

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH : KOLKATA

[Before Hon'ble Shri A.T.Varkey, JM & Shri M.Balaganesh, AM]

I.T.A No.1281 /Kol/2015

Assessment Year : 2010-11

Adhunik Infrastructure (P)Ltd. . -vs.- J.C.I.T, Range-10,
Kolkata Kolkata
[PAN : AADCA 1315 L]
(Appellant) (Respondent)

For the Appellant : Shri Miraj D.Shah, AR

For the Respondent : Shri Saurabh Kumar, Addl. CIT, Sr.Dr

Date of Hearing : 22.02.2018

Date of Pronouncement : 23.05.2018.

ORDER

Per Shri M.Balaganesh, AM

1. This appeal of the assessee arises out of the order for the Asst Year 2010-11 of the Learned Commissioner of Income Tax (Appeals)-4, Kolkata [in short the Ld. ITA] in Appeal No. 493/CIT(A)-4/R-10/Kol/14-15 dated 24.07.2015 against the order passed by the Joint Commissioner of Income Tax- Range-10, Kolkata [in short the ld AO] under section 143(3) of the Act dated 26.03.2013 for the Asst Year 2010-11.

2. The Ground No. 1 and 4 raised by the assessee are general in nature and does not require any specific adjudication.

3. The first issue to be decided in this appeal is as to whether the ld CITA was justified in denying the deduction claimed u/s 80IA of the Act in the facts and circumstances of the case. The interconnected issue to be decided thereon is as to whether the interest income of Rs.5,12,928 was to be set off against the interest expenditure and the net income was to be excluded for the purpose of calculation of deduction u/s 80IA of the

Act and also the apportionment of expense of the expenses of Head Office is to be appropriated against the expenses towards the project for the purpose of calculation of deduction u/s 80IA of the Act.

4. The brief facts of this issue is that the assessee is a company engaged in the business of construction of roads, boundary walls, underground sewerage and drainage system etc. The return of income for the Asst Year 2010-11 was filed by the assessee company on 29.9.2010 disclosing total income of Rs 2,59,70,453/- after claiming deduction u/s 80IA of the Act to the tune of Rs 80,39,696/- . The Id AO during the course of assessment proceedings asked the assessee to furnish the copy of contract for which the claim of deduction u/s 80IA was made by the assessee. The assessee furnished the copy of contract. From perusal of the said contract, the Id AO observed as under:-

- i. The contract was awarded by the public works department, the government of West Bengal.
- ii. The Works was for Improvement of B.T.Road, by widening including a wearing coat on the existing black top from 11.72 KM to 17.00 in the District: of North 24 Paraganas.
- iii. The tender was invited by the Superintending Engineer, Kolkata.
- iv. The tender was for an amount of Rs 1,72,841,114/-.
- v. As per tender document, the assessee is supposed to carry out the work as par the condition and general specification of the PWD,
- vi. There is specific time frame within which the assessee is supposed to carry out the contract.
- vii. As per the contract the contractor must see the damages to any property which in the opinion of the Engineer-In -Charge are due to the negligence of the contractor, are promptly rectified by the contractor at: their own cost and expenses and! According to the direction and satisfaction of the Engineer-In --Charge.
- viii. As per the contract the assessee is not supposed to sublet / assign any portion of the work.

ix. The exact work to be done has been specified in the contract.

The Id AO based on the above observed that the assessee has no discretion in the work to be done. The assessee is merely acting as an agent /contractor of the PWD, and is assigned the only function of completing the work as per the specification given. In the opinion of the Id AO, the assessee does not take any risk in the project as is prevalent in the case of a developer. The project was not conceived by the assessee. The project was conceived by the Government and assessee was merely required to execute the project envisaged by the Government. The assessee was supposed to execute the project as per specification of the PWD for a fixed and assured consideration. The Id AO observed that the assessee has not employed any new plant , machinery in execution of the contract. Old plant and machinery were used by the assessee . Hence the Id AO stated that the assessee is not eligible for deduction u/s 80IA of the Act. The assessee was not required to prepare any design of the project. The design and the drawings of the project were not done by the assessee, but it was done by the Government. The assessee was only required to implement as per the drawing. The assessee was not required to invest its own funds because initially mobilization advance was given and subsequently as per the measurements, money was paid to the assessee. Thus, there was no financial risk or involvement of the assessee in the project. The assessee's return from doing work was guaranteed. The operation and maintenance of the B.T. Road Project was not to be done by the assessee but by the Government. Accordingly the Id AO issued a questionnaire dated 18.10.2012 to the assessee seeking for explanation as to why the claim of deduction u/s 80IA of the Act should not be disallowed.

