IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI N.K PRADHAN, ACCOUNTANT MEMBER

ITA no.1167/Mum/2013
(Assessment Year :2007–08)

Mahindra Lifespace Developers Ltd.
5th Floor, Mahindra Towers
Worli, Mumbai 400 018
PAN – AAACG8904C ……. Appellant

v/s

Asstt. Commissioner of Income Tax
Range–6(3), Mumbai ……. Respondent

ITA no.1171/Mum/2013
(Assessment Year : 2006–07)

Mahindra Lifespace Developers Ltd.
5th Floor, Mahindra Towers
Worli, Mumbai 400 018
PAN – AAACG8904C ……. Appellant

v/s

Asstt. Commissioner of Income Tax
Range–6(3), Mumbai ……. Respondent

Assesseeby : Shri H.P. Mahajania/w
Shri Prasad Bapat
Revenue by : Smt. ArjuGarodia

Date of Hearing – 07.03.2018	Date of Order – 31.05.2018

O R D E R

PER SAKTIJIT DEY, J.M.

Aforesaid appeals by the assessee are against orders dated27th November 2012, passed by the learned Commissioner (Appeals)–12, Mumbai, for the assessment years 2006–07 and 2007–08.

2. The first common ground in both the appeals relate to the validity of re–opening of assessment under section 147 of the Income Tax Act, 1961 (for short *"the Act"*).

3. Facts relating to this issue which are more or less common in both the appeals are stated herein after briefly. The assessee a company is stated to be engaged in the business of real estate development and allied activities. For the assessment year 2006–07, the assessee filed its return of income on 29th November 2006, declaring nil income under the normal provisions after set–off of losses. The assessee also declared book profit of ₹ 17,16,89,516 under section 115JB of the Act. Similarly, for the assessment year 2007–08, the assessee filed its return of income on 15th November 2007, declaring nil income under the normal provisions after set–off of losses and book profit of ₹ 15,30,44,724 under section 115JB of the Act. The assessments for the aforesaid assessment years were originallycompleted under section 143(3) of the Act vide order dated

26th December 2008 and 3rd December 2009 respectively. Subsequently, the Assessing Officer having reason to believe that the assessee is not eligible to avail deduction under section 80IAB of the Act re–opened the assessment for both the assessment years under section 147 of the Act. For that purpose the Assessing Officer issued a notice under section 148 of the Act for the assessment year 2006–07 on 15th January 2010 and for the assessment year 2007–08 on 24th January 2011. During the re–assessment proceedings, the Assessing Officer noted that sanction for establishment of Special Economic Zone (SEZ) at Chennai, Tamil Nadu, was accorded to M/s. Mahindra Industrial Park Ltd. by the Ministry of Commerce and Industry, Government of India, on 8th September 2004. He observed, vide letter dated 19th April 2006, permission was granted to the assessee as a co–developer. Referring to the provisions of section 80IAB of the Act the Assessing Officer observed that deduction under the said provision is allowable to a SEZ notified on/or after 1st April 2005.Whereas, in case of assessee, the SEZ was established prior to 1st April 2005. Thus, he was of the view that assessee's claim of deduction under section 80IAB of the Act is not allowable. Accordingly, he called upon the assessee to justify its claim. In response, it was submitted, since permission to the assessee in the status of co–developer was granted on 19th April 2006, it is eligible to avail deduction under section 80IAB

of the Act. The Assessing Officer, however, did not accept the claim of the assessee and held that, since, the SEZ was notified / established prior to 1st April 2005, assessee was not eligible to claim deduction under section 80IAB of the Act. Accordingly, he disallowed the deduction claimed under section 80IAB of the Act in both the assessment years. The assessee challenged the disallowance of deduction claimed under section 80IAB of the Act for both the assessment years by preferring appeals before the first appellate authority both on the validity of re–opening of assessment under section 147 of the Act as well as on the merits of the disallowance made under section 80IAB of the Act.

