IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B' DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

I.T.As. No.2503 & 4435/DEL/2013
Assessment Years 2009-10 & 2010-11

DCIT, Central Circle-10(1), New Delhi.	v.	DLF Commercial Developers Ltd., 9th Floor, DLF Centre, Sansad Marg, New Delhi.
TAN/PAN: AABCD4619C		
(Appellant)		(Respondent)

I.T.A. No.168/DEL/2016
Assessment Year 2011-12

DCIT, Circle-7(1), New Delhi.	v.	DLF Commercial Developers Ltd., 9th Floor, DLF Centre, Sansad Marg, New Delhi.
TAN/PAN: AABCD4619C		
(Appellant)		(Respondent)

I.T.A. No.9227/DEL/2019
Assessment Year 2008-09

ACIT, Circle-7(1), New Delhi.	v.	DLF Commercial Developers Ltd., 9th Floor, DLF Centre, Sansad Marg, New Delhi.
TAN/PAN: AABCD4619C		
(Appellant)		(Respondent)

Appellant by:	Shri R.S. Singhvi, CA Satyajeet Goel, CA		
Respondent by:	Shri J.K. Mishra, CIT-D.R		
Date of hearing:	30	09	2021
Date of pronouncement:	17	11	2021

O R D E R

PER AMIT SHUKLA, J.M.:

The aforesaid appeals have been filed by the Revenue against the separate impugned orders of ld. Commissioner of Income Tax (Appeals)-XIII, New Delhi for the quantum of assessment passed u/s.143(3) for the Assessment Years 2008-09 to 2011-12. The sole issue involved which is common in all the years relates to deduction u/s.80-IAB and even the finding given by the Assessing Officer and ld. CIT(A) are same, therefore, same were heard together and are being disposed of by way of this consolidated order. We shall take up the appeal for the Assessment Year 2008-09 wherein the final year of claim of deduction u/s.80-IAB has been made.

ITA No. 9227/Del/19 (AY 2008-09)

2. The appeal filed by the revenue is against order dated 13/09/2019 passed by CIT(A)-3, New Delhi.

3. The brief facts of the case before us are that the assessee is a real estate developer and has undertaken project of developing Special Economic Zone at Gachibowli Village, Shrilingampalli Mandal, Ranga Reddy District, Hyderabad in the year under reference. The SEZ project was approved by Board of approval constituted under SEZ Act, 2005. Further, the BOA has also specified list of authorized operation that can be carried out in SEZ.

4. The issue before us is the correctness of claim of deduction u/s 80-IAB of the Income Tax Act, 1961 in respect of SEZ Project. The assessee has claimed deduction in respect of profit derived from development and sale of bare shell building blocks in SEZ to Co-developer M/s. DLF Assets P. Ltd. The claim of deduction is based on the premise that construction of bare shell buildings being an authorized operation constitute development of SEZ in terms of section 80IAB of the Income Tax Act, 1961 and profit arising from sale of such building blocks is eligible for deduction.

5. In this case, originally the assessment was completed u/s 143(3) vide order dated 29/12/2020 wherein the claim of deduction u/s 80-IAB was accepted. Thereafter, the CIT initiated revisionary proceedings u/s 263 disputing the correctness of claim of deduction u/s 80-IAB and directed the assessing officer to re-examine the issue in the light of observation contained in the order u/s 263 dated 14/03/2013.The assessee successfully challenged the order u/s 263 before ITAT and revenue took the matter to Hon'ble Delhi High Court. Eventually, the Hon'ble High Court vide order dated 22/02/2018 in ITA 507/2014 upheld the order u/s 263 and directed the assessing officer to examine the issue of deduction u/s 80-IAB of the I.T. Act, 1961. The question of law framed before High Court is as under:

> *"(i) Did the Income Tax Appellate Tribunal (ITAT) fall into error in holding that the application of Section 263 by the*

CIT(A) in the circumstances of the case was not warranted?

(ii) Did the ITAT fall into error in holding, on the merits, that sale of assets and buildings to the co-developer could have been treated as capital gain and not business income?"

6. In the consequential proceedings u/s 143 read with section 263, the assessing officer rejected the claim of deduction u/s 80IAB on the ground that development and sale of building is not a business activity but capital account transaction resulting in earning of capital gain and same being not in the nature of business, the benefit u/s 80-IAB is not available. The assessing officer further held that profit arising from sale of building cannot be allowed as deduction u/s 80-IAB as the sale of building is not permissible u/s 80-IAB of the Income Tax Act, 1961. Aggrieved by the assessment order u/s 143(3)/263 dated 22/12/2018, the assessee company preferred appeal before CIT(A) which was allowed and against the relief allowed by the CIT(A) the revenue is in appeal before us.

6.1 The revenue has raised following grounds of appeal:

1. *On the facts and in circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made by the AO wherein AO has disallowed deduction claimed by the assessee u/s 80IAB of the Income Tax Act, 1961 amounting to Rs. 5,73,94,33,765/-.*

6.2 Subsequently, revenue also raised **additional grounds** which are reproduced hereunder:

1. "The Ld. CIT(A) erred in holding that reasonableness of amount received was an issue related merely to method of valuation, thereby, failing to notice that the extraordinary profit was contrary to the explicit provisions of sub section (3) of section 80-1AB of the Income Tax Act, 1961".

2. "The Ld. CIT(A) erred in brushing aside the aforesaid by observing that the AO had discussed but not eventually taken into account the price of transaction, ignoring the principle that acts of omission by the Assessing Officer cannot, ipso facto, comprises the basis of granting relief by an Appellate Commissioner as held by the Hon'ble Jurisdictional High Court in CIT-II vs Jansampark Advertising & Marketing Pvt Ltd (231 Taxman 384)"

7.1 The Ld. CIT DR appearing for the revenue made elaborate argument assailing the order of CIT(A) and submitted that development and sale of bare shell buildings cannot be considered as activity of development of SEZ in terms of 80-IAB. The assessee in support of order of CIT(A) filed detailed submission which are extracted hereunder:

BEFORE HON'BLE MEMBERS, INCOME TAX APPELLATE TRIBUNAL, NEW DELHI

ACIT vs. M/S. DLF COMMERCIAL DEVELOPERS LTD.

ITA NO.9227/DEL/2019 FOR AY 2008-09

SYNOPIS

1. The appeal filed by the revenue is against order passed by CIT(A)-3, New Delhi dated 13/09/2019.

2. The brief fact of the case is that the original assessment was completed u/s 143(3) vide order dated 29/12/2010 after accepting the claim of deduction u/s 80IAB of the Income Tax Act, 1961 in respect of SEZ approved project. Subsequently, the assessment was set-aside by CIT, Delhi-IV u/s 263 vide order dated 14/03/2013 and AO was directed the re-examine the eligibility to claim deduction u/s 80IAB of the Act. The revisionary order u/s 263 was quashed by Hon'ble ITAT vide order dated 13/12/2013 after appreciating facts of the case and making reference to judgment of Coordinate bench of ITAT in various cases involving similar facts. Thereafter, the matter travelled to Hon'ble Delhi High Court which vide order dated 22/02/2018 restored the order passed u/s 263 and directed the assessing officer to reframe the assessment after independently examining the claim of deduction u/s 80IAB of the Act.

3. Pursuant to order of Hon'ble Delhi High Court, the assessing officer completed the assessment u/s 143(3)/263 vide order dated 22/12/2018 and disallowed the claim of deduction u/s 80IAB of the Act. The assessee succeeded in its appeal before CIT(A) which allowed the claim of deduction after recording detailed finding vide order dated 13/09/2019.

4. The sole issue involved in this appeal is regarding allowability of claim of deduction u/s 80IAB in respect of profit arising from sale of bare shell building in SEZ by assessee to Co-developer M/s. DLF Assets P. Ltd.. As a part of its business activities, the assessee has undertaken to develop SEZ project on land allotted at Gachibowli Village, Shrilingampalli Mandal, Ranga Reddy District, Hyderabad by Andhra Pradesh Housing Board.

5. The assessee has undertaken development of SEZ project after obtaining requisite approval from Board of Approval, Ministry of Commerce, Government of India in accordance with SEZ Act and Rules. Subsequently, the assessee entered into an MOU with Co-developer M/s.

DLF Assets P. Ltd. wherein it was agreed that assessee will construct a bare shell building and transfer the same to M/s. DLF Assets P. Ltd. for further development and lease of the same to eligible tenants. It was also agreed that the land on which such building is constructed will not be sold to co-developer M/s. DLF Assets P. Ltd and will be leased out for definite period. The profit arising from transfer of bare shell building to M/s. DLF Assets P. Ltd. was claimed as exempt u/s 80IAB of the Act as mandated in SEZ Act, 2005.

6. Even though the assessee placed on record all the documents and approvals obtained by BOA, Ministry of Commerce regarding SEZ Project. The CIT, Delhi-IV during revisionary proceeding u/s 263 independently called for confirmation of approvals from Ministry of Commerce and Industry vide communication dated 02/12/2011 which was replied vide letter dated 17/01/2012. The complete correspondence obtained under RTI is placed at placed at PB-1 Page 109-116.

7. The assessing officer has accepted the fact that the SEZ project and operations undertaken by the assessee i.e. development of bare shell office space and transfer of same to co-developer were duly approved by Board of Approval, Ministry of Commerce which is evident from finding recorded in the assessment order.

Para 6.1 Page 13

"It may kindly be noted that validity of MOU within the premises of SEZ Act, 2005 is not the question raised by the AO and what revenue is interested in is the nature of transaction which has taken place between assessee and the Co-developer DAPL."

8. However, the assessing officer considered the disallowance of claim of deduction u/s 80IAB as per finding given in Para 6.1 to 6.4 Page 13 to 17 to of the assessment order. **The observation of the assessing office can be summarized as under**:

A. The transaction of transfer of building to co-developer amounts to transfer of capital asset and gain arising therefore is taxable as per section 45 of the Income Tax Act, 1961 and same is not eligible for deduction u/s 80IAB.

B. Complete transfer of rights in the building situated in SEZ is not permissible under section 80IAB of the Income Tax Act, 1961.

9. Firstly, we shall make reference to relevant provisions of SEZ Act, 2005 which is the Governing legislation and provisions of section 80IAB of the Income Tax Act, 1961 are

offshoot of the same. It is relevant to mention that section 80IAB in the Income tax Act, 1961 was inserted vide Second Schedule to SEZ Act, 2005.

SEZ Act, 2005 (Placed at PB-2 Page 126-178)

Section 2 – Definition

c) "**authorised operations**" means operations which may be authorised under sub-section (2) of section 4 and sub-section (9) of section 15;

(e) "**Board**" means the Board of Approval constituted under sub-section (1) of section 8;

(f) "**Co-Developer**" means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (12) of section 3;

(g) **"Developer**" means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (10) of section 3 and includes an Authority and a Co-Developer;

(p) "**infrastructure facilities**" means industrial, commercial or social infrastructure or other facilities necessary for the development of a Special Economic Zone or such other facilities which may be prescribed;

(za) "**Special Economic Zone**" means each Special Economic Zone notified under the proviso to sub-section (4) of section 3 and sub-section (1) of section 4 (including Free Trade and Warehousing Zone) and includes an existing Special Economic Zone;

Section 4 - Establishment of Special Economic Zone and approval and authorisation to operate to, Developer

(2) After the appointed day, the Board may, authorise the Developer to undertake in a Special Economic Zone, such operations which the Central Government may authorise.

Section 27 – Provisions of Income tax Act, 1961 to apply with certain modification in relation to Developers and Entrepreneurs

The provisions of the Income-tax Act, 1961, as in force for the time being, shall apply to, or in relation to, the Developer or entrepreneur for carrying on the authorised operations in a Special Economic Zone or Unit subject to the modifications specified in the Second Schedule.

Section 51 - Act to have overriding effect.

(1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

10. Reference is made to section 80IAB of the Income tax Act, 1961 as introduced and inserted vide SEZ Act, 2005 :

Section 80-IAB - Deductions in respect of profits and gains by an undertaking or enterprise engaged in development of Special Economic Zone.

(1) Where the gross total income of an assessee, being a Developer, includes any profits and gains derived by an undertaking or an enterprise from any business of developing a Special Economic Zone, notified on or after the 1st day of April, 2005 under the Special Economic Zones Act, 2005, 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 one hundred per cent of the profits and gains derived from such business for ten consecutive assessment years:

Provided that the provisions of this section shall not apply to an assessee, being a developer, where the development of Special Economic Zone begins on or after the 1st day of April, 2017.

(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 a Special Economic Zone has been notified by the Central Government :

Provided that where in computing the total income of any undertaking, being a Developer for any assessment year, its profits and gains had not been included by application of the provisions of sub-section (13) of section 80-IA, the undertaking being the Developer shall be entitled to deduction referred to in this section only for the unexpired period of ten consecutive assessment years and thereafter it shall be eligible for deduction from income as provided in sub-section (1) or sub-section (2), as the case may be :

Provided further that in a case where an undertaking, being a Developer who develops a Special Economic Zone on or after the 1st day of April, 2005 and transfers the operation and maintenance of such Special Economic Zone to another Developer (hereafter in this section referred to as the transferee Developer), the deduction under sub-section (1) shall be allowed to such transferee Developer for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee Developer.

(3) The provisions of sub-section (5) and sub-sections (7) to (12) of section 80-IA shall apply to the Special Economic Zones for the purpose of allowing deductions under sub-section (1).

Explanation.—For the purposes of this section, "Developer" and "Special Economic Zone" shall have the same meanings respectively as assigned to them in clauses (g) and (za) of section 2 of the Special Economic Zones Act, 200562.

11. The activity of development of SEZ through construction of infrastructure facility (office space) in the form of bare shell and subsequent transfer of same to M/s. DLF Assets P. Ltd. was approved by the Board of Approval, SEZ, Government of India as under:

a. That SEZ project undertaken by the assessee was approved by Government of India (BOA) vide letter dated 23/10/2006 which was subsequently notified in Official Gazette. **(PB-2 Page 183-185)**

b. Vide letter dated 21/06/2007, approval was granted to the assessee to carry out authorized operations in SEZ which included development of infrastructure facility. (**PB-2 Page 188-190**)

c. The MOU filed vide letter dated 08/01/2007 before BOA for treating M/s. DLF Assets P. Ltd. as co-developer for the purpose of developing of SEZ project was approved by Ministry of Commerce and Industry, Government of India (SEZ Section) vide approval dated 01/05/2007. (**PB-2 Page 191-222 and 236-239**)

d. Vide approval letter dated 18/06/2007, BOA approved authorized operations that could be carried out by M/s. DLF Assets P. Ltd. which interalia included development of warm shell. **(PB-2 Page 241-242))**

e. The MOU dated 29/11/2006 got culminated into definitive agreement dated 20/03/2008 which was duly considered while granting approval to M/s. DLF Assets P. Ltd. vide letter dated 01/06/2009. (**PB-2 Page 243-298 and 299-302**)

f. That assessee further sought clarifications vide letter dated 10/01/2011 from Ministry of Commerce and Industry, Government of India (SEZ Section) which were answered by letter dated 18/01/2011 wherein it was categorically stated that lease of land to co-developer is permissible under Rule 11(9) of SEZ Rules. It was further clarified by the Ministry that Co-developer can acquire/purchase building on the leased land to perform approved operations. Moreover, the transaction envisaged in the MOU and agreement with M/s. DLF Assets P. Ltd. has been specifically approved in reply to Query No.6 & 7 of the said letter. This position is once again clarified in reply dated 20/01/2011. (PB-2 Page 307-310)

g. CIT-IV, Delhi during proceedings u/s 263 relating to AY 2008-09 also sought confirmation from BOA regarding correctness of clarification dated 18/01/2011 and 20/01/2011 which was answered in affirmative by the board vide reply dated 17/01/2012. (**PB-1 Pg 110**)

12. From the above, it is more than apparent that SEZ project is an approved project in terms of section 80IAB and the activity of development of bare shell and transfer of the same to co-

developer is an authorized operation. As already clarified, issue of approval was not disputed even by the assessing officer.

13. The provisions of section 80IAB grants benefit of deduction of profits earned from the activity of developing a Special Economic Zone. However, the term 'Developing a Special Economic Zone' has not been defined under the Income Tax Act, 1961 but same is covered vide section 2(g) of the SEZ Act, 2005.

> (g) **"Developer"** means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (10) of section 3 and includes an Authority and a Co-Developer;

14. In this regard, it may be appreciated that meaning of term 'Developing a Special Economic Zone' as used in section 80IAB has to be understood in the light of Specific provisions of SEZ Act, 2005 and once the approval is granted by BOA, it is implicit that grantee entity is a developer in terms of section 2(g) of the SEZ Act, 2005. In the present case, undisputedly, the assesssee has been recognized as 'Developer' under SEZ Act by BOA vide approval dated 23rd October, 2006 (PB Pg 50). Further, the BOA has also specified the list of authorized operations for development of SEZ vide letter dated 21st June 2007 **(PB-2 Page 188-190)** which explicitly contains bare shell (office space) as authorized activity eligible for exemptions under the SEZ Act and Income Tax Act. Furthermore, the BOA has also authorized and approved the activity of transfer of bare shell to Co-developer vide approval dated 1st May, 2007 and 18th June, 2007 **(PB-2 Page 236-239)**

15. At this juncture, it is pertinent to note that section 80IAB was inserted in the statute through enactment of SEZ Act, 2005 and the said provision is clearly an offshoot of SEZ Act, 2005. The attention is drawn to section 27 of the SEZ Act, 2005 which explicitly states that a developer carrying out authorized operation in SEZ Act shall be eligible to claim benefit of section 80IAB of the IT Act.

16. Under these circumstances and in the light of specific provisions of section 27 of the SEZ Act, 2005, the assessee having been recognized as a Developer of SEZ and the activity of developing bare shell office space and its transfer to co-developer been approved as authorized operation, it is self evident that assessee is engaged in the business of developing SEZ in terms of section 80IAB of the Income Tax Act, 1961 and is entitled to benefit of statutory deduction.

17. The assessing officer has alleged that transaction of sale of bare shell structure to Co-developer is a capital account transaction resulting in capital gain and thus not eligible to deduction u/s 80IAB. In this connection, it is clarified that assessee is engaged in the business of real estate and development of SEZ is part of its core business activity.

18. Before moving ahead, it is relevant to explain the term 'Business' so as to understand the nature of income earned by the assessee, a real estate developer, on sale of building. The term 'business' has been defined u/s 2(13) of the income tax act which is reproduced hereunder for ready reference:

> (13) "business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture

19. The above definition has further been elaborated by Apex Court in the case of **Narain Swadeshi Weaving Mills v. CCE [1954] 26 ITR 765 (SC)** wherein it was held as under:

> The word "business" connotes some real, substantial and systematic or organised course of activity or conduct with a set purpose. On the others hand, a single and isolated transaction has been held to be conceivably capable of falling within the definition of business as being an adventure in the nature of trade provided the transaction bears clear indicia of trade. The question, therefore, whether a particular source of income is business or not must be decided according to our ordinary notions as to what a business is.