5. The assessee in reply letter dated 8.11.2012 gave a detailed explanation and the gist of the explanation is as under:-

The assessee: is engaged in the business of construction of roads, bridges, boundary wells, underground sewerage and drainage system since 2000. During the assessment year 2010-1.1 the assessee has undertaken the project for

Improvement of B. T. Road involving widening of existing road from 4 lanes to 6 lanes and developing the existing road by putting additional layers or bituminous mix in pursuant to a tender floated by Public Works Department, Government of West Bengal since December 2007, The assessee has claimed benefits u/s 80IA4(i) as the assessee has fulfilled the main conditions besides fulfilling other procedural conditions as laid down in the Income Tax Act, 1961. Assessee has entered into agreement with state government represented by Eastern Circle, Public Works Department, under Government of West Bengal. Assessee has created a new Infrastructure by itself. Assessee has carried out the work (a) in the capacity of "Developer" and not as a mere works contractor for labour and services. Assessee had also referred the Bombay High Court Judgment in the case of CIT vs ABG Heavy Industries Limited (322 ITR 323). Assessee had also referred the case of Om Metals Infraprojects vs CIT (ITAT Jaipur), CIT vs Glenmark Pharmaceuticals Ltd. (324 ITR 199), Lakshmi Civil Engineering Pvt. Ltd. Vs Addl. CIT, range II, Kolhapur, ITAT Pune Bench, ACIT vs Bharat Udyog Limited (2008) 24 SOT 412 and KMC Construction Limited vs CIT (ITAT Hyderabad)."

6.The Id AO observed that the assessee has claimed deduction u/s 80IA of the Act only in respect of B.T.Road Project only because it is given on contract to the assessee by the State Government. The other works carried out by the assessee has been given on sub-contract by private parties therefore the assessee has not made any claim of deduction u/s 80IA of the Act. The Id AO from the perusal of the contract observed that the assessee is merely a contractor of the project. He applied the Explanation to section 80IA of the Act inserted by Finance Act 2009 with retrospective effect from 1.4.2000 and held that the allowability of deduction in the hands of contractor is not permissible. He also observed that no new road has been constructed. Only the existing road has been widened. Therefore, the assessee is not the developer of any infrastructure project. The Id AO observed that the assessee's contention that widening of existing road amounts to development of the infrastructure project is not acceptable. An infrastructure project is one which leads to creation of totally new thing. There was already an existing road and it was just widened a bit. The total length of the project was also very less (less than 5 km). Such a work cannot be called as development of infrastructure project. He further observed that the assessee has not taken any risk in the

project, therefore he can be called as the developer. He observed that a developer conceives a project, invests in the project, takes risks and executes the project. The work was conceived by the Government and assessee was asked to complete the work as per the terms of contract. Accordingly the Id AO held that the assessee is merely a works contractor and not developer and hence not eligible for deduction u/s 80IA of the Act in view of the Explanation inserted with retrospective effect from 1.4.2000 thereon.

6.1. The Id AO also observed the following in his order :-

4.1.25 Without prejudice to the above contention that the assessee is not eligible to claim the deduction u/s 80IA, if at any appellate stage it is held that the assessee is eligible for deduction u/s 80IA, in that case, the claim of deduction u/s 80IA may be restricted subject to the following:-

a) Claim of deduction on account of ineligible receipts

That the Id AO observed that the assessee is not eligible for claim of deduction u/s 80IA of the Act on account of interest receipts of Rs 5,12,928/- as the same was not derived from the undertaking. By placing reliance on certain decisions in this regard, the Id AO held that even if the said interest income is held to be income from business, still the same is not eligible for deduction u/s 80IA of the Act as it is not derived from the eligible undertaking.