4. As regards validity of re–opening of assessment, the learned Commissioner (Appeals) after considering the submissions of the assessee in the context of facts and material on record, upheld the exercise of power under section 147 of the Act by holding that there is no change of opinion while re–opening the assessment. He observed, assessee's claim of deduction under section 80IAB of the Act was allowed in the original assessment without examining the issue whether the claim of deduction is allowable or not. Therefore, no opinion with regard to the issue on which assessment was reopened was formed in original assessment. He observed, while re–opening the assessment, the Assessing Officer has recorded reason to believe that

income chargeable to tax has escaped assessment year. Therefore, the re–opening of assessment after such recording of reason cannot be held to be invalid.

5. The learned Authorised Representative submitted, during the original assessment proceedings the Assessing Officer has examined the issue relating to assessee's claim of deduction under section 80IAB of the Act, hence, formed an opinion which cannot be reviewed in the proceedings under section 147 of the Act. He submitted, though, the re–opening of assessment was before expiry of four years from the relevant assessment years, however, it cannot be allowed on a mere change of opinion in the absence of any tangible material. The learned Authorised Representative submitted that during the original assessment proceedings, the assessee had furnished audit report in form no.10CCB in support of its claim of deduction under section 80IAB of the Act which was verified by the Assessing Officer. Drawing our attention to the copy of reasons recorded which is placed in the paper book the learned Authorised Representative submitted in the reasons recorded, nowhere the Assessing Officer has referred to any fresh tangible material coming to his possession after completion of original assessment. That being the case, re–opening of assessment on a mere change of opinion is invalid. In support of his contention,

learned Authorised Representative relied upon the following decisions:–

i) CIT v/s Kelvinator of India Ltd., 320 ITR 561 (SC); and

ii) Aroni Commercials Ltd. v/s DCIT, 2014–EIOL–200–HC–MUM–IT.

i) The learned Departmental Representative strongly supporting the finding of the learned Commissioner (Appeals) submitted in the original assessment proceedings, the Assessing Officer has not at all enquired into or examined assessee's claim of deduction under section 80IAB of the Act. He submitted, the basic issue of fulfillment of condition of section 80IAB of the Act was never examined by the Assessing Officer before allowing assessee's claim of deduction. He submitted, as per the condition imposed under section 80IAB of the Act the minimum requirement which is to be fulfilled is, the SEZ must be notified / established in pursuance on or after 01.04.2005 under the Special Economic Zones Act, 2005, which came into force w.e.f. 23rd June 2005. He submitted, whereas, in assessee's case the approval / sanction for establishment of SEZ was granted by the Ministry of Commerce on 8th September 2004, which is prior to 01.04.2005. He submitted, the subsequent approval granted to the assessee as co–developer in the year 2006 cannot be equated to the initial sanction / approval for establishment of SEZ. Thus, he submitted, in the original assessment proceedings, the Assessing

Officer having not examined and applied his mind to the issue, it cannot be said that any opinion was formed with regard to assessee's claim under section 80IAB of the Act so that the re–opening of assessment will amount to be on a change of opinion.Learned Departmental Representative submitted, on the basis of material on record if the Assessing Officer is prima–facie of the belief that income has escaped assessment,he can proceed to re–open the assessment after recording reasons. He submitted, sufficiency of reason to believe cannot be challenged as the assessee gets an opportunity during the re–assessment proceedings to argue its case that there is no escapement of income. Thus, he submitted, the contention of the assessee that re–opening of assessment is invalid should not be accepted. In support of his submission learned Departmental Representative relied upon the decision of the Hon'ble Jurisdictional High Court in Eleganza Jewellery Ltd. v/s CIT, 52 taxmann.com 46.

6. We have considered rival submissions and perused materials on record. We have also applied our mind to the decisions relied upon. It is relevant to observe that the assessee has claimed deduction under section 80IAB of the Act in the return of income filed for both the assessment years. In fact, in support of the deduction claimed under section 80IAB of the Act the assessee has furnished audit reports in form no.10CCB before the Assessing Officer. Undisputedly, the return