In view of the above, it is self evident that any activity carried out by the assessee in an organized and systematic manner constitutes business. The concept of business is not static and it inherently implies continuity of activity for a period of time. Further, the intent to carry business can be gathered from the Memorandum of Association and accounting treatment in the books of account.

20. In the present case, the object clause in MOA of the assessee company is reproduced as under:

PB-1 Page 1-8

Relevant Pg 4

A. THE MAIN OBJECTS TO BE PURSUED BY THE COMPANY ON ITS INCORPORATION ARE:

1. To purchase or otherwise acquire, take on lease or in exchange, hire or otherwise acquire, an interest in any movable or immovable property including industrial,

commercial, residential, agricultural or farm lands, plots, buildings, houses, apartments, flats or areas within or outside the limits of Municipal Corporation or other local bodies, anywhere within the Domain of India, to divide the same into suitable plots, and to rent or sell the plots to the people for building houses, bungalows, and business premises, and to build residential houses and business premises and colonies, and rent or sell the same to the public and realize cost in lumpsum or easy installments or by hire purchase system and otherwise.

2. *To purchase or otherwise acquire, any land, plot(s) of land or immovable property or any right or interest therein either singly or jointly or in Partnership with any person(s) or Body corporate or partnership Firm and to develop and construct thereon commercial complex or complex(es) either singly or jointly or in partnership as aforesaid, comprising officers for self use or for earning rental income thereon by letting out individual units comprised in such building.*

3. *To purchase, sell and otherwise to carry on the following business such as builders, contractors, architects, engineers, Estate agents, decorators, surveyors, Merchants and dealers in stone, stand cement, bricks, timber, iron and steel, hard ware and other building requisites, bricks and tiles and terra cotta markers, job makers, carriers, house and estate agents.*

21. The assessee company is engaged in the business of real estate development in an organized manner in accordance with its objects since year 2002 and has undertaken following projects in FY 2007-08 to 2012-13:

Financial Year	Projects
2007-08	1. Jasola Project near Apollo Hospital, Delhi 2. SEZ Project, Hyderabad
2008-09	SEZ Project, Hyderabad
2009-10	SEZ Project, Hyderabad
2010-11	SEZ Project, Hyderabad
2011-12	SEZ Project, Hyderabad
2012-13	SEZ Project, Hyderabad

22. The SEZ project at Hyderabad is a big Commercial Township having aggregate constructed area of 41,13,332 Sq. Ft. to be developed on 26.225 acres of land. The appellant has huge infrastructure and establishment for execution of SEZ Project of such magnitude comprising of architects, technicians, labour force etc.. The detail of buildings constructed as per Co-developer agreement as mentioned in **Annexure F on PB-2 Pg 271** is as under:

S.No.	Bare Shell Building (Block)	Approx. Area (in Sq.Ft)
1	Block 1	855050
2	Block 2	1019585
3	Block 1 – Ph III	516270
4	Block 2 – Ph III	414410
5	Block 3 – Ph III	276900
6	Block 3	1031117

23. It is relevant to make reference to the meaning of **bare shell** building and **warm shell** building as defined in the Co-developer agreement as approved by BOA so as to understand the scope of work of each party:

> **PB-1 Pg 117**
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> Clause 1.1.6 "**Bare Shell Building**" means the entire bare shell facilities including the built up structures with lift lobbies, external facades, fire suppression system as per building norms, cement flooring, no plaster on concrete columns, walls or ceiling except on brick walls wherever provided, as developed by the Developer in accordance with the sanctioned plan as also shown in the plan annexed hereto as Annexure F to be granted to the Co-developer for executing the Co-Developer operations on the terms agreed hereto, but not including any Infrastructure developed by the Developer:
>
> **PB-1 Pg 119**
>
> Clause 1.1.40 "**Warm Shell Building**" means the Bare Shell Building with complete building atriums, all fittings, air conditioning ducts, electrical distribution and fire fighting, electricity/telephone provisions, on each floor up to the shaft. 100% power back-up air conditioning provision for office area up to Air Handling Unir (AHU) on each floor.

The concept of bare shell and warm shell building as defined above was considered and approved by BOA as the same forms intrinsic part of Co-developer agreement.

24. The assessee company developed several bare shell building blocks as per above details which were subject matter of transfer under co-developer agreement spanning since year 2006 and continuing till date. The assessee company has invested considerable amount of financial resources and engaged manpower, technical and managerial staff to carry out the development of bare shell buildings. Further, the risk associated with construction of bare shell buildings was also borne by the assessee. Moreover, the co-developer agreement also contains penalty clause as per which in case of delay in transfer of bare shell, the developer will have to pay

penalty @ Rs. 5 per square fee per month to the co-developer. Furthermore, in addition to construction of bare shell buildings, the Developer (assessee company) is required to develop following ***infrastructure utilities*** in accordance with Co-developer agreement:

PB-2 Page 247 read with PB-2 Pg 273

i. Sewage Treatment Plant
ii. Water Treatment Plant
iii. Landscaping
iv. Roads
v. Street Lighting
vi. Fire Protection System
vii. Effluent Treatment Plant
viii. Parking
ix. Telecom and Communication

The Developer (assessee company) is responsible for getting all the approvals and NOCs from relevant statutory authorities as per list given in Annexure I to co-developer agreement (PB-2 Pg 274). It is also relevant to mention that assessee company is entrusted with duty to provide maintenance and other services such house keeping and security services for all the common areas within the project (Clause 3.8 PB-2 Pg 251). Considering the totality of facts, it is crystal clear that assessee company is not only involved in development of bare shell building but engaged in *meticulously planned project* of development of SEZ which includes construction of bare shell as well as developing allied Infrastructure facilities which are essential for operation of SEZ.

25. The intention of the assessee is further supported from the accounting treatment in the books of account as per the revenue from sale of building in the SEZ Project is accounted for as per Percentage Completion Method (POCM) as prescribed by AS-7 which give clear indication that bare shell building has been treated as business asset constructed for the purpose of sale in accordance with objects and activities of the assessee. The relevance disclosure to this effect is given under Schedule 22 of the Audited Balance Sheet for FY 2007-08 which is extracted hereunder for ready reference.

Revenue from constructed properties:

SEZ projects Development income from SEZ projects is recognized on the "percentage of completion method". Total sale consideration as per the Co-Developer agreements to sell constructed properties entered into is recognized as revenue based on the percentage of actual project costs incurred thereon to total estimated project cost, subject to such actual cost incurred being 30 per cent or more of the total estimated project cost. Project cost includes the estimated construction and development cost of such properties. The estimates of the saleable area and costs are

reviewed periodically and effect of any changes in such estimates is recognized in the period such changes are determined. However, when the total project cost is estimated to exceed total revenues from the project, the loss is recognized immediately.

26. The income and expenditure from the SEZ project has been reflected in Profit & Loss a/c in respective years in accordance with POCM as per following details:

DCDL- HYDERABAD SEZ	**FINANCIAL YEAR**					**Rs.in Lacs**
	2007-08	**2008-09**	**2009-10**	**2010-11**	**2011-12**	**2012-13**
Area in sq.ft.	**41,13,334**	**41,13,334**	**41,13,334**	**41,13,334**	**41,13,334**	**41,13,334**
Sale Rate Rs./ Sqft	**6278**	**6478**	**6478**	**6478**	**6478**	**6478**
Budgeted Development income	**2,58,235**	**2,66,462**	**2,66,462**	**2,66,462**	**2,66,462**	**2,66,462**
Budgeted Cost						
Construction cost including PMC	62,685	62,334	62,334	61,824	74,541	74,538
Budgeted Interest & Ovd Cost	2,180	7,313	9,105	9,427	9,684	9,802
Total Project Budgeted Cost	**64,864**	**69,647**	**71,439**	**71,252**	**84,226**	**84,340**
Actual cost						
Construction cost including PMC	25,526	36,087	44,089	47,728	48,668	48,775
Actual Interest & Ovd	2,180	7,313	9,105	9,427	9,684	9,802
Total Project Cost incurred	**27,705**	**43,400**	**53,194**	**57,155**	**58,352**	**58,577**
Cost incurred during the year	**19,028**	**15,695**	**9,794**	**3,961**	**1,197**	**225**
POCM Percentage for Cost(A)	**42.71%**	**62.31%**	**74.46%**	**80.22%**	**69.28%**	**69.45%**
POCM Percentage for Income(B)	**100.00%**	**100.00%**	**100.00%**	**100.00%**	**100.00%**	**100.00%**
POCM (A X B)	**42.71%**	**62.31%**	**74.46%**	**80.22%**	**69.28%**	**69.45%**
POCM for the year		**19.60%**	**12.15%**	**5.75%**	**-10.93%**	**0.17%**
Cumulative Development income	1,10,299	1,66,045	1,98,410	2,13,744	1,84,608	1,85,067
Cumulative Cost	27,705	43,400	53,194	57,155	58,352	58,577
Cumulative Margin	82,594	1,22,645	1,45,216	1,56,589	1,26,255	1,26,490
Development income for the period	77,349	55,746	32,365	15,334	(29,137)	459
Development cost for the period	19,028	15,695	9,794	3,961	1,197	225
Margin for the period	58,321	40,051	22,572	11,373	(30,334)	235

27. The primary activity of the assessee company is development of commercial complex and subsequent sale or letting out of the same. It is pertinent to mention that business income earned by the assessee company has been offered and accepted under the head Profit and Gain from Business and Profession (PGBP) and there has been no dispute in this regard in the past and even in the future as the assessing officer has accepted the claim of business income in AY 2007-08 as well as in AY 2012-13 to AY 2014-15 in assessment u/s 143(3) of the Act.

28. On conjoint reading of definition of term 'business' as referred to in section 2(13) and interpreted by Apex Court and on application of the same to the facts of the present case particularly the MOA, there is no shred of doubt that development of SEZ project was active part of assessee's regular business activity and same has resulted in substantial business gain. It goes without saying that a real estate developer can earn business income through following two modes:

    i. Selling of constructed property (including semi constructed structure)

    ii. Leasing of construction property

29. As clarified above, development of a SEZ project on land admeasuring 26.225 acres in itself is a monumental task requiring infusion of huge funds, resources and expertise and as such the business decision of the assessee to carry out exclusive development of SEZ project will not affect the nature of income arising therefrom which purely bears the character of business income. It is pertinent to mention that assessee company undertook development of the said SEZ Project in a phased manner over a span of more than 10 years and even as on date some development activity is going on and as such by no stretch of imagination it can be said SEZ project is a capital asset in the hands of the developer assessee.

30. The allegation of capital gain by the assessing officer is self defeating as the assessing officer has not carried out any working of capital gain in accordance with section 45 of the IT Act. It is important to take note of the fact that the assessing officer has merely categorized business profit as capital gain to deny the benefit of deduction u/s 80IAB of the Act. In fact, the assessing officer has made such observation in assessment years where there was profit but, in the years, where there was loss, the claim of business loss has been accepted. This fact is corroborated from the assessment order for AY 2012-13. Further, the presumption of capital gain is misconceived and contrary to various agreements and terms of approval and provisions of SEZ Act.

31. In view of the above, it is self evident that development of bare shell building and sale of same is part of regular business operation of the assessee and as such the allegation of the assessing office that sale of bare shell to co-developer is a capital account transaction resulting in capital gain is misconceived and without any justification.

32. Without prejudice to above, in any case, as far as deduction u/s 80IAB is concerned, whether gain is business profit or capital gain is of no relevance where SEZ project and operations are authorized and approved by BOA. In this connection, reference is made to latest decision of Hon'ble Delhi Bench of Tribunal in the case of Co-developer **DLF Assets P. Ltd. (ITA No. 4965/D/16 dated 25/01/2021) [PB-3 Page 425-432]** wherein in the context of income from House property it was held that provisions of SEZ Act have overriding effect on Income tax Act and income derived from SEZ project irrespective of head income shall be eligible for deduction. The relevant finding is reproduced hereunder:

> *9. The claim of the assessee was considered by the AO but did not find any favour because the AO was of the firm belief that deduction u/s. 80IAB of the Act is available only from the profits and gains derived by an undertaking from any business and since income from house property does not qualify for deduction u/s.80IAB of the Act, the claim was denied*
>
> *11. There is no dispute in so far as the eligibility of the assessee is concerned. The assessee during the year under consideration has been engaged in developing, leasing as well as maintenance and operations of commercial properties under SEZ. The assessee company is an approved co-developer of the following notified SEZ projects :-*

S. No.	*Name of the Developer*	*Project*
1	*DLF Info City Developers (Chennai)*	*Manapakkam and Muglivakkam Villages, Kancheepuram, Tamil Nadu*
2	*DLF Cyber City Developers Ltd*	*DLF Cyber City District, Gurgaon*
3	*DLF Limited*	*Silokhera, Gurgaon*
4	*DLF Commercial Developers Ltd*	*Ranga Reddy District, Andhra Pradesh*

> *13. In our understanding, the scheme of SEZ is governed by the provision of law contained under the SEZ 2005. Section 51 of the SEZ Act 2005 provides that the SEZ Act shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. In our considered opinion developing SEZ by itself is the business contemplated u/s. 80 IAB of the Act and the SEZ itself provides that the lease rental income generated in the hands of a developer engaged in setting up of the SEZ, is the profits and gains derived from the business of developing a SEZ.*

In view of the above decision, it is manifest that dispute regarding head of income is of academic nature as the same would not affect the eligibility to claim deduction from activity of development of SEZ. In the present case, it is well established that assessee company is dedicatedly engaged in wholesome activities of development of SEZ including business of development and sale of bare shell buildings and as such the claim of deduction in respect of profit derived therefrom is in accordance with scheme and spirit of section 80IAB of the Act.

33. Further, the assessing officer also observed that transfer of bareshell building is not an eligible transaction in terms of section 80IAB of the IT Act. These observation are highly arbitrary and in disregard to specific approval of transfer of bare shell structure by BOA vide approval dated 01/06/2019 (PB-2 Page 299-302). In this regard, as already clarified above, the provisions of section 80IAB stipulates deduction of profit derived from business of developing a SEZ and there is no prohibition of transfer of building or other asset in the process of development activity. The assessee being an approved developer of an approved SEZ project and the activity of development and transfer of bare shell having been duly approved by BOA, Ministry of Commerce, there can be no dispute with regard to eligibility to claim deduction u/s 80IAB in the light of section 27 and 51 of SEZ Act, 2005.

> **Section 27 – Provisions of Income tax Act, 1961 to apply with certain modification in relation to Developers and Entrepreneurs**
>
> The provisions of the Income-tax Act, 1961, as in force for the time being, shall apply to, or in relation to, the Developer or entrepreneur for carrying on the authorised operations in a Special Economic Zone or Unit subject to the modifications specified in the Second Schedule.
>
> **Section 51 - Act to have overriding effect.**
>
> (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

34. In fact, the provisions of section 80IAB cannot be read in isolation without taking into account the object and purpose of mother act i.e. SEZ Act, 2005 which is development of SEZ in accordance with authorized operations approved by the BOA, Ministry of Commerce. In view of above, the observation of the assessing officer has no legs to stand and same is out of context and misconceived.

35. With regard to observation of the assessing officer in respect of sale price of the bare shell building and method adopted for determining FMV of bare shell buildings, it is submitted that such observation of the assessing officer is not relevant and same is merely for the purpose of disallowing the claim of deduction u/ 80IAB of the Act. It is worthwhile to note that the assessing officer herself accepted that transfer value of bare shell structures to Co-developer in accordance with terms of BOA approved agreement is not in question and limited issue for consideration is eligibility to claim deduction u/s 80IAB of the Act. The relevant observation of the assessing officer is extracted hereunder:

> Page 14
>
> "*(iii) the income capitalization approach, opted for income (rent) capitalization approach, in order to arrive at the FMV of the capital apparatus, makes it amply clear that assessee, in back of his head, has treated this as a transfer of capital asset and the entire claim is nothing but a designed arrangement to claim benefit under section 80-IAB of the IT Act.* ***Notwithstanding with the above, Transfer Price analysis of the transaction is not the intention of the AO and the real question is nature of the transaction.*** *We have to see the other aspects of transactions while deciding the nature of the transaction and following points needs to be taken under consideration :"*

36. Further, the CIT(A) has specifically dealt with this issue vide finding recorded in **Para 6.7 at Page 27** of the impugned order wherein, after taking into consideration the important facts and terms of arrangement, it was held that the transaction of sale of bare shell by assessee to co-developer was undertaken at arm's length and on commercial lines. It was further held that rent capitalization method adopted by the assessee is proper and reflects prevailing market condition. The CIT(A) concluded that the casual observation of the assessing officer on the issue of pricing of transaction of sale of bare shell building does not warrant drawing of adverse inference.

37. It is important to mention that pursuant to order of Hon'ble High Court, revenue appointed Special Counsel in very same matter in the case of DLF Ltd. and after detailed hearing on various dates, claim of assessee was accepted by Hon'ble ITAT. (order of ITAT has been enclosed in PB-3 Pg 433 – 483)

38. It is worthwhile to make reference to decision of Hon'ble Mumbai Tribunal in the case of **Mahindra Lifespace Developers Ltd. v. ACIT (ITA No. 1167/Mum/13)** wherein it was held that once the approval is granted by BOA, it is implicit that assessee is engaged in

development of SEZ and benefit is required to be granted u/s 80IAB as per provision of section 27 and 51 of SEZ Act, 2005 which have overriding effect. (PB-3 Pg 484 – 509)

39. The similar issue of claim of deduction u/s 80IAB has been accepted by Hon'ble Tribunal in following cases:

i. DLF Ltd. v. Addl. CIT (ITA No. 2126/D/13) (AY 2008-09) (PB-3 Pg 433-483)

ii. DLF Info City Developers (Chennai) Ltd. (PB-3 Pg 510-556)

iii. DLF Cyber City Developers Ltd. (PB-3 Pg 510-556)

SD/-

Authorized Representative

7.2 During the course of hearing, it was pointed out by the ld. Counsel for the assessee that this precise issue has been considered by this Tribunal in following cases.

- DLF Ltd. Vs. Addl. CIT (ITA No.2126/D/2013 for AY 2008-09
- DLF Info City Developer (Chennai) Ltd.
- DLF Cyber City Developers Ltd.

Wherein this issue has been decided in favour of the assessee. Even the ld. CIT(A) has followed the Tribunal order in the case of DLF Ltd. Vs. Addl. CIT (ITA No.2126/D/2013). Thus, this issue stands squarely covered in favour of the assessee. In response, the ld. DR had filed written submission received from the Assessing Officer.

