2004] 84 TTJ (Mum) 646, the Mumbai Bench of the Tribunal has held that the enterprise must carry on the business of (a) developing, or (b) maintaining and operating or (c) developing, maintaining and operating any infrastructure facility. It is not necessary that the entire infrastructure project is to be developed by one enterprise. In another case of CIT v. Bharat Udyog Ld. [2008] 24 SOT 412 (Mum), it has been held that if an assessee is engaged in developing infrastructure facility*

*(i.e road) but not engaged in “operating and maintaining” said facility, it can claim the benefits of deduction under section 80-IA. The ratio laid down in the reported cases are squarely applicable to the facts of the appellant’s case and hence the appellant being a developer of infrastructure facility discussed above is entitled for deduction under sec. 80-I of the Act.*

*It is also observed that there Hon'ble jurisdictional ITAT 'B' Bench, Kolkata in the cases of M/s Simplex Som Datta Builders J.V. vs. ITO Ward 33(4), Kolkata in Appeal No. 1684/Kol/2011 for AY 2007-08 and in the case of M/s Simplex Subhas J.V. vs. ITO Ward 33(4) Kolkata in Appeal No.1685/Kol/2011 for AY 2007-08, respectively vide their order dated 18.06.2013, held in para 11 & 12 of the order while deciding on the issue having identical set of facts of the cases that the assessee were entitled to get the benefit deduction u/s. 80IA of the Act as claimed them.*

*In the light of the above discussion and findings, perusing the facts of the case and respectfully following the principles laid down in various judicial pronouncements relied upon by the appellant on the issue as discussed above, it is held that the appellant company is engaged in development of infrastructure projects. Therefore, the appellant had acted as developer of the infrastructure facilities and has not acted merely as a work contractor, hence, it was entitled to get deduction under sec. 80-IA(4) of the Act as claimed by the appellant. The Assessing Officer is, thus, directed to allow the same accordingly. Hence, these grounds of appeal of the appellant are allowed.”*

Being aggrieved by this, Revenue has come up in appeal before us on the following grounds of appeal.

5. Before us both the parties relied in the order authorities below as favourable to them.

6. We have heard rival contentions and perused the materials available on record. At the outset we find that the instant issue is already covered in favour of assessee in its own case by the order of Hon'ble Kolkata Tribunal in **ITA No 2168/Kol/2013** vide order dated 08.02.2017. The relevant extract of the order is reproduced below :

“6. We have heard rival contentions and perused the materials available on record. From the foregoing discussion we find that the provisions of Section 80-IA of the Act applies to the enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfils all the following conditions, namely :-

- (a) It is owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;
- (b) It has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;
- (c) It has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995. Provided that where an infrastructure facility is transferred on or after the 1st day of April, 1999 by an enterprise which developed such infrastructure facility (hereafter referred to in this section as the transferor enterprise) to another enterprise (hereafter in this section referred to as the transferee enterprise) for the purpose of operating and maintaining the infrastructure facility on its behalf in accordance with the agreement with the Central Government, State Government, local authority or statutory body, the provisions of this section shall apply to the transferee enterprise as if it were the enterprise to which this clause applies and the deduction from profits and gains would be available to such transferee enterprise for the unexpired period during which the transferor enterprise would have been entitled to the deduction, if the transfer had not taken place.

6.1 From the above it is clear in order to avail deduction u/s 80-IA all the following conditions should be satisfied:

- (i) The assessee is a company or a consortium of companies;
- (ii) There exists an agreement with the Central Government, State Government, Local authority or any other statutory body and
- (iii) Pursuant to the agreement specified in point (ii) the company engages itself in any of the following activities:
  - (a) Development of infrastructure facility
  - (b) Operation and maintenance of infrastructure facility
  - (c) Development, operation and maintenance of infrastructure facility

6.2 Now the assessee in the given case is a company which, pursuant to agreements with various Government bodies, engaged itself in the development of infrastructure facility as defined in the Explanation to sub section 4 of section 80-IA . These set of facts have not been disputed by the AO. The Ld. AO disallowed the claim on the ground that the assessee has challenged the provisions of explanation to section 80IA of the Act to the Hon'ble High Court and the Court has restrained to enforce the demand that may be raised in pursuance to the explanation to section 80IA of the Act. There is no direction to keep the assessment proceedings under abeyance. The AO treated the assessee as a mere works contractor conducting mere

civil construction and hence as per the explanation to section 80- IA(13), the deduction is not available to him. However on examination of the records we find that the assessee has withdrawn the appeal filed before the Hon'ble High Court.