of income filed by the assessee for both the assessment years under appeal were selected for scrutiny and in course of the assessment proceedings, as it appears from material on record, the Assessing Officer specifically enquired into assessee's claim of deduction under section 80IAB of the Act. This fact, as far as assessment year 2006–07 is concerned, is evident from the letter dated 10th December 2008, filed by the assessee before the Assessing Officer in course of original assessment proceedings, a copy of which is at Page–14 of the paper book. A perusal of the said letter reveals that the assessee has specifically responded to Assessing Officer's query regarding claim of deduction under section 80IAB of the Act. Similarly, in assessment year 2007–08 in response to similar query raised by the Assessing Officer the assessee vide letter dated 17th June 2009, has submitted its reply, a copy of which is at Page–8 of the paper book. It is pertinent to observe, learned Departmental Representative in course of hearing drew our attention to letter no.DCIT–7(2)(1)/ITAT/Mahindra Lifespace/2017–18 dated 27th December 2017, of the Dy. Commissioner of Income-tax, Circle–7(2)(1), Mumbai, who happens to be the Assessing Officer of the assessee. On a perusal of the said letter, a copy of which was filed before us, it is evident that the assessment record for assessment year 2006–07 was not traceable and after perusing the assessment record for assessment year 2007–

08, the Assessing Officer has observed that vide order sheet noting dated 23rd October 2009, the Assessing Officer asked the assessee to furnish the complete details regarding deduction claimed under section 80IAB of the Act. He has also stated that in response to the said query the assessee vide submissions dated 4th November 2009, has furnished the details. Of course, the Assessing Officer has commented that further observation / noting of the Assessing Officer with regard to the submissions made by the assessee is not there. Though, he has also observed that the assessee has filed voluminous details running into more than 100 pages. Further, it was stated by him that he was not sure whether the issue of claim of deduction under section 80IAB of the Act was examined by the Assessing Officer during the original assessment proceedings or not. Thus, the facts which clearly emerge from the material on record are, the Assessing Officer in course of original assessment proceedings did enquire into assessee's claim of deduction under section 80IAB of the Act in both the assessment years. Merely because there is no discussion in the body of the assessment order with regard to acceptability of assessee's claim of deduction under section 80IAB of the Act, it cannot be said that the Assessing Officer has not enquired into and applied his mind to the material on record before allowing assessee's claim of deduction under section 80IABof the Act. In other words, it cannot be said that the

Assessing Officer has not formed any opinion with regard to assessee's claim of deduction under section 80IAB of the Act. On the contrary, the material on record indicates that during the original assessment proceedings the Assessing Officer did enquire into assessee's claim of deduction under section 80IAB of the Act. It has to be accepted that the Assessing Officer after due application of mind to the material on record being satisfied that the claim of deduction under section 80IAB of the Act is allowable has not found it necessary to discuss the issue in the assessment order. However, that does not mean that the Assessing Officer while completing the original assessment has not formed any opinion on the issue. As could be seen from the reasons recorded, on the basis of approval granted by the Ministry of Commerce, Government of India, to M/s. Mahindra Industrial Park Ltd. dated 8th September 2004, the Assessing Officer has re–opened the assessment under section 147 of the Act. The reasons recorded further reveal that the aforesaid fact came to the notice of the Assessing Officer on perusal of the records. Thus, it is evident from the reasons recorded that there was no fresh tangible material available before the Assessing Officer at the time of re–opening of assessment. Rather, on re–appreciation / reappraisal of the material available on record during the original assessment proceedings the Assessing Officer has formed an opinion that income has escaped assessment. The Department was

unable to demonstrate that the aforesaid letter of approval by the Ministry of Commerce was not looked into or considered by the Assessing Officer during the original assessment proceedings. That being the case, the re–opening of assessment, prima–facie, appears to be on a mere change of opinion in the absence of tangible material. As regards the decision of the Hon'ble Jurisdictional High Court referred to by the learned Departmental Representative, on a perusal of the said decision it is evident that the Hon'ble Jurisdictional High Court has clearly held that the issue on which the re–opening of assessment was made if were not considered by the Assessing Officer which is evident from the fact that during the assessment proceedings no query was raised with regard to those issues by the Assessing Officer, then it cannot be said that any opinion with regard to those issues were formed by the Assessing Officer during the original assessment proceedings. However, facts are different in the appeals before us. Materials on record clearly indicate that during the original assessment proceedings the Assessing Officer did raise queries with regard to the assessee’s claim of deduction under section 80IAB of the Act. Thus, in view of the aforesaid difference in facts, the ratio laid down in the decision relied upon by the learned Departmental Representative will not apply to the facts of the present case. On the contrary, the ratio laid down in the decisions relied upon by the learned Authorised

Representative squarely apply to the facts of the present case. In view of the above, we hold that the re–opening of assessment under section 147 of the Act in both the assessment years under appeal having been made on a mere change of opinion in the absence of tangible material is legally invalid. Consequently, the assessment orders passed in pursuance thereto have to be declared as invalid and deserves to be quashed.