In the Hon'ble "B" Bench of the Income Tax Appellate Tribunal, Delhi

WRITTEN SUBMISSION IN I.T.A. No. 9227/Del/2019 for the

A.Y. 2008-09

Date: 03.09.2021

Date of hearing: 06.09.2021

DCIT, Circle- 7(1)
New Delhi

Appellant

versus

M/s DLF Commercial Developers Limited
(9th Floor, DLF Centre,
Sansad Marg, New Delhi
PAN: AABCD4619C)

Respondent

Most Respectfully Sheweth:

1. **The transaction under consideration is a device toforcibly bring forward the receipts that would have accrued in the subsequent years. This has been sought to be done by the assessee by artificially and prematurely increasing the receipts in the year under consideration with the intention tounjustly get past the limited time remaining, prior to the sunset clause for section 80IAB of the Act terminating the deduction regime.**

   It may kindly be appreciated that the benefit of the deduction can be availed only for limited maximum of any 10consecutive assessment years out of 15

DCIT 7(1), Delhi

years. On the other hand, construction business is an ongoing activity. Hence, there is no manner of doubt that the transaction entered into by the assessee is opposed to and in violation of the spirit, ethos and essence of section 80IAB of the Act.

2. Before proceeding, it would be useful to reproduce section 80-IAB of the Act which reads as under (emphasis supplied):

> *"Deductions in respect of profits and gains by an undertaking or enterprise engaged in development of Special Economic Zone.*
>
> ***80-IAB.*** *(1) Where the gross total income of an assessee, being a Developer, includes any profits and gains derived by an undertaking or an enterprise from any business of developing a Special Economic Zone, notified on or after the 1st day of April, 2005 under the Special Economic Zones Act, 2005, 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 one hundred per cent of the profits and gains derived from such business for ten consecutive assessment years:*
>
> ***Provided*** *that the provisions of this section shall not apply to an assessee, being a developer, where the development of Special Economic Zone begins on or after the 1st day of April, 2017.*
>
> *(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 a Special Economic Zone has been notified by the Central Government:*
>
> ***Provided*** *that where in computing the total income of any undertaking, being a Developer for any assessment year, its profits and gains had not been included by application of the provisions of sub-section (13) of section 80-IA, the undertaking being the Developer shall be entitled to deduction*

referred to in this section only for the unexpired period of ten consecutive assessment years and thereafter it shall be eligible for deduction from income as provided in sub-section (1) or sub-section (2), as the case may be :

***Provided further** that in a case where an undertaking, being a Developer who develops a Special Economic Zone on or after the 1st day of April, 2005 and **transfers the operation and maintenance of such Special Economic Zone** to another Developer (hereafter in this section referred to as the transferee Developer), the deduction under sub-section (1) shall be allowed to such transferee Developer for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee Developer.*

(3) The provisions of sub-section (5) and sub-sections (7) to (12) of section 80-IA shall apply to the Special Economic Zones for the purpose of allowing deductions under sub-section (1).

Explanation. —For the purposes of this section, "Developer" and "Special Economic Zone" shall have the same meanings respectively as assigned to them in clauses (g) and (za) of section 2 of the Special Economic Zones Act, 2005."

3. **Claim of deduction de-linked from authorized operations.**

3.1 Further, it would be most relevant to take due note of certain important definitions**of SEZ Act, 2005 and SEZ Rules, 2006**there under, which are relevant to the issue:

a) **Board,as per section 2(e), means the Board of Approval constituted under sub-section (1) of section 8;**

b) **The term "Developer" [section 2(g)] is as under:**

"**Developer**" means a person who, or a State Government which, has been granted by the Central Government **a letter of approval under sub-section (10) of section 3** and includes an Authority and a Co-Developer;"

Further sub-section (10) of section 3 reads as under: -

*"(10) The Central Government shall, on receipt of communication under clause (a) or clause (b) of sub-section (9), grant, within such time as may be prescribed, **a letter of approval on** such terms and conditions and obligations and entitlements **as may be approved by the Board**, to the Developer, being the person or the State Government concerned: Provided that the Central Government may, on the basis of approval of the Board, approve more than one Developer in a Special Economic Zone in cases where one Developer does not have in his possession the minimum area of contiguous land, as may be prescribed, for setting up a Special Economic Zone and in such cases, each Developer shall be considered as a Developer in respect of the land in his possession."*

c) **As per section 2(c) the term "authorised operations" is as under:**

*"(c) "**authorised operations**" means operations which **may be authorised** under sub-section (2) of section 4 and sub-section (9) of section 15;"*

In this regard, sub-section (2) of section 4 is as under:

*"(2) After the appointed day, **the Board may**, authorise the Developer to undertake in a Special Economic Zone, such operations which the Central Government may authorise."*

d) **The term "infrastructure"**as per **sub rule 2(s) ofthe Special Economic Zones Rules, 2006is as under:**

"infrastructure" means **facilities needed for development, operation and maintenance of a Special Economic Zone and**

includes industrial, business and social amenities like development of land, roads, buildings, sewerage and effluent treatment facilities, solid waste management facilities, port, including jetties, single point moorings, storage tanks and interconnecting pipelines for liquids and gases, Inland Container Depot or Container Freight Station, warehouses, airports, railways, transport system, generation and distribution of power, gas and other forms of energy, telecommunication, data transmission network, information technology network, hospitals, hotels, educational institutions, leisure, recreational and entertainment facilities, residential and business complex, water supply, including desalination plant, sanitation facility;"

3.2 **The definition of "developer" in the SEZ Act refers to the "letter of approval"**. In the letter dated 14/02/2007 referred in para 65 (ii) of the Hon'ble ITAT order dated 27.05.2019, the approval was granted to the assessee to carry out authorized operation in SEZ which included development of infrastructure facility. The word, "infrastructure" has been defined in rule 2(s) of SEZ Rules, 2006 as under **"facilities *needed for development, operation and maintenance of SEZ and also includes* ....."**

In the instant case, the assessee was manifestly not engaged in 'authorized operations' of developing, operating and maintenance of leased bare- shell building the approved by BOA. Rather and at the most, it was engaged merely with"developing" the infrastructure. As a result, the assessee is not eligible to avail deduction under section 80IAB of the Act. Accordingly, the additions made by the Assessing Officer were free from any infirmity and deserves to be restored fully.

4. **Claim of deduction in disregard to provisions of section 80-IAB.**

4.1 There is another dimension which needs due consideration. **Sub section (2) of section 80-IAB clearly provides that the developerto transfer the operation and management of such SEZ to another developer.**This simply implies and categorically presupposes the **existence of ongoing and existing "operation and maintenance of SEZ"**. However, in the matter at hand, there was undeniably no income from **"the operation and management of SEZ"**at work - but only from "development of SEZ". At the risk of repetition, it needs to be stressed that there was no work in relation to operation and management carried out by developer since all that it did was to transfer the bare shell buildings to another co-developer. Given this undisputed fact, there was no question of even transferring"the operation and management" whichdid not exist with developer - having not even seen the light of the day. **Rather, it is for this purpose of commencing O&M in relation to bare shell building at a future date theassessee-developer transferred the bare shell building to the co-developer. Thus the assesse developer failed to fulfil the enshrined conditions of 2nd proviso to section 80-IAB. Thus, it is not conceivable as to howthe assessee was entitled to the said deduction merely on the basis of "developing" without even an iota of O&M which is the explicit mandate of SEZ Act, Rules and BOA, Income Tax Act etc.**

4.2 It is apparent and worth mentioning that the rational of a long-term gestation is inherent in such projects. It takes cumulatively longer period for development, operation and maintenance so as to infuse commercial viability in them. For this reason, a longer period of entitlement of exemption (any 10 consecutive assessment years out of 15 years) has been engrafted in section 80IAB. It also confers right of enjoyment of exemption/ deduction even to co-developer for remaining period if the same has been leased out with the approval by the BOA and fulfils the condition laid down in Income tax act, 1961. The co-developer will have revenue streams accruing to it from the project from the users of units

by way of operation and maintenance. Consequent to leasing out of the bare shell building by the developer to the co-developer, this developmental activity arises to the co-developer due to clarification as contented by the assessee. **However, converse is not true.By no stretch of imagination, can it be said that the activities of co-developer, in relation to operation and maintenance, have been consumed earlier or even theoretically be treated as part of the development activities carried out by developer assesse. This ispatently obvious, as the developer has merelsy transferred leasehold rights in bare shell building to the co-developer.**

4.3 Without prejudice to the above and purely for the sake of argument if it were to be taken for any reason that'development' includes operation and management, then there was no need of separately using these words even in section 80-IAB. These 3 words connote 3 distinct functions of their own. They carry their different identity and connotation. They cannot be used interchangeably. Hence, there cannot be substitution of one in place of other. Moreover, English language has provided a separate punctuation under the identity "or". So wherever, Legislature wanted words to operate independently, they have categorically inserted punctuation "or". **Therefore, the words separated by comma or combined by way of "and" needs to reads together in an integrated manner. Accordingly, all three conditions "of developing, operation and management" – each represented in the statute by an independent word – needs to be performed in an integrated manner.**

4.4 It is important to highlight that the legislature have used the word **'the operation and management'** in 2nd proviso to sub-section (2) of section 80-IAB specifying thereby transferring the existing and prevailing operation and management of the said bare shell building to the co-developer whereas in the instant case there is no existing operation and management of the bare shell building as the same has actually been carried out by the co-developer. Thus,

there is full non-compliance of the existing provision which has been correctly invoked by the assessing officer for disallowing the claim in the assessment order.

4.5 Without prejudice to above and as an independent argument , it will not be out of place at all to bring on record for consideration that the Ld. CIT(A) has further erred in deleting the additions made by the AO, by not invoking 2nd proviso to sub section (2) of section 80IAB of the Income tax Act, 1961, as condition of **'transfer of the operation and maintenance'** to co-developer has not been fulfilled with, because the developer assessee transferred under so called lease **'base shell structure' which has been further developed by the co-developer as 'warm shell building'**, thereby further violating the second proviso to sub section (2) of section 80IAB explicitly stating that assessee developer has not carried even the developing activities in its entirety. By not carrying out developingactivity fully, there is not even compliance of basic ingredient needed for invoking sub-section (2) of section 80IAB. Thus, entire transaction, per se, is outside the scope of sub section (2) of the section 80-IAB and does not have any entitlement for claim of exemption/deduction.

4.6 The substratum of SEZ project is development, operation and maintenance of the infrastructure facility. Hence, no deduction can possibly be allowed when the business activity was confined only to developing the project with complete absence of **"the operation and maintenance"** by the developer. The assessee unjustly seeks to avail the benefit of exemption/deductions without fulfilling or complying with the statutory pre-requisites for doing so. **The assessee as a developer has merely confined itself to partially developing the project. It is obvious from the facts on record that it was the co-developer who carried out "the operation and maintenance" of the project**. In such a situation, granting the benefit of exemption without any performance whatsoever of "the operation and maintenance" is in complete disregard to the fulfillment of basic

conditions, as provided in the SEZ Act and Income Tax Act, 1961. Therefore, on factual matrix itself, it is noticed that there is no compliance of basic conditions for availing or granting the impugned exemptions in terms of SEZ Act by the assessee developer. **It is respectfully submitted that allowing the deduction to the assessee developer in face of such ineligibility, would tantamount to miscarriage of justice.**

4.7 **Kind reference and due consideration is further invited to para 65 sub para (vi) of order Hon'ble ITAT's order dated 27.05.2019, which is reproduced as under:**

> *"vi. That assessee further sought clarifications vide letterdated 10/01/2011 from Ministry of Commerce and Industry, Government of India (SEZ Section) which were answered by letter dated 18/01/2011 wherein it was categorically stated that* ***lease of land to co-developer is permissible under Rule 11(9) of SEZ Rules. It was further clarified by the Ministry that Co-developer can acquire / purchase building on the leased land to perform approved operations.*** *Moreover, the transaction envisaged in the MOU and agreement with M/s. DLF Assets P. Ltd. has been specifically approved in reply to Query No.6 & 7 of the said letter. This position was once again clarified in reply dated 20/01/2011"*

4.7.1 It may kindly be appreciated that this clarification is in respect of **co-developer and in no way brings any clarification for developer**. This clarification is inconsequential so far as developer is concerned. It, in no way, helps in advancing the case of the developer-assessee. **Further, this clarification, nowhere suggest from whom the co-developer can purchase. Therefore, the reliance on this clarification for granting relief to the assessee developer is misplaced.**

5. **Hon'ble Delhi High Court's finding upholding the revisionary proceedings under section 263 of Income Tax Act, 1961.**

5.1 **Para 80 of the Hon'ble ITAT'sorder dated 27.05.2019 in the case of M/s DLF Limited for A.Y. 2008-09, has been reproduced as under:**

> *"80. Lastly, in so far as the reliance placed by the Ld. Spl. Counsel for the revenue that the Hon'ble High Court in the case of one of the sister concerns, has set-aside the issue for deciding on merits while upholding the revision us/s 263 by the CIT, is also sans any merits, because, nowhere the Hon'ble High Court has adversely commented on the claim of deduction u/s 80IAB on merits. In fact, matter has been restored back to the Tribunal to decide the issue on merits afresh after considering all the facts and the relevant provisions of SEZ Act, which we have already discussed in detail. Thus, reliance placed by the Revenue to draw any adverse inference on merits cannot be sustained."*

5.2 In this regard, the relevant portion of Hon'ble Delhi High Court's observation/judgement in its order dated 22.02.2018 (ITA No. 507/2014) is reproduced hereunder:

> *"6. This Court has considered the submissions of the parties. The question as to whether sale of bare shell building is per se a deductable activity falling within Section 80IAB has, in the opinion of the Court, not been adequately considered or addressed. The Central Government's clarifications were issued to the assessee, at its request. The AO must have analysed the provisions of the Act, especially, the notifications governing the setting-up of the SEZs and the permissible activities in such zones with their investors (Section 80IAB) and the circumstances of the case, i.e. the agreement entered into with the co-developer, the conditions of lease etc., had to be analysed in detail. Clearly, the AO did not conduct that detailed enquiry. On the other hand, the AO's order merely indicates that the analysis, if at*

all, it could be characterized as such of the assessee's claimed SEZ activity was in the context of allegations of varied expenses, as is apparent from the AO's order dated 29.12.2010 below, which was clearly inadequate:

"11. Allocation of Overheads not apportioned to SEZ Project: The assessee during the assessment has claimed deduction of Rs.584,93,80,397/- U/s 801AS in respect of profit from Hyderabad SEZ Project. In order to work out the correct profit from the Hyderabad SEZ project for calculation of deduction U/s 80lAS the assessee company vide questionnaire dated 6.12.2010 was asked the following question:

"In your letter dated 22.10.2010 at Point No.3 you have mentioned that Administrative Expenses of Rs.206.59 lacs have been allocated to Hyderabad SEZ project while computing deduction U/s 801AS. However, it has been observed that the total cost of Hyderabad SEZ Project have been shown in Schedule-XVI of the Profit and Loss Account. As per the profit and loss account the following expenses

have been debited which are not allocated while computing profits of the Hyderabad SEZ project;

a. Establishment charges RS.2712.36 lacs b. Finance charges RS.8575.81 lacs c. Other expenses Rs.4242.01 lacs d. Depreciation Rs.753.80 lacs You are required to showcause that why the above mentioned expenses should not be allocated while computing the profit from the Hyderabad SEZ Project."

7. Furthermore, in the absence of a detailed analysis of the factual narration with respect to the transactions and the documents, having regard to the provisions of the SEZ Act and the purpose for which SEZs are set-up, to ensure that such areas develop in a sustained and consistent manner, with assured infrastructure support on a continuous basis by developers, the CIT(A)'s opinion that the assessment order was erroneous in law and

prejudicial to the interest of the Revenue was justified. As a result, it is held that the ITAT erred in interfering with the order of the CIT(A). Consequently, the impugned order needs to be set aside. The order of the CIT(A) under Section 263 is, therefore, upheld. The CIT(A)'s observations, however, shall not be construed as conclusive or as binding; the discussion with respect to the permissibility of the deduction claimed shall only be considered in the light of the noting to reopen the assessment. Resultantly, the AO is directed to complete the assessment having regard to the rights and contentions of the parties in accordance with law, expeditiously and preferably, within six months."

5.2.1 From the above observation of the Hon'ble High Court, it is clear that Hon'ble High Court has categorically stated that ***"the question as to whether sale of bare shell building is per se a deductable activity falling within Section 80IAB has, in the opinion of the Court, not been adequately considered or addressed."***

5.2.2 Further, in its observation in para 7 above, the Hon'ble Court has held that

"Furthermore, in the absence of a detailed analysis of the factual narration with respect to the transactions and the documents, having regard to the provisions of the SEZ Act and the purpose for which SEZs are set-up, to ensure that such areas develop in a sustained and consistent manner, with assured infrastructure support on a continuous basis by developers, the CIT(A)'s opinion that the assessment order was erroneous in law and prejudicial to the interest of the Revenue was justified. As a result, it is held that the Hon'ble ITAT erred in interfering with the order of the CIT(A). Consequently, the impugned order needs to be set aside."

5.3 In this context offactual unearthing of matters in connection with claim of deduction under section 80-IAB, the observation and findings in the order dated 22.02.2018 of the Hon'ble Delhi High Court in the case of assessee

developer **(Page No. 101-108 Paper book Index- Vol-1 of the assessee developer submitted before Hon'ble ITAT 'B' Bench in this case)**while deciding the appeals (ITA No. 507/2014, ITA No. 563/2015, ITA No. 610/2017, CM.Appl.28227/2017instituted against the various ordersof Hon'ble ITAT are very relevant and are of immense significance. The Hon'ble Delhi High Court has upheld the revision order under section 263 "the Act" of the CIT-IV, Delhi for AY 2008-09 on the issue of claim of deduction under section 80-IAB. The finding from the Hon'ble High Court's order is reproduced as under:

"9. In the present appeals, the Hon'ble ITAT has merely followed the decision rendered in a previous order. The earlier decision in this regard is the one rendered in 2007-08 in the case of DLF Infocity Developers (Chennai) Ltd. There, the Assessing officer's (AO) order granting deduction under section 80-IAB was interfered with by the CIT(A) under section 263 of the Income Tax Act, 1961[hereafter, the 1961 Act". The Hon'ble ITAT preceded to set-aside the order, holding on merits that the assessee was entitled to the deduction claimed. That order has been followed on merits by the Hon'ble ITAT in the current A.Y. 2009-10 and 2010-11.

10.This court is of the opinion that the Hon'ble ITAT's decision merely reproduced the CIT(A)'s judgment and has not analyzedindependently, in either of the AYs, the applicability of section 80-IAB towards the deductions claimed in the light of the transactions reported and the documents enclosed. Furthermore, those facts have also to be analyzed in the light of the provisions of SEZ Act, 2005, which the Hon'ble ITAT has not independently done. For these reasons, the impugned orders of the Hon'ble ITAT are set-aside and are remitted for fresh consideration by the Hon'ble ITAT in

accordance with law. All rights and contentions of the parties are reserved."