At this juncture attention in this regard is firstly invited to the provisions of the Explanation of Section 80-IA of the Act as produced below:

"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). "

From a plain reading of the above it is clear that deduction u/s 80-IA does not apply to works contract. Now the relevant question arises before us for adjudication is that what constitutes a works contract. Section 80-IA nowhere defines the term "**works contract**", hence the natural meaning of the word shall apply. As per the Oxford dictionary the term "work" means application of effort to a purpose or use of energy. Thus going by the dictionary meaning we may say that a works contract is a contract which involves effort or in other words labour of the contractor. Further as per the Black's Law Dictionary, the term "work" means labour or in other words physical and mental exertion to attain an end esp. as controlled by and for the benefit of the employer. Thus as per Blacks's Law also a works contract is a labour contract under which the contractor merely employs his labour as per the directions of the contractee. Further, attention is invited to relevant extracts of section 194C of the IT Act:

"(iv) "work" shall include-

(a) Advertising;

(b) Broadcasting and telecasting including production of programmes for such broadcasting or telecasting;

(c) Carriage of goods or passengers by any mode of transport other than by railways;

(d) Catering;

(e) Manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer, but does not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, other than such customer."

Thus as per section 194C also, "**works contract**" does not include a contract wherein the contractor in addition to employing labour, procures material from a third party. Thus, contracts involving mere labour of the contractor are included in the purview of "works contract". Further, attention is invited to the judgment of the Supreme Court in case of Associated Cement Co. Ltd. vs. CIT [201 ITR 435], wherein the Hon'ble Court while interpreting the term '**work**' u/s 194C held that

"Words `any work' in sub-s. (1) of s. 194C means any work including supply of labour to carry out work and is not intended to be confined to or restricted to works contract, therefore, a person who credits to the account of or pays to a

contractor any sum payable on behalf of organizations specified in s. 194C(1) for carrying out any work (including supply of labour for carrying out any work) is liable to deduct income-tax as required under that sub-section. The words in the sub-sections (1) of 194C 'on income comprised therein' appearing immediately after the words 'deduct an amount equal to two per cent of such sum as income-tax' from their purport, cannot be understood as the percentage amount deductible from the income of the contractor out of the sum credited to his account or paid to him in pursuance of the contract, but deduction is to be made out of payments made to the contractor."

6.3 We see no reason to curtail or to cut down the meaning of the plain words used in the section. "Any work" means any work and not a "**works contract**", which has a special connotation in the tax law. Indeed in the sub-section the "**work**" referred to therein expressly includes supply of labour to carry out a work. It is a clear indication of the Legislature that the "**work**" in the sub-section is not intended to be confined to or restricted to "**works contract**". The issue before the Supreme Court in the aforesaid case was whether the term "**work**" used in section 194C needs to be restricted to "works contract". The Apex Court laid out that the term "work" used in section 194C need not be restricted to "**works contracts**" (i.e. labour contracts) because the sub-section expressly includes supply of labour to carry out work. In other words, it is implied that works contract means supply of labour to carry out work. Thus from the above we may say that a works contract constitutes a contract under which the contractor is merely employing his efforts or labour. Under such a contract, the contractee provides the material and other requisites (a complete infrastructure) needed to carry out the desired work to the contractor who by applying his labour to the said material turns the material into a desired product. Further, attention is invited to 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 {or encouraging private sector participation by way of investment in development of the infrastructure sector and not {or 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- IA of the Act. 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 1<sup>st</sup> April 2000 and will accordingly apply in relation to the assessment year 2000-01 and subsequent years. The Explanatory Memorandum clearly lays out that purpose of extending tax benefit u/s 80-IA was to encourage investments from the private sector and hence work contracts, i.e. contracts involving merely labour (or mere execution of construction without making investments) are outside the purview of the provisions of section 80-1A. Thus, the term "**works contract**" used in Explanation to section 80-IA(13) means a contract of developing infrastructure by merely employing labour and making no investments. We also find support from the following judgments:

The Hyderabad bench of Tribunal in case of M/s. GVPR Engineers Ltd. Vs. ACIT (2012) 32 CCH 0296 HydTrib (2012) 51 SOT 0207 (Hyd) (URO). The relevant extract of the order is reproduced as under :

*"The next question to be answered is whether the assessee is a developer or mere works contractor. 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. 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 department is not correct in holding that the assessee is a mere contractor of the work and not a developer."*

6.4 *It was also observed that "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.*

*Similarly the Chennai Bench of Tribunal in case of R.R. Constructions, Chennai vs Department Of Income Tax 2013) 35 CCH 0547 Chen Trib (2015) 152 ITD 0625 (Chennai) held that "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"*

*Thus, the memorandum explaining the provisions in the Finance Bill, 2007, further strengthens the contention of the assessee that a works contract is a contract which involves mere labour of the contractor. However, if under a contract, the contractor employs his capital and enterprise in addition to labour, then the said contract does not constitute a works contract under the Explanation to section 80-IA(13) and the contractor shall be eligible for deduction U/S 80-IA. Now coming to the facts of the case, it is submitted that the assessee was not mere works contractor, who had merely employed its labour under the projects from the various government authorities. The assessee was a developer. In addition to employing labour it made investments, it developed an enterprise/infrastructure to support the work under the various projects. In addition to labour, it deployed its machinery, materials and did all the things necessary (i.e. provided an enterprise) to support the construction work undertaken under the various projects. The assessee was provided with the site alone and by putting its own inputs (not labour alone) he converted the site into an infrastructural facility.*

6.5 *Further, ITAT (Hyderabad) in case of Siva Swathi Constructions Pvt. Ltd. vs DCIT, Circle-3(2) in ITA No.1008-09/Hyd/2013 for AYs 2009-10 & 2010-11 dated 25.10.2013 held that "The next reason given by the CIT(A) is with regard to non- financial participation by the assessee, as the assessee has got mobilization advance. The mobilization advance has not been given freely. It has been given only after the assessee furnished a bank guarantee, and the bank guarantee has been given by the bank only after getting enough*

security from the assessee, to protect itself from any risk on account of any default on the part of the assessee. The assessee has taken financial assistance from bank and paid huge interest of Rs. 2,87,10,943.00 for assessment year 2009-10 and of Rs. 9,35,78,373.00 for assessment year 2010-11, as seen from the Profit and Loss Account of the assessee for the relevant years ending on 31.3.2009 and 31.3.2010 respectively, copies of which are furnished by the assessee at pages 20 and 65 of the paper-book. Similarly, assessee has invested its own fund of Rs.5,55,00,000.00 for assessment year 2009-10 and of Rs. 7,86,75,710.00 for the assessment year 2010-11, as seen from the Balance Sheet of the assessee as on 31.3.2009 and 31.3.2010 respectively, copies of which are furnished by the assessee at pages 21 and 66 of the paper-book. In this view of the matter, the reason given by the CIT(A) on this aspect for denying deduction to the assessee under S.80-IA is also not valid.

Thus in light of the aforesaid decision of the Tribunal Hyderabad Bench, the contention of the AO is not valid. Further, merely because the assessee was receiving payments from the Government in progress of work it cannot be said that the projects were financed by Government. In this regard it is pointed out that under sub-section 4 of section 80-IA, deduction is available to a developer, i.e. if, an assessee, merely develops the infrastructure facility without operating and maintaining the same, it is entitled to deduction. The Bombay High court in case of Commissioner of Income-tax v. ABG Heavy Industries Limited [322 ITR 323] observed that "Parliament amended the provisions of section 80-IA of the Act so as to clarify that in order to avail of a deduction, the assessee could (i) develop ; or (ii) operate and maintain ; or (iii) develop, operate and maintain the facility. The condition as regards development, operation and maintenance of an infrastructure facility was contemporaneously construed by the authorities at all material times, to cover within its purview the development of an infrastructure facility under a scheme by which an enterprise would build, own, lease and eventually transfer the facility. "

"This was perhaps a practical realisation of the fact a developer may not possess the wherewithal, expertise or resources to operate a facility, once constructed Parliament eventually stepped in to clarify that it was not invariably necessary for a developer to operate and maintain the facility. Parliament when it amended the law was obviously aware of the administrative practice resulting in the circulars of the Central Board of Direct Taxes. The fact that in such a scheme. An enterprise would not operate the facility itself was not regarded as being a statutory bar to the entitlement to a deduction under section 80-IA of the Act. "

6.6 From the above it is clear that even if an assessee is merely developing the infrastructural facility (without operating and maintaining the same), it is entitled to deduction u/s 80-1A. Further, condition (b) laid out in sub-section 4 of section 80-IA mandates the existence of an agreement with the Government. Moreover, if section 80-IA grants deduction on profits from the activity of development carried out in pursuance of an agreement with the Government it presupposes that assessee will earn some profits from mere development (without operating and maintaining) of the infrastructure facility.