7. The common issue on merits as raised in ground no.2 of both the appeals relates to disallowance of deduction claimed under section 80IAB of the Act. Though, in view of our decision in ground no.1, this issue is of mere academic nature, however, considering the fact the issue on merit was also heard at length and it is a pertinent issue, we propose to deal with the issue on merits as well.

8. Brief facts are, as discussed earlier, taking note of the fact that the Ministry of Commerce, Government of India, has granted approval for establishment of Special Economic Zone to M/s. Mahindra Industrial Park Ltd., Chennai, on 8th September 2004, the Assessing Officer was of the view that the assessee is not eligible to claim deduction under section 80IAB of the Act, since, the SEZ in respect of which it has claimed deduction was not notified on / or after 1st April 2005. Accordingly, he disallowed assessee's claim of deduction under

section 80IAB of the Act for both the assessment years. While deciding assessee's appeal against disallowance of deduction claimed under section 80IAB of the Act, the learned Commissioner (Appeals) after referring to the provisions of section 80IAB of the Act held that the deduction under the said provision is allowable to a person engaged in the development of SEZ on/or after 1st April 2005.Since, the approval for Mahindra Industrial Park SEZ was granted by the Ministry of Commerce, Government of India, on 8th September 2004, learned Commissioner (Appeals) held that the project is not entitled to get deduction under section 80IAB of the Act. While coming to such conclusion, learned Commissioner (Appeals) negated assessee's contention that it has been granted approval as a co–developer of the SEZ by the Ministry of Commerce on 28th February 2006, hence, eligible for deduction under section 80IAB of the Act.Learned Commissioner (Appeals) observed, the approval granted to the assessee as a co–developer is nothing else but a continuation of the original approval granted on 8th September 2004. Further, he observed that the approval granted to the assessee is only to acknowledge it as a co–developer of the same project and cannot be termed as an independent approval. The learned Commissioner (Appeals) observed, the approval granted to the assessee as co–developer is akin to transfer of part of the development project by the original developer to

the co–developer. He observed, the proviso to section 80IAB of the Act states that if a developer transfers the operation and maintenance of the SEZ to another developer, the transferee developer shall be allowed deduction under section 80IAB of the Act as if the operation and maintenance were not transferred. Thus, ultimately, the learned Commissioner (Appeals) observed, the approval given to the assessee as a co–developer is not for a new SEZ project but in continuation to a project already approved on 8th September 2004. Therefore, the assessee being a co–developer would be entitled to the same benefit as were being given to the original developer Mahindra industrial Park Ltd. He held that in view of the fact that the original developer is not entitled to the benefit of section 80IAB of the Act since the SEZ project was approved prior to 1st April 2005, the assessee would also not be entitled to any benefit under section 80IAB of the Act. Thus, he upheld the disallowance in both the assessment years.

9. The learned Authorised Representative submitted, the only reason on which the Departmental Authorities have denied assessee's claim of deduction under section 80IAB of the Act is, the approval for the SEZ was granted by the Ministry of Commerce to Mahindra Industrial Park Ltd. on 8th September 2004. In this context, he drew our attention to a copy of the said letter of approval placed at Page–32 of the paper book. Referring to the provisions of section 4 of the

Special Economic Zones Act, 2005 (SEZ Act) the learned Authorised Representative submitted that the proviso to section 4(1) of the SEZ Act clearly states that an existing SEZ shall be deemed to have been notified and established under the provisions of the SEZ Act and all other provisions of the Act shall apply to the existing SEZ. Thus, he submitted, the reasoning of the Departmental Authorities would, therefore, fail since as per the proviso to section 4(1) of the SEZ Act, the SEZ developed by the Mahindra Industrial Park Ltd. will be deemed to have been notified and established under the SEZ Act.Therefore, would be eligible to avail all benefits provided under the SEZ Act including deduction under section 80IAB of the Act.