b) Apportionment of expenses

The Id AO observed that during the year , the assessee has executed 15 different projects. While the taxes have been paid on profits from 14 projects, on the B.T. Road Project, the assessee had not paid any tax and claimed deduction u.s 80IA of the Act. On examination of all the projects he observed that many of the expenses have not been apportioned. He also observed that in computing the eligible profits of the B.T.Road Project, the assessee had claimed depreciation as per the Companies Act and not as per the Income Tax Act. The assessee company in this regard stated that all the expenses related to projects have been apportioned to the respective project account. In Head Office only, expenses related to Head Office had been debited. Therefore, Head Office

expenses cannot be apportioned between the projects as Head Office had also executed some works. The Id AO examined this reply of the assessee and found that one back to back contract was taken by the Head office and given to someone else by way of whom the assessee earned commission income which was disclosed as the HO income. Except for one work, no other work was done by the Head office. However, the assessee had claimed various expenditures in the account of Head office which are related to overall business of the assessee. The Id AO observed that the Head office existed in order to support the work and oversee the work of various projects. The expenditure of work at various sites would be impossible without the existence of Head office. He observed that the purpose of expenditure of Head office is related to the various other projects too. Applying the concept of matching principle, the expenditures of Head Office were apportioned to B.T.Road Project by the Id AO in the ratio of turnover as under:-

Head of common expense	Expense in H.O. Account (in Rs.)	Expenses relating to the B.T.Road Project (in the ratio of turnover) (in Rs.)
Audit fees	11030	1256
Advertisement	20100	2289
Books & Periodicals	3312	377
Computer Usage & Maintenance	26978	3073
Donation & Subscription	67344	7671
Employer-Employee Insurance	998993	113792
Legal Expenses	6007	684
Misc. Expenses	158398	18043
Rent	28984	3301
Rates & Taxes	1832	209
Sundry Balances W/off	159609	18180
Postage & Courier Charges	2455	280
Printing & Stationery	59223	6746
Tender Expenses	55905	6368
Sales Promotion	205525	23411
Telephone Charges	64411	7337
Travelling & Conveyance	136624	15562

Interest on cash credit	2351999	267908
Interest on Equipment Finance	152482	17369
Interest on Unsecured Loan	1237907	141006
Interest on Others	102563	11683
Bank Charges	1689902	192491
Bank Guarantee Commission	225336	25667

The Id AO observed that accordingly the profits of B.T.Road project was overstated by the assessee by Rs 8,84,703/- which is to be reduced while granting deduction u/s 80IA of the Act.

c) Claim of depreciation on B.T.Road project as per IT Act

The Id AO observed that the assessee had debited depreciation as per Companies Act and had arrived at the profit of B.T.Road project at Rs 80,39,696/- instead of debiting income tax depreciation. The Id AO arrived at the depreciation attributable to B.T.Road Project on proportionate basis at Rs 9,15,098/- as per IT Act. Accordingly he held that the assessee claim of deduction u/s 80IA of the Act would be further reduced by Rs 1,00,505/- on account of difference in depreciation.

The Id AO accordingly recomputed the claim of deduction u/s 80IA as under:-

Profit from 80IA unit (as per return of income)		80,39,696
Less: Interest received (as per point a) above)	5,12,928	
Less: Head office exps (as per point b) above)	8,84,703	
Less: Diff in Depn (as per point c) above)	1,00,505	
	-----	14,98,136

Profit eligible for 80IA deduction		65,41,560

7. The Id CITA upheld the action of the Id AO in rejecting the claim of deduction u/s 80IA of the Act by holding that the assessee is only a works contractor and not a developer.

8. Aggrieved, the assessee is in appeal before us on the following grounds :-

“2. That on the facts brought on record, the Learned Commissioner (Appeals)-4, ought to have granted full relief to the appellant against the addition made by the Ld. Assessing officer of Rs.80,39,696/- on account of disallowance of claim u/s 80IA and also restricted the claim u/s 801 A to the extent of RS.65,41,560/- if the appellant claim such deduction at any appellate stage.”

9. We have heard the rival submissions and perused the materials available on record. The disallowance of claim of deduction u/s 80IA of the Act for Rs.80,39,696 has been made holding that the said provisions do not apply to the case of the assessee. For the sake of convenience, the provisions of Section 80IA of the Act are reproduced below:-

80-IA. ³³ [(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.]

(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park ³⁴[or develops ³⁵[***] a special economic zone referred to in clause (iii) of sub-section (4)] or generates power or commences transmission or distribution of power ³⁶[or undertakes substantial renovation and modernisation of the existing transmission or distribution lines ³⁷[^{37a} [or lays and begins to operate a cross-country natural gas distribution network]]] :

³⁸ [**Provided** that where the assessee develops or operates and maintains or develops, operates and maintains any infrastructure facility referred to in clause (a) or clause (b) or clause (c) of the

Explanation to clause (i) of sub-section (4), the provisions of this sub-section shall have effect as if for the words "fifteen years", the words "twenty years" had been substituted.]