Now the relevant question that arises here is that how would an assessee engaged in mere developmental activity (and no operation) pursuant to an agreement with the Government earn profits? The obvious answer is that the assessee will recover its cost of development from the Government otherwise the entire cost of development will be a loss in its hands. Thus, if deduction u/s 80-IA is denied on the ground that the assessee had received payments from Government, then an assessee who is only a "**developer**" (and not an operator) will never be entitled to deduction u/s 80-IA, which is clearly not the intention of legislature as discussed by the Bombay High Court in case of ABG Heavy Industries Ltd. Thus, merely because the assessee was paid by the Government for development work it cannot be denied deduction under section 80-IA(4). The contention of the assessee finds strength from the following judgments:

The ITAT (Mumbai) in case of ACIT v. Bharat Udyog Ltd. (2009) 123 TTJ 0689 : (2009) 23 DTR 0433 : (2009) 118 ITD 0336 : (2008) 24 SOT 0412

"After the amendment effected by Finance Act, 1999 w.e.f. 1st April, 2000, the deduction under s. 80-IA(4) has become available to any enterprise carrying on the business of (i) developing, or (ii) maintaining and operating, or (iii) developing, maintaining and operating any infrastructure facility. Sub-cl. (c) of cl. (i) of s. 80-IA(4) is obviously applicable to an enterprise which is engaged in 'operating and maintaining' the infrastructure facility on or after 1st April, 1995. It is not applicable to the case of an enterprise which is engaged in mere 'development' of infrastructure facility and not its 'operation' and 'maintenance'. Therefore, the question of 'operating and maintaining' of infrastructure facility by such enterprise before or after any cut off date cannot arise. However, if the contention of the Departmental Representative is accepted, it would obviously/understandably lead to manifestly absurd results. When the Act provides for deduction undisputedly for an enterprise who is only 'developing' the infrastructure facility, unaccompanied by 'operating and maintaining' thereof by such person, there cannot be any question of providing a condition for such an enterprise to start operating and maintaining the infrastructure facility on or after 1st April, 1995. Since the assessee is only a developer of the infrastructure project and it is not maintaining and operating the infrastructure facility, sub-cl. (c) of cl. (i) of sub-s. (4) of s. 80-IA is not applicable. The interpretation of Revenue is absurd also in view of the rationale of the provisions of s. 80-IA(4)(i). From the asst. yr. 2000-01, deduction is available if the assessee carries on the business of any one of the 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, realise 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 has 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 canvassed by the Revenue authorities is accepted, no enterprise, carrying on the business of only developing the infrastructure facility, would be entitled to deduction under s. 80-IA(4), which is not the intention of the law. If a person who only develops 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. When 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 developing infrastructure facility. Obvious as it is, a developer would have income only if he is paid for development of infrastructure facility, for the simple reason that he is not having the right/authorisation to operate the infrastructure facility and to collect toll therefrom, and has no other source of recoupment of his cost of development. Considered as such, the business activity of the nature of build and transfer also falls within eligible construction activity, that is, activity eligible for deduction under s. 80-IA inasmuch as mere **'development'** as such and unassociated/ unaccompanied with 'operate' and 'maintenance' also falls within such business activity as is eligible for deduction under s. 80-IA. Therefore, merely because the present assessee was paid by the Government for development work, it cannot be denied deduction under s. 80-IA(4). A person who enters into a contract with another person will be a contractor no doubt; and the assessee having entered into an agreement with the Government agencies for development of the infrastructure projects, is obviously a contractor but that does not derogate the assessee from being a developer as well. The term "**contractor**" is not essentially contradictory to the term "**developer**". On the other hand, rather s. 80-IA(4) itself provides that assessee should develop the infrastructure facility as per 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. Therefore, merely because in the agreement for development of infrastructure facility, assessee is referred to as 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 under s. 80-IA(4). Therefore, an assessee who is only engaged in the developing the infrastructural facility i.e., road and not engaged in the 'operating and maintaining' the said facility is entitled to the benefits of the deduction under s. 80-IA(4).—Patel Engineering Ltd. vs. Dy. CIT (2004) 84 TTJ (Mumbai) 646 **followed**. Provisions of sub-cl. (c) of cl. (i) of s. 80-IA(4) are inapplicable to the assessee which is engaged in mere developing of the infrastructure facility and, therefore, an assessee who is only engaged in developing the infrastructure facility and not in 'operating and maintaining' the said facility is entitled to the benefit of deduction under s. 80-IA(4); merely because assessee is referred to as 'contractor' in the agreement for development of infrastructure facility or