10. Without prejudice to the aforesaid submissions, the learned Authorized Representative submitted that on 28th February 2006, assessee entered into a co–developer agreement with Mahindra World City Developers Ltd., formerly Mahindra Industrial Park Ltd., for development of social infrastructure facility.In pursuance to such agreement both Mahindra World City and the assessee approached the Board of Approval, Ministry of Commerce, Government of India, seeking approval of the assessee as a co–developer. He submitted that the Board of Approval on 17th March 2006, approved the proposal for appointing the assessee as co–developer for development of authorised operation (social infrastructure). The learned Authorised

Representative submitted, vide letter dated 19th April 2006, the Ministry of Commerce, Government of India, finally granted approval to the assessee as co–developer for providing infrastructure facility in the SEZ. He submitted, in the said letter it was also clarified that the co–development agreement dated 28th February 2006, shall form part of the approval. Thus, the learned Authorised Representative submitted, the approval granted by the Ministry of Commerce, Government of India to the assessee as a co–developer of the SEZ having been granted after 1st April 2005, assessee is entitled to claim deduction under section 80IAB of the Act. He submitted, the approval granted by the Ministry of Commerce, Government of India, vide letter dated 19th April 2006, will revert back to the date of co–developer agreement, hence, assessee will be eligible to avail deduction under section 80IAB of the Act for both the assessment years under appeal. He submitted, in the subsequent assessment years i.e., assessment year 2010–11 and 2011–12, assessee's claim of deduction under section 80IAB of the Act have been accepted by the Assessing Officer in assessments completed under section 143(3) of the Act. In this context, he drew our attention to the copies of the assessment orders placed in the paper book. Thus, the learned Authorised Representative submitted, assessee's claim of deduction under section 80IAB of the Act is allowable on merits also.

11. The learned Departmental Representative strongly relied upon the finding of the learned Commissioner (Appeals).

12. We have considered rival submissions and perused materials on record. It is evident from the impugned order of the learned Commissioner (Appeals) that he has upheld the disallowance claimed under section 80IAB of the Act primarily on the following two reasonings:–

i) The approval granted to the SEZ on 8th September 2004 being not on after 1st April 2005, as provided under section 80IAB of the Act, the SEZ is not entitled to benefit under section 80IAB of the Act.

ii) The approval granted to the assessee in 2006 as a co–developer of the SEZ in 2006, is only a continuation of the original approval granted on 8th September 2004, hence, is prior to 1st April 2005.

13. Of–course, the learned Commissioner (Appeals) has also observed that the assessee as a transferee developer cannot avail the benefit of section 80IA(b|) of the Act since the original developer was not entitled to such benefit. Therefore, we have to decide the validity / acceptability of the aforesaid reasonings of the learned Commissioner

(Appeals) keeping in view the provisions of section 80IAB of the Act and SEZ Act. A reading of section 80IAB of the Act makes it clear that the benefit provided therein is available to an assessee in respect of profit or gain derived from the business of developing a SEZ notified on / or after the first day of April 2005 under the SEZ Act. Putting emphasis on the expression *"notified on/or after the 1st Day of April 2005"* as used in section 80IAB of the Act the Departmental Authorities have disallowed assessee's claim of deduction, since, the approval for the SEZ to the original developer was granted by the Ministry of Commerce, Government of India on 8th September 2004. No doubt, the provisions of section 80IAB of the Act provides for deduction in respect of a SEZ notified under the SEZ Act. The SEZ Act received the assent of the President on 23rd June 2005 and was published in the official gazette on the very same day. Section 2(a) of the SEZ Act speaks of appointed date with reference to SEZ to be the date on which the SEZ is notified by the Central Government under sub–section (1) of section 4 of the SEZ Act. Sub–section (1) of section 4 provides that after grant of approval and submission of exact particulars of identified area the Central Government having been satisfied that the requirement under the provisions of the said Act are fulfilled notify specifically identified area in the State as a SEZ. However, the proviso to section 4(1) of SEZ Act provides that an