5.4 In view of the above, it will be completely incorrect to state that no adverse finding has been given the Hon'ble Delhi High Court. It is difficult to comprehend what amounts to adverse finding particularly when the said order explicitly carries these observations/findings/comments which are repeated hereunder in order to highlight the specific observations/findings:

A) "In the present appeals, the Hon'ble ITAT has merely followed the decision rendered in a previous order....."

B) "This court is of the opinion that the Hon'ble ITAT's decision merely reproduced the CIT(A)'s judgment and has not analyzed independently, in either of the AYs, the applicability of section 80-IAB towards the deductions claimed in the light of the transactions reported and the documents enclosed....."

C) "..... Furthermore, those facts have also to be analyzed in the light of the provisions of SEZ Act, 2005, which the ITAT has not independently done. For these reasons, the impugned orders of the ITAT are set-aside and are remitted for fresh consideration by the ITAT in accordance with law. All rights and contentions of the parties are reserved."

In view of the above categorical observation from the Hon'ble High Court, it is stressed that these are nothing but adverse finding of the Hon'ble High Court in the above matter.

6. **The root and genesis of section 80-IAB lies in the SEZ Act, 2005. The same has been inserted in the Income Tax Act, 1961 through the SEZ Act, 2005. The ld. Counsel has repeatedly referred to SEZ Act and heavily relied upon it as a justification for claiming the impugned deduction. It has been also argued**

that the SEZ Act has an overriding effect. The issue under consideration is not that of inconsistencies with other Act, but with complete disregard to the provision and compliances mandated under SEZ Act itself.

Further, section 80-IAB is appearing in the Second Schedule of the SEZ Act, 2005 which provides for modification to the Income Tax Act, 1961. Thus, the violation of Section 80-IAB itself tantamounts to violation of SEZ Act itself.

6.1 **The clarifications dated 18.01.2011 and 20.01.2011[Page No. 307-310 of Paper Book Index – Vol. 2 submitted by the assessee before Hon'ble ITAT 'B' Bench in this case]** issued by MOC has been relied upon by the Hon'ble ITAT in its order dated 27.05.2019 in the case of DLF Limited vs. Addl. Commissioner of Income Tax and cross appeals (ITA No. 2126/Del/2013 AY 2008-09 and ITA No. 2749/Del/2013 AY 2008-09 while deciding the issue in favour of appellant. However, there is a critical aspect which has been overlooked. While allowing the claim, the scope of "authorized operations" has not been examined. The Ld. Counsel has conveniently ignored this requirement which comprises the very foundation of this case. In other words, it is crucial to determine whether the project and the transaction was eligible to be characterized as an "authorized operation" in terms of SEZ Act, rules and the connected notification and approvals granted by the BOA.

6.2 In view of section 9 of SEZ Act, theBOA has a critical role to play in the orderly development of SEZ. It has been empowered to grant approval or reject the approval or modify such proposal. In this regard, it may be useful to**reproduce the para 69 of Hon'ble ITAT's order dated 27.05.2019**, which has been relied upon (emphasis supplied):

> *"69. The Assessing Officer has also drawn adverse inference from the fact that sale of land is not allowed in SEZ, because as per SEZ Rules the assessee has transferred the land for 49 years lease, which in fact is not*

correct, because the same was for 30 years, and also it is against the spirit of Rule 11(9) of 'SEZ Rule 2006'. It has been brought on record and has been contended at every stage that assessee has not transferred the ownership of the land to co-developer M/s. DLF Pvt. Ltd. at any point of time, as the same has been given on lease for the period of 30 years and this fact is clearly borne out from the clauses of MOU and definitive agreements that the ownership of the land remains with the assessee and there is no case of transfer of land. Rule 11(9) of SEZ Rules, 2006 only prohibits sale of land and same is not applicable in the case of lease. ***This position is also corroborated from specific reply of BOA in letter dated 18.01.2011 and 20.01.2011.This clarification issued by BOA clearly clinches the issue in favour of the assessee, because BOA in clear words and terms has clarified the legality and permissibility of transaction of bare shell building to co-developers and lease of land in terms of provision of SEZ Act, 2005.Thus, any doubts regarding authorized operation have been set at rest by BOA. Hence, the allegations of the Assessing Officer are totally misconceived and are rejected."***

6.3 The aforesaid finding categorically hinges on specific letters of BOA dated 18/01/2011 and 20/01/2011. The Hon'ble Tribunal has held thatthe clarification issued by BOA "clinches" the issue in favour of assessee. In this connection, it is submitted that these **so-calledletters of BOAwere actually issued by the Ministry of Commerce (MOC) and not by BOA as empowered in SEZ Act**.In this regard, reference may also be made to para 65(vi)of Hon'bleITAT's order dated 27.05.2019 wherein it is categorically specified that these **are clarification from Ministry of Commerce** (MOC). **It is humbly stated that the aforesaid finding of the Hon'ble Appellate Tribunal is factually incorrect as these are definitely not the communication from BOA as the BOA has actually been**

vested with such powers, duties and functions under section 9 of SEZ Act,2005.

6.4 As per section 2 (e) of the SEZ Act, '**Board**' means **Board of approvals constituted under section 8 of SEZ Act**which specifiesthe constitution of BOA. This is apparent from a reading of **section 8, Chapter III of SEZ Act (page 134 - 135 of the Paper Book Index- Vol.2 of the assessee submitted before Hon'ble ITAT 'B' Bench). In this background, it may be seen that MOC and BOA are not at par.**

6.5 It is equally important to **highlight the constitution and structureof BOA**enshrined in the governing statute, i.e. SEZ Act, 2005. This has been so because such authorized operations have to be approved from this Board in order to be eligible for deduction / exemption under section 80-IAB. **Such strong and multi ministerial constitution has been structuredby the legislature to ensure check and balance that only authorized operations can avail such deductions and other ineligible operation does not claim exemption/deduction asthese exemption, provisions creates huge pressure on fiscal space of the Government.**

6.6 Thus, it is humbly submitted that a factual error has crept into the decision dated 27.05.2019 of the Hon'ble ITAT in the case of M/s DLF Limited. Hence, it is prayed that no reliance can be placed thereupon. **It is submitted that this, therefore, cannot be considered as a 'covered' matter. As the final fact-finding authority, we respectfully urge the Hon'ble Bench for not treating it so.** Not only this, in view of the above irregularity in the compliance of authorized operations, the said activity on which exemption has been claimed, cannot be called as approved operation as the same were not approved by BOA. This violation of essential approval of activities, which occurred for not getting approval from statutorily recognized and constituted Board, does not come under the eligibility of authorized operations.**There is no such letter of**

approval from BOA in this regard. Therefore, Hon'ble tribunal is requested to confirm the finding of AO, which disallowed the claim of the assessee on deduction/exemption, as the conduct of the assessee on transfer of bare-shell building is not found to be in accordance with Explanation to provisions of section 80-IAB.

6.7 Allowing the deduction under section 80-IAB on the basis of the above clarification issued by MOC, in complete disregard to the approval from statutory structure of the BOA, dilutes entirely the very purpose of constitution and power of BOA. **In this regard, even at the cost of repetition, it will be very relevant to peruse the constitution of Board of Approval provided in Section 8 under Chapter 3 of SEZ Act, 2005.**

6.8 Similarly, it is of paramount significance that the **duties, powers and functions of the Board contained in Section 9 of SEZ Act, 2005 may also be duly recognized** while deciding the above appeal because the functions and powers granted to the Board cannot be diluted.

6.9 Therefore, the claim of deduction as made by the assessee on the basis of approved operations, to this extent, nowhere has the sanctity from the BOA and therefore, activities carried out does not fall under authorized operation, which is essential under SEZ Act and consequentlybecomes ineligible for deduction under section 80-IAB.

7. **Even otherwise, it is evident that based on basic structure, objectiveand philosophy of a SEZ project,it is unconceivable to grant exemption to a business activity, which has no stream of income from unit users.** The developer has been left with no such infrastructure assets as same has been alienated/leased to a co-developer. The co-developer will be in receipt of lease income / rental income from unit users in future. It is important not to lose sight

of the fact that the case under consideration is for the developer and not that of a co-developer.

8. This case throws various irregularities and dichotomy. The assessee has actually **camouflaged the advance lease rentals in the form of development consideration.** It is undisputed that assessee submits that **the bare shell structure is sold on lease.** It is a matter of fact that the **entire consideration of lease rentals or advance lease rentals or premium money, pertains to entire lease period,** whereas the assessee has declared it as revenue applying POCM method so that the revenue can be claimed for exemption under section 80-IAB. **From accounting principalperspective, matching concept has also not been followedin order to claim deduction as the period of availing exemption is very much limited** for any 10 consecutive assessment year out of 15 years.**It is totally unjust that at one hand, assessee claims that it has not entered into sale of land, but claims that the transfer of bare shell building term lease to co- developer but development consideration is being offered as revenue in few years,which actually is in the form of advance lease rentals or project advance or whatever terminology one may coin. It is surprising, how can it be treated as revenue ina limited time frame in utter disregard to lease period for which transfer has taken place, so as to take undue benefit of exemption.** Such undue and unjust claim of exemption**creates distortions in the tax structure and unnecessarily creates burden on small and medium class taxpayers.**Further, incorrect claim of exemptions has lowered the effective tax rate of the country. Granting exemption has been a sacrifice by the Parliament to encourage development of SEZ and not intended to promote realestate activity. However, such unjust claim creates burden on narrow fiscal space.

8.1 In this context, it will be prudent to quote from the Budget speech of Hon'ble Finance Minister from the Finance Bill, 2015 which is reproduced here under:

"97. We need to match this transformative piece of legislation in indirect taxation with transformative measures in direct taxation. The basic rate of Corporate Tax in India at 30% is higher than the rates prevalent in the other major Asian economies, making our domestic industry uncompetitive. Moreover, the effective collection of Corporate Tax is about 23%. We lose out on both counts, i.e. we are considered as having a high Corporate Tax regime but we do not get that tax due to excessive exemptions. A regime of exemptions has led to pressure groups, litigation and loss of revenue. It also gives room for avoidable discretion. I, therefore, propose to reduce the rate of Corporate Tax from 30% to 25% over the next 4 years. This will lead to higher level of investment, higher growth and more jobs. This process of reduction has to be necessarily accompanied by rationalisation and removal of various kinds of tax exemptions and incentives for corporate taxpayers, which incidentally account for a large number of tax disputes.

98. I wanted to start the phased reduction of corporate tax rate and phased elimination of exemptions right away; but I thought it would be appropriate to give advance notice that these changes will start from the next financial year. 20 Our stated policy is to avoid sudden surprises and instability in tax policy. Exemptions to individual taxpayers will, however, continue since they facilitate savings which get transferred to investment and economic growth."

8.2 In this context, it is very much important and relevant too, to reproduce the text of **34th meeting from the sub para (viii) of para 54 of Hon'ble ITATs order dated 27.05.2019** in the case of DLF Limited which is as under:

***"viii.** It is very relevant to note that transfer of buildings by the developer to the co-developer was considered by the BoA as against the spirit of SEZ as pointed out by the Department of Revenue and agreed to by BOA unanimously. (i.e. it*

is not the business of development of SEZ.) This is the reason that BOA has put the condition of examination of the issue of taxability after determining the nature of income by the Assessing Officer. In this respect minutes of 32nd meeting and of 34th meeting of SEZ BOA held on 23rd February 2009 and 19th June 2009, which discussed the assessee company's case as one of the co-developer, are very important and are reproduced as follows: 32nd Meeting "The representative of the DoR (Department of Revenue i.e representative of CBDT) pointed out that the co-development agreement refers to transfer and hand over deeds which states that co-developer shall be the owner of the SEZ buildings on payment of development consideration, which is against the spirit of SEZ Act and Rules. 34th Meeting "The Board noted that in the meeting held on 23.02.2009 it was decided to defer the 4 proposals of co-developers in respect of same Developer, i.e., M/s DLF Limited as the representative of the DoR pointed out that the co-developer agreement refers to transfer and hand over deeds which states that co-developer shall be the owner of the SEZ buildings on payment of development consideration, which is against the spirit of SEZ Act and Rules. Following this observation, the proposals were deferred and it was decided to examine the case on file. DoC examined these proposals on file in consultation with CBDT and the agreements were revised by the co-developer. ***The proposals were approved subject to the condition that particular terms and conditions of lease agreement will not have any bearing on the treatment of income by way of lease rentals/down payment/premium etc. for the purpose of assessment under the prevalent Income Tax Act and Rules. The Assessing Officer, will have the right to examine the taxability of these amounts under the Income Tax Act.***

Copy of Minutes of 32nd Meeting and 34th Meeting of BOA are enclosed with these Submissions."

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8.3 **From the last line of the above text of 34th meeting, it is obvious that the Assessing Officer, will have the right to examine the taxability of these amounts under the income tax Act. Thus, the final and operational part of 34th meeting gives unfettered right to AO vis-a-vis taxability of income under Income Tax Act.**

8.4 Further, it will not be out of place to emphasise that the above text of 34th meeting also states that the proposals were approved subject to the condition that particular terms and conditions of lease agreement **will not have any bearing on the treatment of income by way of lease rentals/down payment/premium etc. for the purpose of assessment under the prevalent Income Tax Act and Rules.** The above text of meeting also uses the word "lease rentals". Therefore, the treatment of income by the assessee under the nomenclature of development consideration is nothing but advance lease rentals relating to various years under terms of lease, which has been compressed as income for few years in order to claim deduction, **in disregard to underlying period of lease of underlying assets.The assessee, though consider it as lease transfer but for the sake of claiming deduction, it has adopted artificial and inappropriate method for claiming it as development consideration in order to claim exemption/deduction of "lease rentals" which are actually in the nature of advance lease rentals pertaining to future periods of lease agreement. Thus, there seems to be no merit in claim of deduction.**

8.5 In view of above, the claim of assessee under section 80-IAB, in the guise of development consideration instead of advance lease rentals pertaining to various years, is entirely misplaced and incorrect and squarely does not fit to the spirit of section 80-IAB. Accordingly, it is prayed that the additions made by assessing officer be confirmed as the assessee is not eligible to claim deduction under section 80-IAB.

DCIT 7(1), Delhi

9. **Prayer for confirming the additions due to applicability of Substance over Form**: It is important that entire spectrum of transaction has to be looked from the lenses of **"Substance over Form"** and not in the isolated form of transactions and agreement and approvals. Holistically, **the transaction on which claim of deduction has been disallowed by the AO, has not fulfilled the requirements/ conditions of governing statute, the SEZ Act in letter & spirit**. Your honour, the facts of this particular case need to examined from judicial GAAR which has been in existence for long and is also applicable even during the relevant period. The totality of transactions clearly demonstrates that assessee has designed its affairs with series of paper documentation and accounting treatment, in a manner to so as to claim deduction under section 80-IAB for which in substance it is not entitled to, as the receipts aredeclared as revenue based on POCM related to various years. It is important to look into these essential facts in entirety for consideration of the matter under consideration in relation to claim of deduction under section 80-IAB which have been rightfully added by assessing officer while passing the assessment order.

a. Changes in the MOU for co-developers' 'agreements, co developers' agreement,addendum to co-developers' agreementunfolds the purpose behind the transactions which is intended to take advantage of section 80-IAB which does not accrue to it or for which it was not actually entitled to.

b. Intrinsically and actually, it has entered into sale of land and real intension was also for sale of land to co-developer but in order to take the tax benefit and to fall under authorised operations, it has entered into activities to look like that it is a lease transaction and not a sale transaction relating to land but that of bare shell building. The underlying purpose was only to cover up the limitation casted under Rule 11(10) of SEZ Rules 2006 which specify that the

developer shall not sell the land in a SEZ. As sale of land is prohibited and it was possible for the assessee to sell the buildings only, the land has been given to co-developer through an arrangement of lease of land which is nothing but a play to overcome this prohibition.

c. There is no dispute that buildings have been sold to Co-developer.

d. Though SEZ Act prohibits for sale of land thereby implicitly denying any benefit to a developer who is basically interested in deriving income by transfer of assets, the assessee has found a way to overcome this prohibition by creating 49 years lease in favour of co-developer, renewable further, thus effectively transferring the land also.

e. SEZ Act notifies specific authorized operations which alone would qualify for exemptions, concessions and drawbacks. Therefore, income from sale or transfer or such operation would not be eligible for exemption as per notification no. S.O. 1846(E) dated 27th October, 2006.

f. Sale of buildings to the co-developer is not an activity of development of SEZ.

g. The term 'development consideration' is for the entire lease period for which transaction has been entered with and represents advance lease rentals. Offering advance lease receipts as eligible income / profits in limited few years based on POCM on lease of bare-shell building merely to take advantage of exemption under section 80-IAB, in disregard to the period for which lease rental relates to, is nothing but disregarding the edifice of accounting principle and matching concept.

h. In order to claim the benefit and consequent eligibility, it has not obtained clarification from BOA, which is the statutorily empowered and structured body, consisting of representative / stakeholders from various ministries/ department. The Parliament in its wisdom has rightly empowered and constituted BOA to examine such proposals and then after due process,

approve/ disapprove the same as authorised operations to be eligible for exemption under section 80-IAB. The BOA is to ensure checks and balances so that the scheme is not mis-utilised and there is orderly development of SEZ.Obviously, the legislatures have instituted the strong and well-defined mechanism of BOA to examine eligibility. **However, in the instant case, approval in the form of clarification has not come from BOA but from MOC which is in violation section 9, astatutory requirement of SEZ Act itself. With no stretch of imagination, MOC can interchangeably be used for BOA.**

i. Further, SEZ projects are long term projects. They have inbuilt fundamentals of integrated activities. Nowhere legislatures have thought to grant exemption under section 80-IAB based on transfer of BARE SHELL STRUCTURES.**Not only this, the transfer of base-shell building has been converted into warm-shell building by the co-developer, which is also not the objective of the section 80IAB.**

j. It is also not the objective of scheme that the developer will get exemption on the basis of transfer **bare shell structures where further development into warm shell structure has been carried out by the co-developer.**

k. The so-called **lease Transfer of 'Bare shell building'** has been **equated with 'office space'provided under (vii) of para (A) information technology/information technology enabled services, biotechnology and gems and jewellery special economic zone**which is the authorised operation as per notification dated 27.10.2006.**(Page 179-182 of the Paper Book Index-Vol.2 of the assessee, submitted before Hon'ble ITAT 'B' Bench.)**The extreme non adherence, in the instant business operation, for claiming exemption/deduction is obvious from this particular notification also.

9.1 Your honour, the claim of deduction has to be seen **from the yardstick of statement of objects and reasons of The Special Economic Zones Act, 2005.**

"1. The Government of India had announced a Special Economic Zone Scheme in April 2000 with a view to provide an internationally competitive environment for exports. The objectives of Special Economic Zones include making available goods and services free of taxes and duties supported by integrated infrastructure for export production, expeditious and single window approval mechanism and a package of incentives to attract foreign and domestic investments for promoting export-led growth.