³⁹ [(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the deduction in computing the total income of an undertaking providing telecommunication services, specified in clause (ii) of sub-section (4), shall be hundred per cent of the profits and gains of the eligible business for the first five assessment years commencing at any time during the periods as specified in sub-section (2) and thereafter, thirty per cent of such profits and gains for further five assessment years.]

(3) This section applies to ⁴⁰[an ⁴¹ [undertaking] referred to in ⁴²[clause (ii) or] clause (iv) ⁴³[^{43a} [or clause (vi)]]] of sub-section (4)] which fulfils all the following conditions, namely :—

(i) it is not formed by splitting up, or the reconstruction, of a business already in existence :

Provided that this condition shall not apply in respect of an ⁴⁴[undertaking] which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such ⁴⁴[undertaking] as is referred to in [section 33B](#), in the circumstances and within the period specified in that section;

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose:

⁴⁵ [**Provided** that nothing contained in this sub-section shall apply in the case of transfer, either in whole or in part, of machinery or plant previously used by a State Electricity Board referred to in clause (7) of [section 2](#) of the Electricity Act, 2003 (36 of 2003), whether or not such transfer is in pursuance of the splitting up or reconstruction or reorganisation of the Board under Part XIII of that Act.]

Explanation 1.—For the purposes of clause (ii), any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely :—

(a) such machinery or plant was not, at any time previous to the date of the installation by the assessee, used in India;

(b) such machinery or plant is imported into India from any country outside India; and

(c) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of the installation of machinery or

plant by the assessee.

Explanation 2.—Where in the case of an ⁴⁶[undertaking], any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with.

(4) This section applies to—

(i) any enterprise carrying on the business ⁴⁷[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 ⁴⁸[or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;]

⁴⁹[(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.

⁵⁰ [Explanation.—For the purposes of this clause, "infrastructure facility" means—

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

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

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

(d) a port⁵¹, airport, inland waterway⁵²[, inland port or navigational channel in the sea];]

⁵³[(ii) any undertaking which has started or starts providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services on or after the 1st day of April, 1995, but on or before the 31st day of March,⁵⁴[2005].]

Explanation.—For the purposes of this clause, "domestic satellite" means a satellite owned and operated by an Indian company for providing telecommunication service;

(iii) any undertaking which develops, develops and operates or maintains and operates an industrial park⁵⁵[or special economic zone] notified⁵⁶ by the Central Government in accordance with the scheme framed⁵⁶ and notified⁵⁷ by that Government for the period beginning on the 1st day of April, 1997 and ending on the 31st day of March,⁵⁸[2006] :

⁵⁹[**Provided** that in a case where an undertaking develops an industrial park on or after the 1st day of April, 1999 or a special economic zone on or after the 1st day of April, 2001 and transfers the operation and maintenance of such industrial park or such special economic zone, as the case may be, to another undertaking (hereafter in this section referred to as the transferee undertaking), the deduction under sub-section (1) shall be allowed to such transferee undertaking for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee undertaking :

⁶⁰[**Provided further** that in the case of any undertaking which develops, develops and operates or maintains and operates an industrial park, the provisions of this clause shall have effect as if for the figures, letters and words "31st day of March, 2006", the figures, letters and words "31st day of March, ^{60a}[2011]" had been substituted;]

(iv) an ⁶¹[undertaking] which,—

(a) is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, ⁶²[2011];

(b) starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period beginning on the 1st day of April, 1999 and ending on the 31st day of March, ⁶²[2011] :

Provided that the deduction under this section to an ⁶³[undertaking] under sub-clause (b) shall be allowed only in relation to the profits derived from laying of such network of new lines for transmission or distribution;

⁶⁴[(c) undertakes substantial renovation and modernisation of the existing network of transmission or distribution lines at any time during the period beginning on the 1st day of April, 2004 and ending on the 31st day of March, ⁶⁵[2011].