existing SEZ shall be deemed to have been notified and established in accordance with the provisions of SEZ Act and all the provisions of the Act shall as far as may be applicable to such SEZ. However, in our considered opinion, the approval granted by the Ministry of Commerce, Government of India, to M/s. Mahindra Industrial Park Ltd., in September 2004, is not of much relevance insofar as it relates to assessee's claim of deduction under section 80IAB of the Act. That being the case, we have to examine whether the approval granted to the assessee by the Board of Approval and followed by the letter of approval from Ministry of Commerce, Government of India, will have to be considered independent of the earlier approval granted on September 2004 to Mahindra Industrial Park Ltd or the approval granted to the assessee is to be treated in continuation of the earlier approval, as held by the learned Commissioner (Appeals). Before deciding this issue it is necessary to deal with the statutory provisions concerning the benefits to be given to SEZ. As could be seen, with an intention to boost the infrastructure development in India, the Government of India legislated the SEZ Act. The SEZ Act was brought under the aegis of the Ministry of Commerce and Industries, Govt. of India and the implementation of SEZ Act along with corresponding rules were entrusted under the SEZ Act to a Board of Approval (BOA). Section 27 of the SEZ Act provides for applicability of the provisions of

Income Tax Act, 1961 in relation to a developer entrepreneur for carrying on the authorised operations in a Special Economic Zone or unit subject to modifications specified in the Second Schedule of the SEZ Act. In clause–13 of Second Schedule of SEZ Act, a number of amendments to other enactments were made which would have a bearing on the development of SEZ in India. One of such amendments made under Second Schedule of SEZ Act was by way of introduction of section 80IAB of the Income Tax Act which provides for deduction on profit derived from the business of developing SEZ. Even, the Income Tax Act, 1961 makes it clear that the provisions of section 80IAB of the Act were inserted to the statute w.e.f. 10th February 2006 by the Special Economic Zone Act, 2005. As discussed earlier, under the provisions of section 80IAB of the Act 100% of the profit derived by an assessee from business of developing SEZ notified on/or after 1st April 2005 under the SEZ Act, 2005 will be eligible for deduction. Explanation to section 80IAB of the Act provides that the terms *"Developers"* and *"Special Economic Zone"* shall have the same meaning as assigned to them respectively in clauses (g) and (za) of section (2) of SEZ Act.

14. Thus, at this juncture it is necessary to look into some of the provisions of SEZ Act. Section 2(c) of the SEZ Act defines 'authorised operation' to mean such operation which may be authorised under

sub–section (2) of section 4 and sub–section (9) of section 15. As per section 2(e) of the SEZ Act *"Board"* means the Board of Approval constituted under section 8(1) of SEZ Act. As per section 2(f) of the SEZ Act, *"Co–developer"* means a person or State Government which has been granted approval by the Central Government under sub–section (12) of section 3. Section 2(g) of the SEZ Act defines *"Developer"* to be a person or a State Government which has been granted a letter of approval under sub–section (10) of section 3 of the SEZ Act, and includes a *"co–developer"*. Section 2(p) of the SEZ Act, defines *"infrastructure facilities"* to mean industrial, commercial or social infrastructure or other facilities necessary for the development of a SEZ or such other facilities which may be prescribed. Section 2(za) of the SEZ Act, defines 'Special Economic Zone' to mean SEZ notified under the proviso to sub–section (4) of section 3 and sub–section (1) of section 4 and includes an existing Special Economic Zone. Section 3 of the SEZ Act lays down the procedure for making proposal to establish SEZ and grant of approval. As per section 3(10) of the SEZ Act, the Central Government on receipt of an application for establishment of SEZ shall issue a letter of approval on such terms & conditions and obligation and entitlement as may be approved by the Board. Section 3(11) of the SEZ Act provides that any person or a State Government intending to providing any infrastructure facilities in

the SEZ after entering into an agreement with the Developer make a proposal to the Board for its approval. Section 3(12) of the SEZ Act provides that if such proposal is approved by the Board and a letter of approval is granted by the Central Govt., such person or State Government shall be considered as a co–developer of the Special Economic Zone. Thus, the provisions contained under section 2(g) r/w section 3(11) and (12) of the SEZ Act and Explanation–1 to section 80IAB of the Income Tax Act, 1961, make it clear that the co–developer has been given the status of developer of SEZ if such co–developer has entered into an agreement with the developer and his proposal for co–developer has been approved by the Board of Approval and Central Government.