2. There are at present eleven functioning Special Economic Zones. While seven Zones have been set up by the Central Government, four by the private/joint/State sector. In addition, approvals have been given for setting up of thirty-five new Special Economic Zones in the private/joint/State sector.

3. While the policy relating to the Special Economic Zones is contained in the Foreign Trade Policy, incentives and other facilities offered to the Special Economic Zone developer and units are implemented through various notifications and circulars issued by the concerned Ministries/Departments. The present system, therefore, does not lend enough confidence for investors to commit substantial funds for development of infrastructure and for setting up of the units in the Zones for export of goods and services. In order to give a long term and stable policy framework with minimum regulatory regime and to provide expeditious and single window clearance mechanism, a Central Act for Special Economic Zones has been found to be necessary in line with international practice. To achieve this purpose, a "Special Economic Zones Bill, 2005" is proposed."

9.2 While deciding the issue, it is prayed that the observation of the Hon'ble High Court vide in its order dated 22.02.2018 in the case of assessee in para 7 assumes significance as the Hon'ble Court has stated that **the purpose for which SEZ Act are set up are to be considered**. The relevant para is as under:

> *"Furthermore, in the absence of a detailed analysis of the factual narration with respect to the transactions and the documents, **having regard to the provisions of the SEZ Act and the purpose for which SEZs are set-up**, to ensure that **such areas develop in a sustained and consistent manner, with assured infrastructure support on a continuous basis by developers**, the CIT(A)'s opinion that the assessment order was erroneous in law and prejudicial to the interest of the Revenue was justified."*

9.3 Sub-Rule (9) of Rule 11 of SEZ Rules, 2006 also states that

> ***"The Developer shall not sell the land in a Specific Economic Zone."***

9.4 The claim made by the assessee under section 80IAB **is unreasonable and excessive** as against the construction cost of Rs 190.30 crores, revenue has been recognized by the assessee developer at Rs. 773.52 crores from the group concern, namely DLF assets limited, resulting into profit of Rs. 583.22 crores during the AY 2008-09 in order to claim deduction under section 80-IAB of Rs. 573.94 crores.**The profit margin offered on this specific project on POCM method in relation to cost incurred for bare shell building is exorbitant,** the obvious reason is to availexemption/deduction of income, which offers limited time frame of any 10 consecutive assessment years out of 15 years.It will be relevant to know from which year actual lease rentals have started from actual users to the co-developers and what is the magnitude of such volume over years.It is important to bring on record what is yearly net profits on such transactions during the eligible period and what is the yearly profits after the

sunset period in relation to such SEZ.Further, it is also parametria to understand what is Net Profit on such projects in which exemptions are claimed vis-a-vissimilar projects in which exemptions/ deductions are not claimed.

10. There is another aspect to the matter. The present appeal cannot be compared with or treated as "covered" vis-a-vis the case of **DLF Limited vs. Addl. Commissioner of Income Tax and cross appeals (ITA No. 2126/Del/2013 AY 2008-09 and ITA No. 2749/Del/2013 AY 2008-09** because the adequacy, appropriateness and correctness of quantum of consideration received by the appellant from its sister concerns i.e., the co-developers has not been examined in terms of specific section 80IAB(3) r.w.s. 80IA (10) of the Act. The relevant Para in this regard from the Income Tax Act, 1961 is reproduced hereunder:

> ***"Deductions in respect of profits and gains by an undertaking or enterprise engaged in development of Special Economic Zone.***
>
> ***80-IAB.*** *(1)* .....
>
> .....
>
> ***(3) The provisions of sub-section (5) and sub-sections (7) to (12) of section 80-IA shall apply to the Special Economic Zones for the purpose of allowing deductions under sub-section (1)."***

10.1 Further, there are inherent issues in relation to price of the transaction andforthe field inquiry carried out by the A.O.

i. In this instant case of pending appeal, the learned CIT(A) has overlooked the finding of field inquiry conducted by the A. O. fromstamp valuation authority, Ranga Reddy district, Government of Telangana on the assessee's contention that the said letter does not clarify the year to which the information pertains to.

ii. The learned CIT (A) has further ignored the finding of the field inquiry conducted by the A.O. from stamp valuation authority, Ranga Reddy district, Government of Telangana that has brought on record comparable market value of land and structure rate which is much lower

iii. The learned CIT (A) has failed to conduct further inquiries in connection with inconclusive field inquiry conducted by A.O from stamp valuation authority, Ranga Reddy district, Government of Telangana by exercising power vested under section 250(4) of the Income Tax Act, 1961.

iv. The learned CIT (A) has failed to invoke sub section (10) of section 80IA read with sub section (3) of section 80IAB of the Income Tax Act particularly when the construction cost was Rs 190.30 crores, whereas sales has been recognized at Rs773.52 crores from the group concern, namely DLF assets limited, resulting into profit of Rs 583.22 crores during the AY 2008-09 in order to claim deduction under section 80-IAB of Rs573.94 crores

v. The learned CIT (A) has erred in holding that the reasonableness of amount received was an issue related merely to method of valuation, thereby, failing to notice that the extraordinary profit was contrary to the explicit provisions of section 80-IAB(3) of the Act.

vi. The learned CIT(A) has incorrectly brushed aside the aforesaid by observing that the AO had discussed but not taken eventually taken into account the price of transaction, ignoring the principle that acts of omission by the AO cannot, ipso facto, comprise the basis of granting relief by an Appellate Commissioner as held by the Hon'ble jurisdictional High Court in CIT-II vs. Jansampark Advertising & Marketing (P.) Ltd (231 Taxman 384).

DCIT 7(1), Delhi

10.2 In this regard, it is pertinent to place reliance on the **judgement of Hon'ble jurisdictional High Court, Delhi in CIT-II vs. Jansampark Advertising & Marketing (P.) Ltd (231 Taxman 384) wherein it has been rendered that**

> *"42. The AO here may have failed to discharge his obligation to conduct a proper inquiry to take the matter to logical conclusion. But CIT (Appeals), having noticed want of proper inquiry, could not have closed the chapter simply by allowing the appeal and deleting the additions made. It was also the obligation of the first appellate authority, as indeed of ITAT, to have ensured that effective inquiry was carried out, particularly in the face of the allegations of the Revenue that the account statements reveal a uniform pattern of cash deposits of equal amounts in the respective accounts preceding the transactions in question. This necessitated a detailed scrutiny of the material submitted by the assessee in response to the notice under Section 148 issued by the AO, as also the material submitted at the stage of appeals, if deemed proper by way of making or causing to be made a "further inquiry" in exercise of the power under Section 250(4). This approach not having been adopted, the impugned order of ITAT, and consequently that of CIT (Appeals), cannot be approved or upheld."*

10.3 Thus, Ld. CIT(Appeal) has incorrectly granted relief on the disallowance of deductions made by the assessing officer and it is prayed that the same may be reversed.

11. **Strict interpretation of Exemption notification**: The judicial landscape while granting exemptions/deductions has undergone tectonic shift after the decision or finding or pronouncements by the **Constitutional bench of Hon'ble Supreme Court in the case of Commissioner of Customs (Import), Mumbai versus M/s. Dilip Kumar and Company & Ors. (Civil Appeal No. 3327 OF 2007) dated 30.07.2018.** The certain relevant paragraphs of the same are

reproduced here, under for the sake of immediate reference and easy coherence:

> *"40. After considering the various authorities, some of which are adverted to above, we are compelled to observe how true it is to say that there exists unsatisfactory state of law in relation to interpretation of exemption clauses. Various Benches which decided the question of interpretation of taxing statute on one hand and exemption notification on the other, have broadly assumed (we are justified to say this) that the position is well settled in the interpretation of a taxing statute:* ***It is the law that any ambiguity in a taxing statute should ensure to the benefit of the subject/assessee, but any ambiguity in the exemption clause of exemption notification must be conferred in favour of revenue*** *and such exemption should be allowed to be availed only to those subjects/assesses* ***who demonstrate that a case for exemption squarely falls within the parameters enumerated in the notification and that the claimants satisfy all the conditions precedent for availing exemption.*** *Presumably for this reason the Bench which decided Surendra Cotton Oil Mills Case (supra) observed that there exists unsatisfactory state of law and the Bench which referred the matter initially, seriously doubted the conclusion in Sun Export Case (supra) that the ambiguity in an exemption notification should be interpreted in favour of the assessee*
>
> ***41. After thoroughly examining the various precedents some of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that every taxing statue including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in charging provisions, the benefit must necessarily go in favour of subject/assessee, but the***

same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State.

.....

43. *There is abundant jurisprudential justification for this. In the governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the Courts insist upon strict compliance before a State demands and extracts money from its citizens towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee may warrant visualizing different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to pay tax, and whether the revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation.* ***Thus, we may emphatically reiterate that if in the event of ambiguity in a***

taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion. We may now consider the decisions which support our view.

.....

51. In Hari Chand Case (supra), as already discussed, the question was whether a person claiming exemption is required to comply with the procedure strictly to avail the benefit. The question posed and decided was indeed different. The said decision, which we have already discussed supra, however, indicates that while construing an exemption notification, the Court has to distinguish the conditions which require strict compliance, the non-compliance of which would render the assessee ineligible to claim exemption and those which require substantial compliance to be entitled for exemption. We are pointing out this aspect to dispel any doubt about the legal position as explored in this decision. ***As already concluded in para 50 above, we may reiterate that we are only concerned in this case with a situation where there is ambiguity in an exemption notification or exemption clause, in which event the benefit of such ambiguity cannot be extended to the subject/assessee by applying the principle that an obscure and/or ambiguity or doubtful fiscal statute must receive a construction favouring the assessee. Both the situations are different and while considering an exemption notification, the distinction cannot be ignored.***

52. To sum up, we answer the reference holding as under –

(1) ***Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his***

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case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export Case (supra) stands over–ruled."

11.1 **To fortify the above, further reliance is placed on the decision rendered by Hon'ble Supreme Court in the case of Ramnath & Co.v Commissioner of Income-tax (Civil Appeal Nos. 2506 TO 2510 OF 2020) order dated June 5, 2020, 116 taxmann.com 885 (SC).** The relevant findings are reproduced here under for easy reference:

"17.4. Obviously, the generalised, rather sweeping, proposition stated in the case of Sun Export Corpn. (supra) as also in other cases that in the matters of taxation, when two views are possible, the one favourable to assessee has to be preferred,stands specifically disapproved by the Constitution Bench in Dilip Kumar & Co. (supra). It has been laid down by the Constitution Bench in no uncertain terms that exemption notification has to be interpreted strictly; the burden of proving its applicability is on the assessee; and in case of any ambiguity, the benefit thereof cannot be claimed by the subject/assessee, rather it would be interpreted in favour of the revenue.

18. *It has been repeatedly emphasised on behalf of the appellant that section 80-O of the Act is essentially an incentive provision and, therefore, needs to be interpreted and applied liberally. In this regard, we may observe that*

deductions, exemptions, rebates et cetera are the different species of incentives extended by the Act of 1961 Liberty India v. CIT [2009] 183 Taxman 349/317 ITR 218 (SC)[15]*. In other words, incentive is a generic term and 'deduction' is one of its species; 'exemption' is another. Furthermore, section 80-O is only one of the provisions in the Act of 1961 dealing with incentive; and even as regards the incentive for earning or saving foreign exchange, there are other provisions in the Act, including section 80HHC, whereunder the appellant was indeed taking benefit before the assessment year 1993-94.*

19. Without expanding unnecessarily on variegated provisions dealing with different incentives, suffice would be to notice that the proposition that incentive provisions must receive "liberal interpretation" or to say, leaning in favour of grant of relief to the assessee is not an approach countenanced by this Court. The law declared by the Constitution Bench in relation to exemption notification, proprio vigore, would apply to the interpretation and application of any akin proposition in the taxing statutes for exemption, deduction, rebate et al., which all are essentially the form of tax incentives given by the Government to incite or encourage or support any particular activity*[16]*.

20.The principles laid down by the Constitution Bench, when applied to incentive provisions like those for deduction, would also be that the burden lies on the assessee to prove its applicability to his case; and if there be any ambiguity in the deduction clause, the same is subject to strict interpretation with the result that the benefit of such ambiguity cannot be claimed by the assessee, rather it would be interpreted in favour of the revenue. In view of the Constitution Bench decision in Dilip Kumar & Co. (supra), the generalised

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observations in Baby Marine Exports (supra) with reference to a few other decisions, that a tax incentive provision must receive liberal interpretation, cannot be considered to be a sound statement of law; rather the applicable principles would be those enunciated in Wood Papers Ltd. (supra), which have been precisely approved by the Constitution Bench. Thus, at and until the stage of finding out eligibility to claim deduction, the ambit and scope of the provision for the purpose of its applicability cannot be expanded or widened and remains subject to strict interpretation but, once eligibility is decided in favour of the person claiming such deduction, it could be construed liberally in regard to other requirements, which may be formal or directory in nature."

11.2 In view of the above, it is crystal clear that exemptions/deduction provisions granting concessions are to be complied with fully and strictly. From the facts of this particular pending case, it is abundantly clear that the assessee has not fulfilled the conditions or adhered to the requirement of provisions of SEZ Act and/orsection 80-IAB of the Income Tax Act. Therefore, the claim of the assessee, on the pretext of fulfilment of conditions under SEZ Act or also the section 80-IAB, is totally incorrect and unlawful and the same is requested to be confirmed by the Hon'ble ITAT.

12 **Without prejudice to above, Judicial pronouncements supporting the above finding based on multiple events and circumstantial evidences leading to non-fulfilment of conditions and consequent denial of the claim of deduction under section 80-IAB:**

Considering the totality of facts brought on record by the AO, the adverse observations of the Hon'ble Delhi High Court and also recognizing the well-settled principle of "substance over form", the following landmark judgment

supports the case of revenue in entirety. In the case of Edward Keventer (P) Ltd. v. Dy. Commissioner of Income-tax [2004] 89 ITD 347 (Kol.) where the Hon'ble Tribunal decided the issue of "whether transaction is real or not real" in favour of revenue. The relevant text is reproduced hereunder:

" ..... 9. Having regard to the totality of the facts and circumstances of this case we have now to see whether the transaction of sale of shares of Keventer to five sister companies and then to buy back the same from the same companies to whom they were previously sold is real and genuine and not sham, bogus or make believe.

10. In this connection, the legal position as emerging from various decisions rendered from time to time in that context are to be borne in mind and may be summarized as under:

***(i)** The taxing authority is entitled and is indeed bound to determine the true legal relation resulting from a transaction. Motive alone cannot make unlawful what the law allows but at the same time if there is a presence of bad faith or fraud or non-bonafideness in the transaction, the taxing authorities are not bound to consider the legal effect of the transaction. If the assessee's acts are not bona fide but are ambiguous, sham or make-believe it is open to the taxing authorities to question and doubt the transaction and to find out the true, correct and real meaning and result thereof. The make-believe transactions, though seemingly legal, are not free from judicial scrutiny.*

In the context of determining whether a transaction is sham or illusory or a device or a ruse or a make-believe, the taxing authorities are entitled to penetrate the veil covering it and ascertain the truth. The taxing authorities are not required to put on blinkers while looking at the documents produced before them. They are entitled to look into the surrounding circumstances to find out the reality of the recitals made on the documents. It is the duty of

the court, in every case, where ingenuity is expended to avoid facing and welfare legislations, to get behind the smoke-screen and discover the true state of affairs. The court is not to be satisfied with the form and leave alone the substance of the transactions.

(ii) *The transactions should not be seen in isolation but in consonance to each other. The matter may also be considered and decided upon in the light of human probabilities and the surrounding facts and circumstances.*

(iii) *The principle 'what is apparent is real' is not sacrosanct and may be overlooked if surrounding circumstances so suggest.*

(iv) *It is true that every person is entitled to so arrange his affairs as to avoid taxation but the arrangement must be real, genuine or bona fide and not a sham or make believe or colourable device. Tax planning may be legitimate provided it is within the framework of the law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is Hon'ble to avoid the payment of tax or to obtain any advantage or benefit for tax purpose by dubious method.*

(v) *A colourable transaction is one, which is seemingly valid, but a feigned or counterfeit transaction entered into for some ulterior purposes. The transaction is to be decided as such by reference to the material or evidence or circumstances of each and every case.*

(vi) *The principle on the matter of tax evasion and tax avoidance as laid down by Hon'ble Supreme Court in a landmark judgment in the case of McDowell & Co. Ltd. v. CTO [1985] 154 ITR 148 (SC) can have its application only where colourable or artificial devices are adopted and not to the transactions which are otherwise legitimate and are undertaken bona fide in the ordinary course of business. In other words, the McDowell & Co.'s case (supra) can have its application where the devices though seemingly legal are adopted in collusion or whether devices adopted are not*

genuine or bona fide but are sham, make believe or camouflaged to escape the liability for the tax or to obtain certain benefit for tax purpose……..".

(vii) *In support of our above conclusion and discussion we may also refer to the following decision:*

(i) *In the case of CIT Vs. Durga Prasad More [1971] 82 ITR 540 (SC), it is held that it is a well-settled principle of law that apparent must be considered real until it is shown that there are reasons to believe that the apparent is not the real. This means that what is projected by the assessee must be accepted by the authorities unless the authorities have reasons to believe that what is projected by the assessee is not genuine. For the purpose of uncovering the reality the authorities are empowered to look into the surrounding circumstances of the matter. They are also entitled to go behind the motive of the transaction.*

(ii) *In Sumati Dayal v. CIT [1995] 214 ITR 801 the Apex Court has held that the matter has to be considered in the light of human probabilities and the surrounding circumstances, and the Court had occasion to consider the principle 'what is apparent is real' and held that this principle is not sacrosanct and may be overlooked if surrounding circumstances so suggest.*

(iii)*In the case of CIT v. L.N. Dalmia [1994] 207 ITR 89, the Hon'ble Calcutta High Court held the device adopted by the assessee to reduce the tax liability to be colour and sham. In this case the Court observed as follows: -*

"as discussed, the assessee effected a transaction of sale of shares held by him to the companies formed by himself holding the major part of the shares of such companies along with his nephew and wife, who held only the smaller part therein and are shown to have suffered a loss by the sale which would be a cushion against future tax liability for gains either under the revenue head or under the capital head. We have observed that as far as the exercise of control of the company (Punalur Paper Mills Ltd.) there has been no change

whatsoever. He continued to exercise the same control over Punalur Paper Mills Ltd. as before. This special aspect cannot be overlooked by any appellate authority dealing with tax matters. When there was no real change whatsoever, the apparent change being the transfer on the surface of shares from the individual to the company, a handmaid of the transferring individual, cannot be overlooked and we are in complete agreement with the view of the taxing authority that there was no real change and transfer claimed was a sham transfer."