*some basic specifications are laid down, would not debar the assessee from claiming deduction under s. 80-IA(4)."*

*If a person who only develops the infrastructure facility was not paid by the Government, the entire cost of development would be a loss in the hands of the developer as he was not operating the infrastructure facility. Merely because the assessee was paid by the Government for development work it could not be denied deduction under section 80-IA(4). The Chennai Bench of Tribunal in case of R.R. Constructions, Chennai vs. Department of Income tax held that "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, which develops 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.*

*The Indore Bench of the Tribunal in case of Saneer Infrastructure Pvt. Ltd. vs. ACIT [138 ITD 433] held that "As per our considered view, after amendment by the Finance Act, 2002 for claim of deduction u/s 80IA(4) infrastructure facility is only required to be developed and there is no condition that assessee should also operate the same. Thus, after amendment, when the assessee is not required to operate the facility, the payment for development of such infrastructure is required to be made by the Government only.*

*"After amendment, when assessee undertakes to develop the infrastructure facility only, it is the Government who will make payment to assessee in respect of infrastructure facility developed by it in terms of agreement so entered with Government. Thus, we do not find any infringement of conditions {or claim of deduction"*

6.7 Thus from the above, it is clear that the fact that the assessee had received payments from the Government in progress of its work has no bearing on eligibility of deduction u/s 80- IA. Further, the Revenue in all the grounds has contended that the contracts entered into by the assessee were merely '**construction contracts**' since the assessee is not exposed to any

entrepreneurial and investment risk. In this regard, the AO has observed that the assessee is executing the contract against predetermined revenue w.r.t the above, it is submitted that under the impugned contracts, the assessee was merely carrying out the civil construction work. It was responsible for overall development of the infrastructure facility. It was merely provided with the site which it had to develop into an infrastructural facility by deploying his resources i.e. material, plant & machinery, labour, supervisors etc. It was responsible for any damage/loss caused to any property or life in course of execution of the works. It was even responsible for remedying of the defects in the works at its cost. It was also required to operate and maintain the infrastructure facility. Hence, it cannot be said that the contract with the Government was to carry out mere civil construction. Attention in this regard is invited to the following:

(i) The ITAT (Ahmedabad) in case of Sugam Construction (P) Ltd. vs. ITO [56 SOT 45] held that "It is also gathered (a) That a developer is a person who undertakes the responsibility to develop a project. (b) That a developer is therefore not a civil contractor simplicitor. (c) That if we apply the commercial aspect, then a developer has to execute both managerial as well as financial responsibility. (d) That the role of a developer, according to us, is larger than that of a contractor. (e) That when a person is acting as a developer, then he is under obligation to design the project, it is another aspect that such design has to be approved by the owner of the project, i. e. the Government in the present case. (f) That he has not only to execute the construction work in the capacity of a contractor but also he is assigned with the duty to develop, maintain and operate such project. (g) That to ascertain whether a civil construction work is assigned on development basis or contract basis can only be decided on the basis of the terms and conditions of the agreement. Only on the basis of the terms and conditions it can be ascertained about the nature of the contract assigned that whether it is a "**work contract**" or a "**development contract**". (h) That in a development contract" responsibility is fully assigned to the developer for execution and completion of work. (i) That although the ownership of the site or the ownership over the land remains with the owner but during the period of development agreement the developer exercise complete domain over the land or the project. That a developer is not expected to raise bills at every step of construction but he is expected to charge the cost of construction plus mark-up of his profit from the assignee of the contract. (k) That a developer is therefore expected to arrange finances and also to undertake risk. (l) That in contrast to the rights of a "**contractor**" a "**developer**" is authorized to raise funds either by private placement or by financial institutions on the basis of the project. These are few broad qualities of a developer through which the character of a developer can be defined. "

(ii) ITAT(Hyderabad) in case of Koya and Co. Construction (P) Ltd. vs ACIT [51 SOT 203] held that "The explanatory memorandum to Finance Act 2007 states that the purpose of the tax benefit has all long 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 the court 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."