Explanation.—For the purposes of this sub-clause, "substantial renovation and modernisation" means an increase in the plant and machinery in the network of transmission or distribution lines by at least fifty per cent of the book value of such plant and machinery as on the 1st day of April, 2004;]

⁶⁶ [(v) an undertaking owned by an Indian company and set up for reconstruction or revival of a power generating plant, if—

(a) such Indian company is formed before the 30th day of November, 2005 with majority equity participation by public sector companies for the purposes of enforcing the security interest of the lenders to the company owning the power generating plant and such Indian company is notified ⁶⁷ before the 31st day of December, 2005 by the Central Government for the purposes of this clause;

(b) such undertaking begins to generate or transmit or distribute power before the 31st day of March, ⁶⁸[2011];]

⁶⁹ [^{69a} [(vi) any undertaking carrying on the business of laying and operating a cross-country natural gas distribution network, including pipelines and storage facilities being an integral part of such network, which fulfils 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 established or constituted under any Central or State Act;

(b) it has been approved by the Petroleum and Natural Gas Regulatory Board established under sub-section (1) of section 3 of the Petroleum and Natural Gas Regulatory Board Act, 2006 (19 of 2006) and notified by the Central Government in the Official Gazette;

(c) one-third of its total pipeline capacity is available for use on common carrier basis by any person other than the assessee or

an associated person;

(d) it has started or starts operating on or after the 1st day of April, 2007; and

(e) any other condition which may be prescribed.

Explanation.—For the purposes of this clause, an "associated person" in relation to the assessee means a person—

(i) who participates directly or indirectly or through one or more intermediaries in the management or control or capital of the assessee;

(ii) who holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in the assessee;

(iii) who appoints more than half of the Board of directors or members of the governing board, or one or more executive directors or executive members of the governing board of the assessee; or

(iv) who guarantees not less than ten per cent of the total borrowings of the assessee.]]

(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made.

(6) Notwithstanding anything contained in sub-section (4), where housing or other activities are an integral part of the highway project and the profits of which are computed on such basis and manner as may be prescribed⁷⁰, such profit shall not be liable to tax where the profit has been transferred to a special reserve account and the same is actually utilised for the highway project excluding housing and other activities before the expiry of three years following the year in which such amount was transferred to the reserve account; and the amount remaining unutilised shall be chargeable to tax as income of the year in which such transfer to reserve account took place.

(7) ⁷¹[The deduction] under sub-section (1) from profits and gains derived from an ⁷²[undertaking] shall not be admissible unless the accounts of the ⁷²[undertaking] for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant, as defined in the Explanation below sub-

section (2) of [section 288](#), and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form [73](#) duly signed and verified by such accountant.

(8) Where any goods [74](#)[or services] held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods [74](#)[or services] held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods [74](#)[or services] as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods [74](#)[or services] as on that date :

Provided that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.

[75](#) [Explanation.—For the purposes of this sub-section, "market value", in relation to any goods or services, means the price that such goods or services would ordinarily fetch in the open market.]

(9) Where any amount of profits and gains of an [76](#)[undertaking] or of an enterprise in the case of an assessee is claimed and allowed under this section for any assessment year, deduction to the extent of such profits and gains shall not be allowed under any other provisions of this Chapter under the heading "C.—Deductions in respect of certain incomes", and shall in no case exceed the profits and gains of such eligible business of [76](#)[undertaking] or enterprise, as the case may be.

(10) Where it appears to the Assessing Officer that, owing to the close connection between the assessee carrying on the eligible business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom.

(11) The Central Government may, after making such inquiry as it may think fit, direct, by notification in the Official Gazette, that the exemption conferred by this section shall not apply to any class of industrial undertaking or enterprise with effect from such date as it may specify in the notification.

(12) Where any undertaking of an Indian company which is entitled to the deduction under this section is transferred, before the expiry of the period specified in this section, to another Indian company in a scheme of amalgamation or demerger—

(a) no deduction shall be admissible under this section to the amalgamating or the demerged company for the previous year in which the amalgamation or the demerger takes place; and

(b) the provisions of this section shall, as far as may be, apply to the amalgamated or the resulting company as they would have applied to the amalgamating or the demerged company if the amalgamation or demerger had not taken place.