It was further observed therein:-

"In context of determining whether a transaction is a sham or illusory or a device or a ruse, the income-tax authorities are entitled to penetrate the veil covering it and ascertain the truth. The taxing authorities are not required to put on blinkers while looking at the documents produced before them. They are entitled to look into the surrounding circumstances to find out the reality of the recitals made in the documents. It is the duty of the Court in every case, where ingenuity is expended to avoid taxing and welfare legislations, to get behind the smokescreen and discover the true state of affairs. The Court is not to be satisfied with the form and leave alone the substance of the transactions."

(iv)*In the case of Smt. Nayantara G. Agrawal v. CIT [1994] 207 ITR 639 (Bom.), the Hon'ble Court held that "the courts in such a case should not lay undue emphasis on the language of each individual document as that is not determinative of the controversy. What is really necessary to be considered in such cases is the true nature and effect of the transaction. If on such a consideration, the Court arrives at a finding that the true nature is 'transfer of land' and the various steps originating from the affidavit and formation of partnership and culminating into dissolution of the same, in the process leaving the land with the company, are nothing but a device to avoid capital*

gains tax leviable under section 45 of the Act on transfer of the land to the company, such a device cannot get the seal of approval of this Court. In the light of the foregoing discussion, we hold that the firm was not genuine".

***(v)** In the case of CIT v. Shekhawati Rajputana Trading Co. (P.) Ltd. [1999] 236 ITR 950, the jurisdictional Calcutta High Court held that The Tribunal mainly based its findings on the ground that the consideration was received through cheque and was duly credited in the bank account of the assessee. The Tribunal did not appreciate properly the fact that the transaction was between the company and its chairman and there was no substantial credit of the parties in the bank, at the time when the cheques were issued by the assessee as well as by its chairman all upon the same bank. It has been submitted that all transactions themselves make the transaction genuine. The transaction in the instant case is between the assessee-company and its chairman, the onus lies heavily on the assessee to prove that the transaction is genuine which, was not discharged by the assessee in the instant case, cheques were issued simultaneously by the parties in favour of each other for purchase and repurchase on the same day without both the parties having sufficient funds in the bank, that itself goes to show that the transaction was not genuine. This aspect, however, could not be explained by the assessee. Regarding sale of shares of three companies particularly J. Ltd., no evidence was produced on behalf of the assessee that there was no other buyer of the shares except its chairman, although those shares were quoted in the stock exchange. The fact that though the sale through broker of listed shares is essential under the Securities Contracts (Regulation) Act, 1956, it was not done in the instant case was also ignored by the Tribunal. The Tribunal failed to take note of the fact that the assessee-company and K tried to claim loss in their respective assessment for tax avoidance by fictitious transactions. Considering the totality of the facts and in the circumstances of the case, the Tribunal was not*

correct in law in directing the Assessing Officer to allow the share of loss to the assessee-company.

The Income-tax Appellate Tribunal, Mumbai Bench, 'C' in the case of Bombay Oil Industries Ltd. v. Dy. CIT [2002] 82 ITD 626 (Mum.) having considered the motive and timing of the transaction, commercial point of view and the transactions with a person in whom the assessee found un protested or obliging medium to put through the series of steps envisaged for claiming the loss had held that the series of steps taken to achieve the desired results was nothing but a sham or collusive and as such the transaction cannot be considered. It was also held therein that there is nothing in sections 45 and 48 of the I.T. Act so as to prevent the income-tax authorities to go behind the apparent to find out the real on the basis of evidences and surrounding circumstances of the case. The decision of Apex Court in the case of McDowell & Co. Ltd. (supra) and the Hon'ble Gujarat High Court in the case of Banyan & Berry (supra) amongst others, were considered by the Tribunal and thus held as follows:

"The gist of these authorities appears to us to be that whereas tax planning can be tolerated, tax evasion by dubious means cannot be countenanced. Where the transaction put through or steps taken by the assessee need not have been taken in order to achieve a commercial result or object, and were taken only with a view of reducing the tax burden, then though such transactions or steps may be legal and actually put through, they are hollow and colourable devices. They are not then to be considered as having been undertaken necessarily for achieving the commercial object or purpose but as having been undertaken with the oblique motive of evading taxes."

13 Further, your honour, Hon'ble ITAT is the highest fact-finding authority. The AO has rightfully disallowed claim under section 80IAB on so called leased

transfer of bare shell building, where as actually, there is advance receipt of rentals in the form of development consideration which are not entitled to avail deduction under section 80IAB.Moreover, and without prejudice the nature and quantum of the consideration, received on the transaction emanating from group concerns, has been overlooked in deciding the other case.

14 In view of the aforesaid and the factual matrix of this case, coupled with evidences brought on record and supported by the judicial pronouncement by the Hon'ble Apex Court (supra) redefining the spectrum in the context of exemptions/ deductions, the deduction of Rs 573,94,33,765/- claimed by the assessee under section 80-IAB of the Act, which is incorrectly claimed on so called lease transfer on bare shell structure in relation to advance lease rentals, is undeniably not in accordance with provisions of the said section.

15 It is respectfully prayed that the claim of deduction rightly denied by the AO may not be found infirm and, therefore, be upheld by reversing the order of the Ld. Appellate Commissioner.

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PCIT-1 Delhi
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7.3 The Ld. AR for the respondent assessee supported the order of CIT(A) and submitted that the SEZ project being a

BOA approved project and assessee having satisfied all the pre-requisite conditions in terms of SEZ Act read with Section 80-IAB, the claim of deduction is proper. The counsel also filed detailed rejoinder to revenue's submission which are reproduced here below:

REJOINDER TO SUBMISSIONS OF THE REVENUE

1. The appeal of the revenue is against order passed by CIT(A)-3, New Delhi dated 13/09/2019

2. The sole issue under consideration is claim of deduction u/s 80IAB of the Income Tax Act, 1961. The assessee claimed deduction u/s 80IAB in respect of SEZ Project situated at Gachibowli Village, Shrilingampalli Mandal, Ranga Reddy District, Hyderabad on the basis of approval by Board of Approvals (BOA) in terms of SEZ Act, 2005. This is the first year of claim of deduction. The income which is subject matter of claim of deduction is arising from carrying out authorized operation of development of SEZ. The assessee is engaged in well planned activity of development of bare shell buildings and transfer of the same to Co-developer for sale consideration. In addition to above, the assessee is also carrying out allied operations for maintenance of infrastructure facilities in SEZ.

3. The assessing officer in the original assessment u/s 143(3) vide order dated 29/12/2010 (PB-1 Page 51-65) accepted the claim of deduction u/s 80IAB after making necessary verification and on the basis of approval accorded by BOA.

4. Thereafter, the CIT initiated revisionary proceeding u/s 263 on the issue of correctness of claim of deduction u/s 80IAB and directed the assessing officer to re-examine the claim of deduction. The finding of CIT is reproduced hereunder:

> *"6. As enumerated above the assessee company is a developer of SEZ, during the year claimed deduction u/s. 801AB on the development income receipt from the co-developer which is also a company of same group. Deduction u/s 801AB amounting Rs. 573,94,33,765/- was allowed by the AO on the basis of accounting method followed by the assessee, relevant provisions of SEZ Act including provision of Income Tax Act and after examining taxability of the "development income" claimed exempt by the assessee company.*

Section 801AB of the I.T.Act. inserted by SEZ Act gives assessee déduction of 100% of profit and gains derived from the business of developing SEZ. This deduction is available for 10 consecutive assessment years and this deduction is also allowable to the co-developer on transfer collaboration and maintenance of SEZ for remaining period in 10 consecutive assessment years. Thus section 801AB clearly refers to exemption for profit from operation and maintenance of SEZ only and not for profit from sale of assets. This section does not specifically provides for a deduction to income arising from the transfer of assets to a co- developer by a developer.

7.(i) The detailed examination of issues involved as above in the assessee's case, establish the followings:

a. *Rule 11(10) of SEZ Rules 2006 specifies that the developer shall not sell the land in a SEZ. As sale of land is prohibited and it was possible for the assessee to sell the buildings only, the land has been given to co-developer through an arrangement of lease of land which is nothing but a play to overcome this prohibition.*

b. *Sale of buildings to the co-developer is not an activity of development of SEZ. It is an isolated transaction giving one time income from transfer of capital assets. It is very clear from the agreement that the intention from the very beginning was to construct and sale the buildings as a onetime, activity. Such isolated transaction can never be termed as business activity. Co-developer agreement is very clearly showing that the developer loses all rights over these assets and the relinquishment of right is irrevocable.*

c. *There is no dispute that buildings have been sold to co-developer.*

d. *Though SEZ Act prohibits for sale of land thereby implicitly denying any benefit to a developer who is basically interested in deriving income by transfer of assets, the assessee has found a way to overcome this prohibition by creating 49 years lease in favour of co-developer, renewable further, thus effectively transferring the land also.*

e. *SEZ Act notifies specific authorized operations which alone would qualify for exemptions, concessions and drawbacks. Therefore income from sale or transfer or such operation would not be eligible for exemption as per notification no. S.O. 1846(E) dated 27th October, 2006.*

(ii) In view of the above, the assessee's income from the sale of assets is not eligible for deduction u/s.801AB.

(iii) Once it is established that the transfer of buildings to co-developer is not a business activity and the income from such transfer is not business income, it is clear that sale of such buildings, in the nature of capital assets, has generated capital gains and, therefore, income shown by the assessee on this count has to be treated as capital gains.

On examination of the assessment records for the A.Y. 2008-09, it is seen that the A.O has allowed the deduction uls 80IAB wrongly without considering the above facts so as to render the assessment order not only erroneous but also prejudicial to the interest of revenue. Hence, the assessment is set aside on this limited issue to be

reframed by the AO after considering the above facts and after giving the assessee opportunity of being heard.

5.1 The undisputed facts as emerged from the revisionary order u/s 263 passed by CIT are as under:

- **The assessee is a developer of SEZ and deduction was claimed in respect of development income arising from sale of bare shell building blocks**
- **Section 80IAB was inserted on the basis of provisions of SEZ Act so as to allow deduction from profit and gains derived from the business of developing SEZ.**
- **There is no dispute that buildings have been sold to Co-developer**

5.2 However, the CIT set-aside the assessment order u/s 143(3) and directed the assessing officer to reconsider following issues:

- Whether the claim of exemption is in respect of authorized operations
- Whether transfer of building is a business activity and income from such transfer is business income or capital gain.

6. The Hon'ble ITAT quashed the order passed u/s 263 vide order dated 13/12/2013 in ITA No. 2560/D/13. The relevant finding of Hon'ble ITAT is reproduced hereunder:

15. Let us take the second question first. Hon'ble Delhi High Court in the case of Sunbeam Auto reported in 332 ITR 167 and CIT vs. Anil Kumar reported in 335 ITR page 1 has pointed out the distinction between lack of inquiry and inadequate inquiry. In case of no inquiry, Learned Commissioner can be justified to say that assessment order is erroneous because the Assessing Officer plays a role of investigator as well as adjudicator. He is duty bound to look into the details, verify them and then adjudicate. Learned Commissioner has observed in his order that Assessing Officer failed to conduct proper inquiry. The expression "proper inquiry" is a very subjective and vague term, it depends upon each adjudicator, what is a proper inquiry. In the impugned order, Learned Commissioner has not referred any particular fact; had that been considered then result could be different. We could appreciate the stand of the revenue, if Learned Commissioner had pointed out the particular facts whose non-investigation by the Learned Assessing Officer, goad him on wrong conclusion. Learned Assessing Officer has enquired about the overhead expenditure, he has reduced the claim of the assessee, this suggests that he was aware about the claim of deduction under sec. 80IAB. The allegations by the Learned Commissioner, at the most, can be; that it is not discernible from the

record whether very applicability of sec. 80IAB was examined or not. This aspect we will deal with the issue No.1, however, on the point No.2, we are of the opinion that Assessing Officer had examined the details of deduction claimed under sec. 80IAB. He had issued questionnaire and thereafter revised the claim. The alleged inadequate inquiry cannot be a ground to term the assessment order as erroneous.

16. As far as reason No.1 is concerned, the SEZ Act was enacted in 2005, offering slew of benefit to developers of various SEZ in India. The Act provides a complete mechanism and under sec. 8(1), a regulatory body called "Board of Approval" (for short BOA) is created, conferring wide powers on it, which are enshrined in SEZ Act. Simultaneously, section 80IAB has been introduced in the Income-tax Act, 1961 providing 100% deduction on the income derived from SEZ on fulfillment of various conditions. It also emerges out from the record that the developers would not sell the warm shell building and the ultimate user would be a lesser only. However, a provision has been made in the SEZ Act, whereby a codeveloper has been provided who will be treated at par with the developers. The assessee has leased out the land to the co-developer and sold bare shell structure to the co-developer, who will convert it into the warm shell and ultimately lease rental would be earned from exploitation of developed building. When all these aspects come up then assessee approached the BOA who is a competent authority under the SEZ Act. The transfer of bare shell building has been approved by the BOA. It was held as an authorized activity. BOA has not raised any dispute. We have extracted some of the questions and replies. We have also gone through the other correspondence available on pages 106 to 113 of the paper book. In brief, co-developer is to be construed as developer. The bare shell structure can be sold by a developer to the co-developer. This activity is to be considered as an authorized activity under the SEZ Act. The assessee has treated alleged "bare shell" as stock-in-trade. It has claimed the deduction in one year on sale of stock in trade. Section 80IAB provides that income derived from the activity of developing SEZ, notified on or after Ist day of April 2005, would be eligible for deduction subject to fulfillment of conditions in sub-section (5) and (7) to (12) of sec. 80IA of the Income-tax Act, 1961. As far as fulfillment of conditions with regard to provisions of sub-section (5) and (7) to (12) of sec. 80IA is concerned, Learned Commissioner has not raised any dispute. Sub-section (5) of sec. 80-IA puts certain restrictions on the quantum of admissible deduction. This aspect has been examined by the Assessing Officer while dealing with allocation of proportionate overheads expenses. Sub-section (7) talks of submission of reports in form No. 10CCB which is not in dispute. Sub-section (8) talks of transfer of service at arm's length price, so that any assessee would not claim excess deduction. This exercise has also been carried out by the Assessing Officer and no dispute has been raised. Sub-section 80(a) again restrict the quantum of deduction available where profits of the undertaking or enterprises have been claimed as deduction under this section. Since no deduction was claimed under any other section of this chapter, therefore, according to the assessee, this section is not applicable. Sub-section (10) empowers the Assessing Officer to reduce the quantum of deduction, if it was found that the transactions have been so arranged which gives higher rate of profit then ordinary profit in that line of business. Sub-section (11) deals with the notification, if any, issued by the Government denying the deduction to any particular class of industry or in any, notified area. It is also not applicable. Similarly, sub-section (12) under sec. 80IA deals with a situation where the undertaking or enterprise has been amalgamated, this clause is also not applicable.

16.1 Though in the present appeal, we are not called upon to adjudicate the issue regarding admissibility of deduction under sec. 80IAB conclusively because the Learned Commissioner himself has not adjudicated this issue that a deduction would not be admissible to the assessee. He confined himself to the area that proper inquiry was not conducted before granting the deduction. Thus, our endeavor is to judge the assessment order and whether learned Assessing Officer has taken one of the possible views while granting deduction under sec. 80-IAB of the Income-tax Act, 1961. In our opinion, Learned Commissioner has failed to comprehend the complete concept of SEZ Act and confined himself to the ordinary meaning of expression "income derived from developing SEZ" provided in sec. 80IAB. He construed the limited income from developing SEZ Act, as the lease rental. On the other hand, stand of the assessee is that if a developer transfers a bare shell structure of the building, developed by him to a co-developers then such an activity would fall within the ambit of authorized activity and the final authority to interpret whether it is an authorized activity or not is BOA. This authority has granted its approval about the transfer of bare shell structure and termed it as a authorized activity of development of SEZ. We have also noticed that assessee has not totally abandoned the project. It has still to perform number of responsibilities. Thus, Assessing Officer has taken one of the possible view or interpretation of all these provisions, somehow, his view does not match with the view of Learned Commissioner but that would not authorize the Learned Commissioner to say that assessment order is erroneous.

7. The above order of Hon'ble ITAT was set-aside by Hon'ble Delhi High Court in ITA 507/2014 vide order dated 22/02/2018 and Hon'ble High Court directed the assessing officer to frame the assessment in accordance with law. The finding of Hon'ble High Court is as under:

Question of law:

"(i) Did the Income Tax Appellate Tribunal (ITAT) fall into error in holding that the application of Section 263 by the CIT(A) in the circumstances of the case was not warranted?

(ii) Did the ITAT fall into error in holding, on the merits, that sale of assets and buildings to the co-developer could have been treated as capital gain and not business income?"

Finding:

"6. This Court has considered the submissions of the parties. The question as to whether sale of bare shell building is per se a deductable activity falling within Section 80IAB has, in the opinion of the Court, not been adequately considered or addressed. The Central Government's clarifications were issued to the assessee, at its request. The AO must have analysed the provisions of the Act, especially, the notifications governing the setting-up of the SEZs and the permissible activities in such zones with their investors (Section 80IAB) and the circumstances of the case, i.e. the agreement entered into with the co-developer, the conditions of lease etc.,

had to be analysed in detail. Clearly, the AO did not conduct that detailed enquiry. On the other hand, the AO's order merely indicates that the analysis, if at all, it could be characterized as such of the assessee's claimed SEZ activity was in the context of allegations of varied expenses, as is apparent from the AO's order dated 29.12.2010 below, which was clearly inadequate:

"11. Allocation of Overheads not apportioned to SEZ Project:

The assessee during the assessment has claimed deduction of Rs.584,93,80,397/- U/s 801AS in respect of profit from Hyderabad SEZ Project. In order to work out the correct profit from the Hyderabad SEZ project for calculation of deduction U/s 80lAS the assessee company vide questionnaire dated 6.12.2010 was asked the following question:

"In your letter dated 22.10.2010 at Point No.3 you have mentioned that Administrative Expenses of Rs.206.59 lacs have been allocated to Hyderabad SEZ project while computing deduction U/s 801AS. However, it has been observed that the total cost of Hyderabad SEZ Project have been shown in Schedule-XVI of the Profit and Loss Account. As per the profit and loss account the following expenses have been debited which are not allocated while computing profits of the Hyderabad SEZ project;

a. Establishment charges RS.2712.36 lacs

b. Finance charges RS.8575.81 lacs

c. Other expenses Rs.4242.01 lacs

d. Depreciation Rs.753.80 lacs

You are required to show cause that why the above mentioned expenses should not be allocated while computing the profit from the Hyderabad SEZ Project."