15. Keeping in view the aforesaid statutory provisions if we examine the facts of the present case it is to be seen that the assessee as a co–developer has entered into an agreement with the developer on 28th February 2006. After entering into such agreement, the assessee has made a proposal for approval before the Board of Approval. The Board of Approval vide its meeting held on 17th March 2006, has approved the proposal of the assessee as a co–developer of infrastructure facility and in terms of the approval granted by the Board of Approval, the Ministry of Commerce and Industry, Government of India, has issued a letter of approval to the assessee on 19th April 2006 as a co–developer

for providing infrastructure facility. Thus, keeping in view the provisions contained under section 3(11) and (12) of the SEZ Act the assessee has to be treated as a developer of SEZ as the definition of *"Developer"* under section 2(g) of the SEZ Act r/w Explanation–1 to section 80IAB of the Act includes a co–developer. Thus, in simple terms, as per the provisions contained under the SEZ Act read in conjunction with section 80IAB of the Act, the assessee has to be considered as a developer of SEZ by virtue of the letter of approval granted by the Central Government. Moreover, such approval to the assessee has been granted on/or after 1st April 2005. That being the case, the conditions of section 80IAB of the Act stand satisfied. The observation of the learned Commissioner (Appeals) that the approval granted to the assessee as a co–developer is in continuation to the earlier approval granted on 8th September 2004 to M/s Mahindra Industrial Park Ltd., in our view, is too farfetched and contrary to the statutory provisions, hence, unacceptable. When the SEZ Act treats the co–developer at par with a developer of SEZ and as per section 3(12) of SEZ Act, the infrastructure facility to be provided by the co–developer is also treated as SEZ, then in our considered opinion it cannot be said that the approval granted to the assessee for development of infrastructure facility is not independent of the approval granted to M/s Mahindra Industrial Park Ltd. on 8th

September 2004. Inasmuch as, the observations of the learned Commissioner (Appeals) that in terms of proviso to section 80IAB of the Act the assessee is also not entitled to the benefit is without any basis considering the fact that in this case the developer has not transferred the operation and maintenance of the SEZ to the assessee. On the contrary, the assessee by virtue of the co–developer agreement has developed infrastructure facility. In view of the aforesaid, the assessee having granted approval after 1st April 2005 for development of infrastructure facility which is akin to development of SEZ as per section 3(11) and (12) of the SEZ Act, is eligible for deduction under section 80IAB of the Act. It is relevant to observe, section 51 of the SEZ Act provides that the SEZ Act will have overriding effect over all other Acts and law if there is any inconsistency in those Acts and laws. It is also pertinent to observe, in course of hearing it was submitted by the learned Authorised Representative, in assessment year 2010–11 and 2011–12 assessing officer has allowed assessee's claim of deduction under section 80IAB of the Act in scrutiny assessments. On perusal of material placed on record we find the aforesaid submissions of the assessee to be correct. Therefore, when under similar facts and circumstances assessee's claim of deduction under section 80IAB have been allowed in subsequent years, there is no justifiable reason to reject assessee's

claim in the impugned assessment years. Thus, in our considered opinion, the assessee is entitled to avail deduction under section 80IAB of the Act.

16. Having held so, it is now necessary to examine from which period the assessee is entitled to claim deduction under section 80IAB of the Act. As could be seen, the assessee has entered into co–developer agreement on 28th February 2006 which has been approved by the Board of Approval on 17th March 2006. The Ministry of Commerce and Industry, Government of India, has issued a letter of approval to the assessee as co–developer on 19th April 2006. However, in the said letter of approval, it has been specified that the co–development agreement dated 28th February 2006 forms part of the approval. Thus, the reading of letter of approval clearly indicates that the assessee has been approved as a co–developer from the date of co–development agreement i.e., 28th February 2006. Thus, the assessee is eligible to avail deduction under section 80IAB of the Act in respect of profit derived from the development of the SEZ on and after 28th February 2006. The Assessing Officer is directed to examine the facts and allow deduction under section 80IA(b) of the Act to the assessee in respect of profit derived from the SEZ business on/or after 28th February 2006. With the aforesaid directions grounds are allowed.

17. In the result, assessee's appeals are allowed.

Order pronounced in the open Court on 31.05.2018

Sd/-	**Sd/-**
N.K. PRADHAN	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 31.05.2018

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Sr. Private Secretary)
ITAT, Mumbai