⁷⁷ *[(12A) Nothing contained in sub-section (12) shall apply to any enterprise or undertaking which is transferred in a scheme of amalgamation or demerger on or after the 1st day of April, 2007.]*

⁷⁸ *[(13) Nothing contained in this section shall apply to any Special Economic Zones notified on or after the 1st day of April, 2005 in accordance with the scheme referred to in sub-clause (iii) of clause (c) of sub-section (4).]*

⁷⁹ *[Explanation.—For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub-section (1).]*

9.1. We find that as per the provisions of Section 80IA the deduction is allowable to an undertaking or enterprises from any eligible business. As per clause (4) to Section 80IA of the Act, an enterprise which is a Company registered in India and is developing, operating and maintaining or developing, operating and maintaining any infrastructure facility is eligible for deduction if the said enterprise has entered into an agreement with Central Government, State Government and or local authority or Statutory body on or after 01.04.1995. The explanation to the said clause states that the meaning of “infrastructure facility” for the purposes of the said clause means a road, toll road,

bridge, rail system etc. Further the explanation to the said section also states 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) 80IA of the Act. We find that the assessee is a company and during the year under consideration reported a turnover of Rs.72.31 crores and declared a net profit of Rs.3.52 crores. The assessee was enjoying credit facility from various banks and NBFC for cash credit, loans on lien of Fixed Deposits and Equipment finance. The total amount of secured loans availed as on 31.03.2010 was Rs.11.70 crores in addition to unsecured loans from share holders to the tune of Rs.97.20 lakhs. As per the schedule of fixed assets as on 31.03.2010 as annexed to the audited accounts, the assessee has a gross block of Commercial Vehicles, Computers, Furniture & Fixtures, Motor Car , Office Equipments, Plant and Machinery etc for Rs.11.75 crores and during the Asst Year 2010-2011, there was addition of Rs.2.40 crores on various heads in the block of assets. We find that as per the notes to accounts, the assessee has obtained Bank Guarantees worth Rs.12.33 crores from Yes Bank against lien of fixed deposit receipts and also availed Bank Guarantees worth Rs.7.50 crores from Federal Bank against lien of fixed deposit receipts. On perusal of the Audit Report in form 10CCB, we find that the Auditors of the Company have certified that the assessee is claiming deduction u/s 80IA of the Act from Asst Year 2004-2005 and during Asst Year 2010-2011 (i.e the year under consideration), the assessee had undertaken development of roads and the total turnover of the eligible unit was Rs.8.21 crores and the net profit was Rs.80.39 lakhs and the deduction u/s 80IA of the Act for the year was Rs.80.39 lakhs.

9.2. We find from the copy of the work order available in the paper book that the Executive Engineer, Public Works Department, Government of West Bengal awarded a contract for improvement and widening of BT Road from 11.72 KM to 17 KM. We find that BT Road is a part of State Highway No. 1. The assessee has stated before the Id AO and as recorded in the assessment order, the said road was to be widened from 4 lane to

6 lane. Thus the work to be done by the assessee was that of widening of road, increasing the length of the road. It is evident from the definition of infrastructure project as per Section 80IA(4) of the Act that the development of “road” is included in the scope of the section. We also find that that even the Central Board of Direct Taxes in its Circular No.4/2010 issued on 18.05.2010 clarifying that the work of widening of an existing road by constructing additional lanes as a part of Highway project would be recorded as a new infrastructure facility for the purpose of Section 80-IA(4)(i) of the Act, however, simply re-laying or improving by tarring again of an existing road would not be classifiable as a new infrastructure facility for this purpose. The said Circular is reproduced below for the sake of convenience:

“CIRCULAR NO.4 OF 2010 DT. 18TH MAY, 2010
Widening of existing road-Definition of a new infrastructure facility-
Clarification regarding 18/05/2010

DEDUCTIONS SECTION 80-IA(4)

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

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

- “(a) a road including toll road, a bridge or a rail system;*
- (b) a highway project including housing or other activities being an integral part of the highway project;*

The issue has been examined by the Board. It has been decided that widening of an existing road by constructing additional lanes as a part of a highway project by an undertaking would be regarded as a new infrastructure facility for the purpose of section 80-IA(4)(i). However, simply relaying of an existing road would not be classifiable as a new infrastructure facility for this purpose.

[F.No.178/14/2010-ITA.I] (2010) 232 CTR (St) 231”

(Underlining provided by us)

Thus as per the Circular issued by the CBDT, it is settled that widening of existing roads by construction of additional lanes of a highway shall be considered to be new infrastructure facility for the purpose of Section 80IA(4)(i) of the Act. It is not in dispute that the assessee had actually carried out the work of widening of road. We therefore hold that the said work of widening of the BT Road was an eligible infrastructure project as per Section 80IA(4)(i) of the Act.

9.3. We find that 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. 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). "

9.3.1. 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."