Thus, the fact that the assessee deploys its resources (material, machinery, labour etc.) in the construction work clearly exhibits the risks undertaken by the assessee. Further, the assessee vide the agreements has clearly demonstrated the various risks undertaken by it. The assessee was to furnish a security deposit to the Employer and indemnify the employer of any losses/damage caused to any property/life in course of execution of works. Further, it was responsible for the correction of defects arising in the works at its cost. Thus, it cannot be said that the assessee had not undertaken any risk. The ITAT (Hyderabad) in case of Siva Swathi Construction (P) Ltd. (supra) held that "Further reason given by the Id. CIT(A) for denying deduction under S.80IA to the assessee is that the assessee has not undertaken any risks. The observations of the Id. CIT(A) in this behalf are also not valid and correct. It was clearly mentioned in the agreement that the assessee shall execute and furnish indemnity bond for a period of four years, indemnifying the Government against any loss or expenditure incurred, to repair any defect noticed due to faulty working done by the contractor or substandard material used by the contractor. Further, it is also mentioned in the contract agreement that the assessee shall not claim for any loss due to foreseen circumstances, including suspension of work due to cause. It is also provided that in the event of accident to people employed by the assessee resulting in compensation to be paid as per the Workmen's Compensation Act the same shall be paid by the contractor, viz. the assessee only. In view of the various specific clauses in the agreement fastening the risks to be undertaken by the assessee, discussed above, it cannot be said that the assessee has not undertaken any risk.

6.8 From the above, it is clear that the contention of the AO that the assessee had not undertaken any entrepreneurial and investment risk is an incorrect interpretation of the facts. Lastly, with regard to the project O&M, Bangalore (on which a deduction of Rs. 35,16,9411- was claimed), it is submitted that it is an operation and maintenance project, to which Explanation to section 80-IA(13) does not apply. Explanation to section 80-IA(13) merely distinguishes between a developer and works contractor. It clarifies that a works contractor shall not be included in the category of 'developer' u/s 80-1A. Thus, the Explanation clearly does not apply to O&M projects. Hence, deduction of Rs. 35,16,9411- claimed for the aforesaid project u/s 80-IA cannot be denied by invoking the explanation to section 80-1A.

7. From the perusal of the terms and conditions in the agreement, it is clear that the assessee was not a works contractor simpliciter and was a developer and hence Explanation to section 80- IA(13) does not apply to the assessee. Further, in addition to developing the infrastructure facility, the assessee was even operating and maintaining the same. Thus, clearly the assessee is eligible for deduction u/s 80-1A. In our considered view do not

*find any reason to uphold the order of Id. CIT(A). Hence this ground of appeal of the Assessee is allowed.*

We also find that the facts of the case of the assessee are identical as that of the above case of the assessee's own case (supra). In the light of above reasoning, we hold that the order of the Ld. CIT(A) is correct and in accordance with law and no interference is called for. We uphold the same. Hence, this ground of Revenue's appeal is dismissed.

**7. In the result, Revenue's appeal stands dismissed.**

Order pronounced in the open court 10/03/2017

Sd/-  
(न्यायिक सदस्य)  
(N.V.Vasudevan)  
(Judicial Member)  
Kolkata,

Sd/-  
(लक्षा सदस्य)  
(Waseem Ahmed)  
(Accountant Member)

\*Dkp, Sr.P.S

दिनांक:- 10/03/2017 कोलकाता ।

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. अपीलार्थी/Appellant-DCIT, Circle-12, P-7, Chowringhee Square, Aayakar Bhawan, 7<sup>th</sup> Fl, Kol-69
2. प्रत्यर्थी/Respondent-M/s Simplex Infrastructure Ltd. 27, Shakespeare Sarani, Kolkata-17
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश सप्त  
उप/सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
कोलकाता ।