7. Furthermore, in the absence of a detailed analysis of the factual narration with respect to the transactions and the documents, having regard to the provisions of the SEZ Act and the purpose for which SEZs are set-up, to ensure that such areas develop in a sustained and consistent manner, with assured infrastructure support on a continuous basis by developers, the CIT(A)'s opinion that the assessment order was erroneous in law and prejudicial to the interest of the Revenue was justified. As a result, it is held that the ITAT erred in interfering with the order of the CIT(A). Consequently, the impugned order needs to be set aside. The order of the CIT(A) under Section 263 is, therefore, upheld. The CIT(A)'s observations, however, shall not be construed as conclusive or as binding; the discussion with respect to the permissibility of the deduction claimed shall only be considered in the light of the noting to reopen the assessment. Resultantly, the AO is directed to complete the assessment having regard to the rights and contentions of the parties in accordance with law, expeditiously and preferably, within six months."

8.1 Pursuant to order of Hon'ble Delhi High Court, the assessing officer completed the assessment vide order dated 22/12/2018 passed u/s 143(3)/263 of the Income Tax Act, 1961 and disallowed the claim of deduction u/s 80IAB on following grounds:

A. The transaction of transfer of building to co-developer amounts to transfer of capital asset and gain arising therefore is taxable as per section 45 of the Income Tax Act, 1961 and same is not eligible for deduction u/s 80IAB.

B. Complete transfer of rights in the building situated in SEZ is not permissible under section 80IAB of the Income Tax Act, 1961.

8.2 The assessing officer has not disputed the fact that claim of deduction u/s 80IAB was in respect of approved SEZ Project and agreement for sale of bare shell building blocks to Co-developer was also approved by BOA.

9. The CIT(A) allowed the claim of deduction u/s 80IAB vide order dated 13/09/2019 after recording following finding:

> *"6.5 During the course of appellate proceedings, the Ar has also brought on record the order of Hon'ble ITAT Delhi in the case of DLF Ltd. vs. Addl. CIT in ITA Nos. 2126/Del/2013 and 2749/Del/2013 for AY 2008-09, in which vide order dated 27.05.2019, the Hon'ble ITAT has decided similar issues in the case of group company of the appellant, which are also raised in the present case. These issues are-*
>
> .....
>
> *6.6 On perusal of the above order, it is observed that the Hon'ble ITAT Delhi has clearly held that the transfer of bare shell buildings is an authorized operation of developing of SEZ as per the SEZ Act, 2005 and the profit earned from transfer of bare shell buildings constitutes part of the operating profit and the said income/profit is eligible for deduction u/s 801AB of the Act. It has also been held that the income from sale of buildings is purely in the nature of business income and the same cannot be re-characterized as capital gains. Similar additions made in subsequent years by the AO have been allowed by my ld. predecessors also. The facts of the present case are similar to the facts in the above referred case and therefore, following the decision of Hon'ble ITAT Delhi (supra), it is held that the appellant is entitled for deduction u/s 801AB of the Act in respect of the profit earned from transfer of bare shell buildings and the sale of bare shell buildings cannot be treated as transfer of Capital Asset.*
>
> *6.7 The AO has also held that the transfer of bare shell buildings has been done at artificially high value in order to claim the benefit of deduction u/s 801AB of the Act. It is further held that the appellant has opted for Rent Capitalization Method in order to arrive at the fair market value of the sold assets. In this regard, it is observed that the AR has duly explained the reason for the method of valuation adopted by the appellant. Moreover, it is observed that out of the three methods prescribed, not one method has been made mandatory and the basic principle which needs to be looked into is that the transaction is held that arm's length price. In this case, the appellant has explained that the price was determined commercially by both the parties on the basis of prevailing market rent rates and the same was*

incorporated in the MOU and the co-developer agreement. It is also observed that in this year under consideration, the appellant has shown the revenue on the basis of 42.71% by applying POCM method and the balance amount has been recognized as revenue in the subsequent years and in those years, the rate/value of the transaction has already been accepted by the AO. Moreover, a perusal of the assessment order also shows that although the AO has discussed the issue of price of transaction, but the AO has not taken the same into account while computing total income of the appellant. In view of this, I am of the opinion that no adverse view can be taken about the pricing of the transaction of sale of bare shell buildings.

6.8 Keeping in view the above facts and discussion and following the decision of Hon'ble ITAT Delhi (Supra) and of the ld. CIT(A) in the case of appellant in AYs 2009-10 to 2011-12, it is held that the appellant is entitled for deduction u/s 80IAB of the Act in respect of the profit earned from transfer of bare shell buildings and the sale of bare shell buildings cannot be treated as transfer of Capital Asset. Accordingly, the addition made by the AO is deleted and the grounds of appeal are allowed."

10. Against the order of CIT(A), the revenue has raised following ground before Hon'ble ITAT:

"1. On the facts and in circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made by the AO wherein AO has disallowed deduction claimed by the assessee u/s 80IAB of the Income Tax Act, 1961 amounting to Rs. 5,73,94,33,765/-."

11. In respect of above said ground, we furnished our detailed synopsis vide which we have duly explained the purpose and overriding effect of SEZ Act and concept of authorized operation vis-à-vis development activity envisaged under section 80IAB of the Act. It is worthwhile to submit that provision of section 80IAB mandates development of SEZ which essentially means carrying out authorized operation in accordance with approval by BOA and as such the claim of deduction in respect of authorized activity of development of bare shell building and transfer of the same to Co-developer is in accordance with law. The detailed synopsis filed are extracted hereunder for ready reference:

"13. *The provisions of section 80IAB grants benefit of deduction of profits earned from the activity of developing a Special Economic Zone. However, the term 'Developing a Special Economic Zone' has not been defined under the Income Tax Act, 1961 but same is covered vide section 2(g) of the SEZ Act, 2005.*

*(g) **"Developer"** means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (10) of section 3 and includes an Authority and a Co-Developer;*

*14. In this regard, it may be appreciated that meaning of term 'Developing a Special Economic Zone' as used in section 80IAB has to be understood in the light of Specific provisions of SEZ Act, 2005 and once the approval is granted by BOA, it is implicit that grantee entity is a developer in terms of section 2(g) of the SEZ Act, 2005. In the present case, undisputedly, the assesssee has been recognized as 'Developer' under SEZ Act by BOA vide approval dated 23rd October, 2006 (PB Pg 50). Further, the BOA has also specified the list of authorized operations for development of SEZ vide letter dated 21st June 2007 **(PB-2 Page 188-190)** which explicitly contains bare shell (office space) as authorized activity eligible for exemptions under the SEZ Act and Income Tax Act. Furthermore, the BOA has also authorized and approved the activity of transfer of bare shell to Co-developer vide approval dated 1st May, 2007 and 18th June, 2007 **(PB-2 Page 236-239)***

15. At this juncture, it is pertinent to note that section 80IAB was inserted in the statute through enactment of SEZ Act, 2005 and the said provision is clearly an offshoot of SEZ Act, 2005. The attention is drawn to section 27 of the SEZ Act, 2005 which explicitly states that a developer carrying out authorized operation in SEZ Act shall be eligible to claim benefit of section 80IAB of the IT Act.

16. Under these circumstances and in the light of specific provisions of section 27 of the SEZ Act, 2005, the assessee having been recognized as a Developer of SEZ and the activity of developing bare shell office space and its transfer to co-developer been approved as authorized operation, it is self evident that assessee is engaged in the business of developing SEZ in terms of section 80IAB of the Income Tax Act, 1961 and is entitled to benefit of statutory deduction.

17. The assessing officer has alleged that transaction of sale of bare shell structure to Co-developer is a capital account transaction resulting in capital gain and thus not eligible to deduction u/s 80IAB. In this connection, it is clarified that assessee is engaged in the business of real estate and development of SEZ is part of its core business activity.

18. Before moving ahead, it is relevant to explain the term 'Business' so as to understand the nature of income earned by the assessee, a real estate developer, on sale of building. The term 'business' has been defined u/s 2(13) of the income tax act which is reproduced hereunder for ready reference:

(13) "business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture

19. The above definition has further been elaborated by Apex Court in the case of ***Narain Swadeshi Weaving Mills v. CCE [1954] 26 ITR 765 (SC)*** *wherein it was held as under:*

The word "business" connotes some real, substantial and systematic or organised course of activity or conduct with a set purpose. On the others hand, a single and isolated transaction has been held to be conceivably capable of falling within the definition of business as being an adventure in the nature of trade provided the transaction bears clear indicia of trade. The question, therefore, whether a particular source of income is business or not must be decided according to our ordinary notions as to what a business is.

In view of the above, it is self evident that any activity carried out by the assessee in an organized and systematic manner constitutes business. The concept of business is not static and it inherently implies continuity of activity for a period of time. Further, the intent to carry business can be gathered from the Memorandum of Association and accounting treatment in the books of account.

20. In the present case, the object clause in MOA of the assessee company is reproduced as under:

PB-1 Page 1-8

Relevant Pg 4

A. THE MAIN OBJECTS TO BE PURSUED BY THE COMPANY ON ITS INCORPORATION ARE:

1. To purchase or otherwise acquire, take on lease or in exchange, hire or otherwise acquire, an interest in any movable or immovable property including industrial, commercial, residential, agricultural or farm lands, plots, buildings, houses, apartments, flats or areas within or outside the limits of Municipal Corporation or other local bodies, anywhere within the Domain of India, to divide the same into suitable plots, and to rent or sell the plots to the people for building houses, bungalows, and business premises, and to

build residential houses and business premises and colonies, and rent or sell the same to the public and realize cost in lumpsum or easy installments or by hire purchase system and otherwise.

2. To purchase or otherwise acquire, any land, plot(s) of land or immovable property or any right or interest therein either singly or jointly or in Partnership with any person(s) or Body corporate or partnership Firm and to develop and construct thereon commercial complex or complex(es) either singly or jointly or in partnership as aforesaid, comprising officers for self use or for earning rental income thereon by letting out individual units comprised in such building.

3. To purchase, sell and otherwise to carry on the following business such as builders, contractors, architects, engineers, Estate agents, decorators, surveyors, Merchants and dealers in stone, stand cement, bricks, timber, iron and steel, hard ware and other building requisites, bricks and tiles and terra cotta markers, job makers, carriers, house and estate agents.

21. The assessee company is engaged in the business of real estate development in an organized manner in accordance with its objects since year 2002 and has undertaken following projects in FY 2007-08 to 2012-13:

Financial Year	***Projects***
2007-08	*1. Jasola Project near Apollo Hospital, Delhi* *2. SEZ Project, Hyderabad*
2008-09	*SEZ Project, Hyderabad*
2009-10	*SEZ Project, Hyderabad*
2010-11	*SEZ Project, Hyderabad*
2011-12	*SEZ Project, Hyderabad*
2012-13	*SEZ Project, Hyderabad*

22. The SEZ project at Hyderabad is a big Commercial Township having aggregate constructed area of 41,13,332 Sq. Ft. to be developed on 26.225 acres of land. The appellant has huge infrastructure and establishment for execution of SEZ Project of such magnitude comprising of architects, technicians, labour force etc.. The detail of buildings constructed as per Co-developer agreement as mentioned in ***Annexure F on PB-2 Pg 271*** *is as under:*

S.No.	Bare Shell Building (Block)	Approx. Area (in
1	Block 1	855050
2	Block 2	1019585
3	Block 1 – Ph III	516270
4	Block 2 – Ph III	414410
5	Block 3 – Ph III	276900
6	Block 3	1031117

*23. It is relevant to make reference to the meaning of **bare shell** building and **warm shell** building as defined in the Co-developer agreement as approved by BOA so as to understand the scope of work of each party:*

PB-1 Pg 117

*Clause 1.1.6 "**Bare Shell Building**" means the entire bare shell facilities including the built up structures with lift lobbies, external facades, fire suppression system as per building norms, cement flooring, no plaster on concrete columns, walls or ceiling except on brick walls wherever provided, as developed by the Developer in accordance with the sanctioned plan as also shown in the plan annexed hereto as Annexure F to be granted to the Co-developer for executing the Co-Developer operations on the terms agreed hereto, but not including any Infrastructure developed by the Developer:*

PB-1 Pg 119

*Clause 1.1.40 "**Warm Shell Building**" means the Bare Shell Building with complete building atriums, all fittings, air conditioning ducts, electrical distribution and fire fighting, electricity/telephone provisions, on each floor up to the shaft. 100% power back-up air conditioning provision for office area up to Air Handling Unir (AHU) on each floor.*

The concept of bare shell and warm shell building as defined above was considered and approved by BOA as the same forms intrinsic part of Co-developer agreement.

24. The assessee company developed several bare shell building blocks as per above details which were subject matter of transfer under co-developer agreement spanning since year 2006 and continuing till date. The assessee company has invested considerable amount of financial resources and engaged manpower, technical and managerial staff to carry out the development of bare shell buildings. Further, the risk associated with construction of bare shell buildings was also borne by the assessee. Moreover, the co-developer agreement also contains penalty clause as per which in case of delay in

transfer of bare shell, the developer will have to pay penalty @ Rs. 5 per square fee per month to the co-developer. Furthermore, in addition to construction of bare shell buildings, the Developer (assessee company) is required to develop following ***infrastructure utilities*** *in accordance with Co-developer agreement:*

PB-2 Page 247 read with PB-2 Pg 273

i. Sewage Treatment Plant
ii. Water Treatment Plant
iii. Landscaping
iv. Roads
v. Street Lighting
vi. Fire Protection System
vii. Effluent Treatment Plant
viii. Parking
ix. Telecom and Communication

The Developer (assessee company) is responsible for getting all the approvals and NOCs from relevant statutory authorities as per list given in Annexure I to co-developer agreement (PB-2 Pg 274). It is also relevant to mention that assessee company is entrusted with duty to provide maintenance and other services such house keeping and security services for all the common areas within the project (Clause 3.8 PB-2 Pg 251). Considering the totality of facts, it is crystal clear that assessee company is not only involved in development of bare shell building but engaged in meticulously planned project of development of SEZ which includes construction of bare shell as well as developing allied Infrastructure facilities which are essential for operation of SEZ.

25. The intention of the assessee is further supported from the accounting treatment in the books of account as per the revenue from sale of building in the SEZ Project is accounted for as per Percentage Completion Method (POCM) as prescribed by AS-7 which give clear indication that bare shell building has been treated as business asset constructed for the purpose of sale in accordance with objects and activities of the assessee. The relevance disclosure to this effect is given under Schedule 22 of the Audited Balance Sheet for FY 2007-08 which is extracted hereunder for ready reference.

Revenue from constructed properties:

SEZ projects Development income from SEZ projects is recognized on the "percentage of completion method". Total sale consideration as per the Co-Developer agreements to sell constructed properties entered into is recognized as revenue based on the percentage of actual project costs incurred thereon to total estimated project cost, subject to such actual cost incurred being 30 per cent or more of the total estimated project cost. Project

cost includes the estimated construction and development cost of such properties. The estimates of the saleable area and costs are reviewed periodically and effect of any changes in such estimates is recognized in the period such changes are determined. However, when the total project cost is estimated to exceed total revenues from the project, the loss is recognized immediately.

26. The income and expenditure from the SEZ project has been reflected in Profit & Loss a/c in respective years in accordance with POCM as per following details:

DCDL- HYDERABAD SEZ	**FINANCIAL YEAR**					**Rs.in Lacs**
	2007-08	**2008-09**	**2009-10**	**2010-11**	**2011-12**	**2012-13**
Area in sq.ft.	**41,13,334**	**41,13,334**	**41,13,334**	**41,13,334**	**41,13,334**	**41,13,334**
Sale Rate Rs./ Sqft	**6278**	**6478**	**6478**	**6478**	**6478**	**6478**
Budgeted Development income	**2,58,235**	**2,66,462**	**2,66,462**	**2,66,462**	**2,66,462**	**2,66,462**
Budgeted Cost						
Construction cost including PMC	62,685	62,334	62,334	61,824	74,541	74,538
Budgeted Interest & Ovd Cost	2,180	7,313	9,105	9,427	9,684	9,802
Total Project Budgeted Cost	**64,864**	**69,647**	**71,439**	**71,252**	**84,226**	**84,340**
Actual cost						
Construction cost including PMC	25,526	36,087	44,089	47,728	48,668	48,775
Actual Interest & Ovd	2,180	7,313	9,105	9,427	9,684	9,802
Total Project Cost incurred	**27,705**	**43,400**	**53,194**	**57,155**	**58,352**	**58,577**
Cost incurred during the year	**19,028**	**15,695**	**9,794**	**3,961**	**1,197**	**225**
POCM Percentage for Cost(A)	**42.71%**	**62.31%**	**74.46%**	**80.22%**	**69.28%**	**69.45%**
POCM Percentage for Income(B)	**100.00%**	**100.00%**	**100.00%**	**100.00%**	**100.00%**	**100.00%**
POCM (A X B)	**42.71%**	**62.31%**	**74.46%**	**80.22%**	**69.28%**	**69.45%**
POCM for the year		**19.60%**	**12.15%**	**5.75%**	**-10.93%**	**0.17%**
Cumulative Development income	1,10,299	1,66,045	1,98,410	2,13,744	1,84,608	1,85,067
Cumulative Cost	27,705	43,400	53,194	57,155	58,352	58,577
Cumulative Margin	82,594	1,22,645	1,45,216	1,56,589	1,26,255	1,26,490
Development income for the period	77,349	55,746	32,365	15,334	(29,137)	459
Development cost for the period	19,028	15,695	9,794	3,961	1,197	225
Margin for the period	58,321	40,051	22,572	11,373	(30,334)	235

27. The primary activity of the assessee company is development of commercial complex and subsequent sale or letting out of the same. It is pertinent to mention that business income earned by the assessee company has been offered and accepted under the head Profit and Gain from Business and Profession (PGBP) and there has been no dispute in this regard in the past and even in the future as the assessing officer has accepted the claim of business income in AY 2007-08 as well as in AY 2012-13 to AY 2014-15 in assessment u/s 143(3) of the Act.

28. On conjoint reading of definition of term 'business' as referred to in section 2(13) and interpreted by Apex Court and on application of the same to the facts of the present case particularly the MOA, there is no shred of doubt that development of SEZ project was active part of assessee's regular business activity and same has resulted in substantial business gain. It goes without saying that a real estate developer can earn business income through following two modes:

i. Selling of constructed property (including semi constructed structure)

ii. Leasing of construction property

29. As clarified above, development of a SEZ project on land admeasuring 26.225 acres in itself is a monumental task requiring infusion of huge funds, resources and expertise and as such the business decision of the assessee to carry out exclusive development of SEZ project will not affect the nature of income arising therefrom which purely bears the character of business income. It is pertinent to mention that assessee company undertook development of the said SEZ Project in a phased manner over a span of more than 10 years and even as on date some development activity is going on and as such by no stretch of imagination it can be said SEZ project is a capital asset in the hands of the developer assessee.