9.3.2. Thus as per section 194C of the Act 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". We find that the *Hon'ble Supreme Court in case of Associated Cement Co. Ltd. vs. CIT reported in 201 ITR 435* while interpreting the term 'work' u/s 194C of the Act had held that words `any work' in section 194C(1) of the Act 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 section 194C(1) of the Act 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-section (1) of 194C of the Act `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. 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 subsection, 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 Hon'ble Supreme Court in the aforesaid case was whether the term "work" used in section 194C needs to be restricted to "works contract". The Hon'ble 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 subsection 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. We find further that the memorandum explaining the provisions in the Finance Bill, 2007, reported in (2007) 289 ITR (St.) 292 at page 312 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 1st 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.

9.4. We find that there is a difference between a developer and a contractor simplicitor.

This issue was examined by the various coordinate benches of the tribunal as under:-

a) Co-ordinate Bench of Ahmedabad Tribunal in the case of Sugam Construction (P) Ltd. vs. ITO [56 SOT 45] wherein it was 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. (I) 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.

b) Co-ordinate Bench of Hyderabad Tribunal in the case of Koya and Co. Construction (P) Ltd. vs ACIT reported in 51 SOT 203, wherein it was 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.

c) Co-ordinate Bench of Hyderabad Tribunal in the case of Siva Swathi Construction (P) Ltd reported in. (2013 (10) TMI 1411 , wherein it was held that: Further reason given by the ld. CIT(A) for denying deduction under S.80IA to the assessee is that the assessee has not undertaken any risks. The observations of the ld. 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.

d) Co-ordinate Bench of Hyderabad Tribunal in the case of M/s. GVPR Engineers Ltd. Vs. ACIT reported in (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 undeveloped 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.

9.4.1. We also find that the *Hon'ble Bombay High court in case of Commissioner of Income-tax v. ABG Heavy Industries Limited reported in 322 ITR 323 (Bom)* 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. "

9.5. 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 Hon'ble Bombay High Court in case of ABG Heavy Industries Ltd supra. Thus, merely because the assessee was paid by the Government for development work, it cannot be denied deduction under section 80-IA(4) of the Act. Reliance in this regard is placed on the following decisions :-

a) Co-ordinate Bench of Mumbai Tribunal in the case of ACIT v. Bharat Udyog Ltd reported in (2009) 118 ITD 0336 , wherein it was held that:-

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 TITJ (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).*

b) Co-ordinate Bench of Indore Tribunal in the case of Saneer Infrastructure Pvt. Ltd. vs. ACIT reported in 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.

9.6. 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 80IA of the Act. Further, the Revenue 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. We do not agree with this view of the Revenue. We find that on reading of the above it is clear that the contention of the Id AO that the assessee had not undertaken any entrepreneurial and investment risk is an incorrect

interpretation of the facts. The assessee deploying its resources i.e. finance, technical expert, human resources, material, machinery, labour etc. in the construction work clearly exhibits the risks undertaken by the assessee. The assessee was to 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. It is clear that the assessee was not a works contractor simplicitor and was a developer and hence Explanation to section 80IA(13) of the Act 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 80IA of the Act. In our considered view, we do not find any reason to uphold the order of Id. CITA. We therefore hold that the assessee was entitled to deduction u/s 80IA of the Act.

9.7. With respect to the interest income of Rs.5,12,928/- , the same represents interest on fixed deposits. We have examined the audited accounts and found that the Fixed Deposits are utilized to provide bank guarantees for the work undertaken by the assessee. Thus it is clear that there is a direct nexus of the fixed deposit with the development activity of the assessee. We also find that the Id AO in the assessment order has pointed out that there were interest expenses incurred by the assessee on cash credit, equipment finance and unsecured loans. The total of the interest paid including bank charges (which are as per Section 2(28A) of the Act are also considered to be interest) for the BT Road project was Rs.6,56,124. We find that the interest income and interest expenses are closely linked and hence we direct the Id AO to consider the net interest while determining the profit of the enterprise. In the instant case, the net interest expense is more and hence it would not affect the computation of deduction u/s 80IA of the Act.

9.8. With respect to the apportionment of expenses and depreciation apportionment of Rs.8,84,703 and Rs.1,00,505/- respectively, we find that we have directed to consider the interest and bank charges net of interest income. We find that the amount of Rs.8,84,703/- includes the bank interest and bank charges of Rs.6,56,124/-. Thus the balance amount of Rs.2,28,579/- and the amount of depreciation of Rs.1,00,505/- shall also be reduced from computation of deduction u/s 80IA of the Act. To this extent the order of the Id AO is upheld.

9.9. Accordingly, the Ground No. 2 raised by the assessee is partly allowed.

10. The last issue to be decided in this appeal is as to whether the Id CITA was justified in upholding the action of the Id AO in reducing the claim of depreciation from 30% to 15% on commercial vehicles in the facts and circumstances of the case.

10.1. The brief facts of this issue is that the assessee had used its commercial vehicles for the purpose of execution of its development projects and it was stated that it had calculated its costing for the use of tippers / commercial vehicles as per requirement given by the Government department . It was pleaded that this costing is nothing but the hire charges which the assessee would have earned by hiring the vehicles. Indirectly, hire charges of tippers whether tippers are taken on hire or used for own business is included in assessee's tender rate. The contract value awarded to the assessee includes a portion towards this hire charges also. Hence the tippers / commercial vehicles were used by the assessee in the business of running them on hire and accordingly would be entitled for higher depreciation at 30% . This plea was not accepted by the Id AO and accordingly the depreciation was reduced on these vehicles from 30% to 15% in the assessment thereby resulting in disallowance of Rs 10,22,504/- This action of the Id AO was upheld by the Id CITA. Aggrieved, the assessee is in appeal before us on the following ground:-

“3. That on the facts brought on record, the Learned Commissioner (Appeals)-4, ought to have granted full relief to the appellant against the addition made by the Ld. Assessing Officer of rs.10,22,504/- on account of excess depreciation claimed on commercial vehicles. “

10.2. We have heard the rival submissions. We find from page 50 of the paper book that the total contract value undertaken by the assessee includes a sum of Rs 89,97,573/- towards removal of earth from working site including loading, unloading and carriage within a distance of 2 km over pacca road. For this purpose, the commercial vehicles of the assessee had been used for execution of the development project undertaken by the assessee. Hence it could be safely concluded that the vehicles were used for the purpose of business for transportation of goods of running them on hire as admittedly the total contract value includes hire charges (in different nomenclature) and accordingly entitled for higher rate of depreciation @ 30%. We find that the *Hon'ble Jurisdictional High Court in the case of CIT vs M/s Ripley & Company Ltd in ITAT No. 231 of 2010 dated 10.1.2011 for Asst Year 2006-07* had decided the issue in favour of the assessee by holding as under:-

“ The learned Tribunal below, on consideration of the materials on record, came to the conclusion that in view of Circular No. 652 dated 14th June, 1993 of C.B.D.T. , the assessee was entitled to the benefit because of the fact that the assessee was using the vehicles in both the capacities, that is to say, business for transportation of goods on hire as well as transportation of goods. It was also pointed out that in the past for the assessment years 2005-2006 and 2004-2005, the learned C.I.T.(A) held that the assessee had the business of transportation of goods on hire as well as transporting other goods and, as such, was entitled to higher rate of depreciation as per the said Circular No. 652. It appears that the Revenue did not challenge those decisions.

We, therefore, find that in the facts of the present case, the learned Appellate Tribunal rightly held that the assessee was entitled to the benefit of Circular No. 652. No substantial question of law being involved, we dismiss this appeal.”

10.2.1. Even otherwise, it is not in dispute that this depreciation is related to B.T.Road Project. Hence the disallowance of depreciation of 15% would only go to increase the

profits of B.T.Road Project and consequentially the assessee would be entitled for higher claim of deduction u/s 80IA of the Act. We find that the CBDT in its Circular No. 37 of 2016 dated 2.11.2016 had also confirmed this aspect. Hence in any case, the relief is entitled for the assessee. Accordingly, the Ground No. 3 raised by the assessee is allowed.

11. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the Court on 23.05.2018.

Sd/-
[A.T.Varkey]
Judicial Member

Sd/-
[M.Balaganesh]
Accountant Member

Dated : 23.05.2018.

[RG SPS]

Copy of the order forwarded to:

1.M/s Adhunik Infrastructure Pvt. Ltd., 308, Kamalalaya Centre, 156A, Lenin Sarani, Kolkata-700013.

2. J.C.I.T., Range-10, Kolkata.

3. C.I.T.(A)-4, Kolkata. 4. C.I.T.-4, Kolkata.

5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O.. ITAT, Kolkata Benches