30. The allegation of capital gain by the assessing officer is self defeating as the assessing officer has not carried out any working of capital gain in accordance with section 45 of the IT Act. It is important to take note of the fact that the assessing officer has merely categorized business profit as capital gain to deny the benefit of deduction u/s 80IAB of the Act. In fact, the assessing officer has made such observation in assessment years where there was profit but, in the years, where there was loss, the claim of business loss has been accepted. This fact is corroborated from the assessment order for AY 2012-13. Further, the presumption of capital gain is misconceived and contrary to various agreements and terms of approval and provisions of SEZ Act.

31. In view of the above, it is self evident that development of bare shell building and sale of same is part of regular business operation of the assessee and as such the allegation of the assessing office that sale of bare shell to co-developer is a capital

account transaction resulting in capital gain is misconceived and without any justification.

32. Without prejudice to above, in any case, as far as deduction u/s 80IAB is concerned, whether gain is business profit or capital gain is of no relevance where SEZ project and operations are authorized and approved by BOA. In this connection, reference is made to latest decision of Hon'ble Delhi Bench of Tribunal in the case of Co-developer ***DLF Assets P. Ltd. (ITA No. 4965/D/16 dated 25/01/2021) [PB-3 Page 425-432]*** *wherein in the context of income from House property it was held that provisions of SEZ Act have overriding effect on Income tax Act and income derived from SEZ project irrespective of head income shall be eligible for deduction. The relevant finding is reproduced hereunder:*

9. The claim of the assessee was considered by the AO but did not find any favour because the AO was of the firm belief that deduction u/s. 80IAB of the Act is available only from the profits and gains derived by an undertaking from any business and since income from house property does not qualify for deduction u/s.80IAB of the Act, the claim was denied

11. There is no dispute in so far as the eligibility of the assessee is concerned. The assessee during the year under consideration has been engaged in developing, leasing as well as maintenance and operations of commercial properties under SEZ. The assessee company is an approved co-developer of the following notified SEZ projects :-

	Name of the Developer	*Project*
	DLF Info City Developers (Chennai)	*Manapakkam and Muglivakkam Villages, Kancheepuram, Tamil Nadu*
	DLF Cyber City Developers Ltd	*DLF Cyber City District, Gurgaon*
	DLF Limited	*Silokhera, Gurgaon*
	DLF Commercial Developers Ltd	*Ranga Reddy District, Andhra Pradesh*

13. In our understanding, the scheme of SEZ is governed by the provision of law contained under the SEZ 2005. Section 51 of the SEZ Act 2005 provides that the SEZ Act shall have overriding effect notwithstanding anything inconsistent therewith contained in

any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. In our considered opinion developing SEZ by itself is the business contemplated u/s. 80 IAB of the Act and the SEZ itself provides that the lease rental income generated in the hands of a developer engaged in setting up of the SEZ, is the profits and gains derived from the business of developing a SEZ.

In view of the above decision, it is manifest that dispute regarding head of income is of academic nature as the same would not affect the eligibility to claim deduction from activity of development of SEZ. In the present case, it is well established that assessee company is dedicatedly engaged in wholesome activities of development of SEZ including business of development and sale of bare shell buildings and as such the claim of deduction in respect of profit derived therefrom is in accordance with scheme and spirit of section 80IAB of the Act.

33. Further, the assessing officer also observed that transfer of bareshell building is not an eligible transaction in terms of section 80IAB of the IT Act. These observation are highly arbitrary and in disregard to specific approval of transfer of bare shell structure by BOA vide approval dated 01/06/2019 (PB-2 Page 299-302). In this regard, as already clarified above, the provisions of section 80IAB stipulates deduction of profit derived from business of developing a SEZ and there is no prohibition of transfer of building or other asset in the process of development activity. The assessee being an approved developer of an approved SEZ project and the activity of development and transfer of bare shell having been duly approved by BOA, Ministry of Commerce, there can be no dispute with regard to eligibility to claim deduction u/s 80IAB in the light of section 27 and 51 of SEZ Act, 2005.

Section 27 – Provisions of Income tax Act, 1961 to apply with certain modification in relation to Developers and Entrepreneurs

The provisions of the Income-tax Act, 1961, as in force for the time being, shall apply to, or in relation to, the Developer or entrepreneur for carrying on the authorised operations in a Special Economic Zone or Unit subject to the modifications specified in the Second Schedule.

Section 51 - Act to have overriding effect.

(1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

34. In fact, the provisions of section 80IAB cannot be read in isolation without taking into account the object and purpose of mother act i.e. SEZ Act, 2005 which is development of SEZ in accordance with authorized operations approved by the BOA, Ministry of Commerce. In view of above, the observation of the assessing officer has no legs to stand and same is out of context and misconceived.

35. With regard to observation of the assessing officer in respect of sale price of the bare shell building and method adopted for determining FMV of bare shell buildings, it is submitted that such observation of the assessing officer is not relevant and same is merely for the purpose of disallowing the claim of deduction u/ 80IAB of the Act. It is worthwhile to note that the assessing officer herself accepted that transfer value of bare shell structures to Co-developer in accordance with terms of BOA approved agreement is not in question and limited issue for consideration is eligibility to claim deduction u/s 80IAB of the Act. The relevant observation of the assessing officer is extracted hereunder:

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"(iii) the income capitalization approach, opted for income (rent) capitalization approach, in order to arrive at the FMV of the capital apparatus, makes it amply clear that assessee, in back of his head, has treated this as a transfer of capital asset and the entire claim is nothing but a designed arrangement to claim benefit under section 80-IAB of the IT Act. ***Notwithstanding with the above, Transfer Price analysis of the transaction is not the intention of the AO and the real question is nature of the transaction.*** *We have to see the other aspects of transactions while deciding the nature of the transaction and following points needs to be taken under consideration :"*

36. Further, the CIT(A) has specifically dealt with this issue vide finding recorded in ***Para 6.7 at Page 27*** *of the impugned order wherein, after taking into consideration the important facts and terms of arrangement, it was held that the transaction of sale of bare shell by assessee to co-developer was undertaken at arm's length and on commercial lines. It was further held that rent capitalization method adopted by the assessee is proper and reflects prevailing market condition. The CIT(A) concluded that the casual observation of the assessing officer on the issue of pricing of transaction of sale of bare shell building does not warrant drawing of adverse inference.*

37. It is important to mention that pursuant to order of Hon'ble High Court, revenue appointed Special Counsel in very same matter in the case of DLF Ltd. and after detailed

hearing on various dates, claim of assessee was accepted by Hon'ble ITAT. (order of ITAT has been enclosed in PB-3 Pg 433 – 483)

38. It is worthwhile to make reference to decision of Hon'ble Mumbai Tribunal in the case of ***Mahindra Lifespace Developers Ltd. v. ACIT (ITA No. 1167/Mum/13)*** *wherein it was held that once the approval is granted by BOA, it is implicit that assessee is engaged in development of SEZ and benefit is required to be granted u/s 80IAB as per provision of section 27 and 51 of SEZ Act, 2005 which have overriding effect. (PB-3 Pg 484 – 509)*

39. The similar issue of claim of deduction u/s 80IAB has been accepted by Hon'ble Tribunal in following cases:

i. DLF Ltd. v. Addl. CIT (ITA No. 2126/D/13) (AY 2008-09) (PB-3 Pg 433-483)

ii. DLF Info City Developers (Chennai) Ltd. (PB-3 Pg 510-556)

iii. DLF Cyber City Developers Ltd. (PB-3 Pg 510-556)"

12. At the time of last hearing, the revenue has raised following **additional grounds** before Hon'ble ITAT:

> *1. "The Ld. CIT(A) erred in holding that reasonableness of amount received was an issue related merely to method of valuation, thereby, failing to notice that the extraordinary profit was contrary to the explicit provisions of sub section (3) of section 80-1AB of the Income Tax Act, 1961".*
>
> *2. "The Ld. CIT(A) erred in burshing aside the aforesaid by observing that the AO had discussed but not eventually taken into account the price of transaction, ignoring the principle that acts of omission by the Assessing Officer cannot, ipso facto, comprises the basis of granting relief by an Appellate Commissioner as held by the Hon'ble Jurisdictional High Court in CIT-II vs Jansampark Advertising & Marketing Pvt Ltd (231 Taxman 384)"*

13.1 At the outset, it is submitted that the revenue has not filed any formal application for raising the additional grounds and only a copy of authorization singed by Pr.CIT has been forwarded to us. It is relevant to state that the additional ground before Hon'ble ITAT can only be raised by the assessing officer being party to the appeal and that too through proper application addressed to Hon'ble Bench. However, no formal application has been

filed for raising additional grounds of appeal and as such the plea of revenue raising additional ground may kindly be rejected.

13.2 In any case, the assessing officer has only raised dispute about validity of claim of deduction u/s 80IAB and issue of valuation is not subject matter of dispute in the assessment order and as such the additional ground being raised now is highly arbitrary and not in conformity with order of AO and CIT(A). In this connection, reference is made to following decisions:

i. Mahindra & Mahindra Ltd. v. DCIT [2009] 30 SOT 374 (Mumbai) (SB) [affirmed by Bom HC reported in [2014] 48 taxmann.com 150 (Bombay)]

19.6 After considering the rival submissions and perusing the relevant material on record we find that the Assessing Officer has undoubtedly examined the provisions of DTAA between India and U.K. for deciding the taxability or otherwise of the sums paid to the non-resident. The assessee vide its letter dated 6-2-1999, reproduced on pages 9 onwards of the assessment order, categorically stated in para 5.3 that the DTAA between India and U.K. was applicable. The Assessing Officer has also not disputed this fact. He has referred to various Articles of DTAA between India and U.K. at several places of his order viz., para 49, 50, 52, 55 etc. At no stage it has been denied by the Assessing Officer that DTAA between India and U.K. was not applicable. In such a situation it is impermissible for the learned D.R. to come out with a submission contrary to the finding of the Assessing Officer that DTAA with U.K. was not relevant as both the lead managers were residents of countries other than UK. In view of the admission of the Assessing Officer and the further elaboration of the point in the light of DTAA between India and U.K., we cannot permit the learned D.R. to take contrary stand from the one taken by the Assessing Officer. In our considered opinion the learned Departmental Representative has no jurisdiction to go beyond the order passed by the Assessing Officer. He cannot raise any point different from that considered by the Assessing Officer or CIT(A). His scope of arguments is confined to supporting or defending the impugned order. He cannot set up an altogether different case. If the learned D.R. is allowed to take up a new contention de hors the view taken by the Assessing Officer that would mean the learned A.R. stepping into the shoes of the CIT exercising jurisdiction under section 263. We, therefore, do not permit the learned D.R. to transgress the boundaries of his arguments. Similar view has been taken by the Jodhpur Bench of the Tribunal in the case of Kwal Pro Exports v. Asstt. CIT [2008] 110 ITD 59. This contention is therefore repelled as devoid of any merit.

ii. Asstt. CIT v. Ms. Aishwarya K. Rai [2010] 127 ITD 204 (Mum.)

It is no doubt true that the learned D.R. can make any arguments in support of the stand taken by the Assessing Officer but there are certain inherent limits of his arguments inasmuch as he cannot transgress the boundaries made by the Assessing Officer. In other words, the learned D.R. can support the action of the Assessing Officer with any arguments, he can rely on any case law in support of the Assessing Officer's case, but he cannot make out altogether a new case which was not the

subject-matter of consideration by the Assessing Officer or the learned first appellate authority. To find fault in the assessment order is outside the domains of the arguments of the learned D.R. as such power vests with the learned CIT under section 263 for revising any order which is erroneous and prejudicial to the interest of the revenue. We are, therefore, not inclined to accept these grounds as they do not emanate from the orders of the authorities below.

iii. ITO v. Anant Y. Chavan [2009] 126TTJ984 (PUNE)

It is essential to bear in mind that the revenue only represents the Assessing Officer who can do no better than to justify his own action on the grounds which have been discussed in the assessment order or perhaps even on extended grounds. Undoubtedly, there can be occasions when Assessing Officer fails to bring an income to tax or grants excessive deduction and the remedy for these lapses are prescribed by the provisions of sections 147, 154 and 263, etc. but all these sections have certain time-limits within which these sections can be invoked. Whether it is a rectification of a mistake or initiation of proceedings for income escaping assessment, or even a revision proceeding, everything must be completed within the prescribed time-limit.

To suggest that even a proceeding before the Tribunal is a continuation of assessment proceedings and, therefore, the Assessing Officer can be allowed to make up for his deficiencies will amount to rendering all these time-limits as nugatory and redundant.

The Tribunal's powers do not go beyond the points or grounds raised before it. It is not the scheme of the Act that entire assessment is open before the Tribunal and it must consider the same. Ground which was raised by the revenue was confined to profits relatable to commercial units and, therefore, it was not really open to the Tribunal to go beyond the said ground. As such the revenue's appeal was to be dismissed.

In this connection, it is relevant to submit that issue before Hon'ble High Court was only whether development income was in the nature of capital gain or business income and as such the issue for consideration by assessing officer was limited to this effect only.

However, in the light of **CBDT Circular no. 16/2017 dated 25th April, 2017**, the CBDT has confirmed that income of SEZ Project is to be charged under the head 'Profit and Gains of Business'. In the light of this position, there is no case of any surviving dispute as to the nature of income and consequential benefit u/s 80IAB of the Income Tax Act, 1961. The relevant extract of the Circular is hereunder:

> *"The issue whether income arising from letting out of premises/developed space along with other amenities in an Industrial Park/SEZ is to be charged under head 'Profits and Gains of Business' or under the head 'Income from House Property' has been subject matter of litigation in recent years. Assessees claim the letting out as business activity, the income arising from which to be charged to tax under the*

head 'Profits and Gains of Business' whereas the Assessing officers hold it to be chargeable under the head 'Income from House Property'

2. *The matter has been considered by the Board. Income from the Industrial Parks/SEZ established under various schemes framed and notified under section 80-IA(4)(iii) of the Income-tax Act, 1961 ('Act') is liable to be treated as income from business provided the conditions prescribed under the schemes are met.*
In the case of Velankani Information Systems Pvt Ltd., [2013] 35 taxmann.com 1 (Karnataka) the Hon'ble Karnataka High Court observed that any other interpretation would defeat the object of section 80-IA of the Act and government schemes for development of Industrial Parks in the country. SLPs filed in this case by the Department have been dismissed by the Hon'ble Supreme Court.

In a subsequent judgment dated 30-4-2014 in ITA No. 76 & 78/2012 in the case of CIT v. Information Technology Park Ltd., [2014] 46 taxmann.com 239 (Karnataka) the Karnataka High Court has reaffirmed its earlier views. It has held that, since the assessee-company was engaged in the business of developing, operating and maintaining an Industrial Park and providing infrastructure facilities to different companies as its business, the lease rent received by the assessee from letting out buildings along with other amenities in a software technology park would be chargeable to tax under the head "Income from Business" and not under the head "Income from House Property". The judgment has been accepted by the Board.

3. *In view of the above, it is now a settled position that in the case of an undertaking which develops, develops and operates or maintains and operates an industrial park/SEZ notified in accordance with the scheme framed and notified by the Government, the income from letting out of premises/developed space along with other facilities in an industrial park/SEZ is to be charged to tax under the head 'Profits and Gains of Business'.*

4. *Accordingly, henceforth, appeals may not be filed by the Department on the above settled issue and those already filed may be withdrawn/not pressed upon."*

14. The revenue has also filed written synopsis based on additional ground raising following contentions in support of rejection of claim of deduction u/s 80IAB :

a. The assessee is only developing bare shell building and not engaged in activity of operation and maintenance of the SEZ. The provision of section 80IAB mandates carrying out cumulative activity of development, operation and maintenance of SEZ.

b. As the bare shell building was transferred to Co-developer, the activity of development was not carried out in entirety.

c. Clarification from Ministry of Commerce dated 18/01/2011 and 20/01/2011 are not from BOA and as such they cannot be relied upon

d. ITAT Order in the case of DLF Ltd. is erroneous as scope of 'authorized operation' has not been examined in that judgment. The ITAT has erred in relying upon clarification given by Ministry of Commerce.

e. The activity of the assessee cannot be called approved operation withing SEZ. Income from sale/transfer of building is not eligible for deduction.

f. The assessee does not have any revenue stream from units in SEZ and as such the income earned by the assessee is not eligible for deduction.

g. Advance lease rentals have been camouflaged as development consideration. The recognition of revenue as POCM is improper as the assessee has merely leased out the building to Co-developer by receiving lease rentals in advance and shown the transaction as sale of building.

h. The revenue in the form of development consideration has been recognition in short span of time so as to claim the benefit of deduction u/s 80IAB of the Act.

i. Approval was granted with the condition that assessing officer has right to examine the taxability of income from SEZ. The use of word 'Lease rental' includes development consideration.

j. The assessing officer disallowed the claim of deduction on the ground that conditions/requirements of SEZ Act were not fulfilled.

k. The assessee has earned exorbitant profit on sale of bareshell. No comparison between profit earned from SEZ project and Non SEZ project was done. Adequacy, appropriateness and quantum of deduction has not been examined in DLF Ltd. case.

l. CIT(A) should have exercised co-terminus power and invoked section 80IA(10). The report of field enquiry conducted by the assessing officer was ignored by CIT(A). Omission by AO cannot lead to granting of relief. The CIT(A) should have conducted further enquiry u/s 250(4). Reference to Delhi High Court decision in the case of Jansampark Advertising and Marketing P Ltd. 231 Taxman 384.

m. The incentive provisions warrants strict interpretation and in case of doubt, the view favouring the revenue must be taken. Reference to Apex Court judgement in Dilip Kumar's case.

n. ITAT is the final fact-finding authority and the principle of substance over form must be applied in the present case. Reference to decision of Kol ITAT in the case of Edward Keventors.

15. Even though these issues are extraneous to the controversy, we shall be making our submissions in respect of these issue also

16. Before dealing with the contentions of the revenue, it is important to first make reference to relevant provisions of SEZ Act and section 80IAB of the Income Tax act, 1961.

SEZ Act, 2005 (Placed at PB-2 Page 126-178)

Section 2 – Definition

c) "**authorised operations**" means operations which may be authorised under sub-section (2) of section 4 and sub-section (9) of section 15;

(e) "**Board**" means the Board of Approval constituted under sub-section (1) of section 8;

(f) "**Co-Developer**" means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (12) of section 3;

(g) **"Developer**" means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (10) of section 3 and includes an Authority and a Co-Developer;

(p) "**infrastructure facilities**" means industrial, commercial or social infrastructure or other facilities necessary for the development of a Special Economic Zone or such other facilities which may be prescribed;

(za) "**Special Economic Zone**" means each Special Economic Zone notified under the proviso to sub-section (4) of section 3 and sub-section (1) of section 4 (including Free Trade and Warehousing Zone) and includes an existing Special Economic Zone;

Section 4 - Establishment of Special Economic Zone and approval and authorisation to operate to, Developer

(2) After the appointed day, the Board may, authorise the Developer to undertake in a Special Economic Zone, such operations which the Central Government may authorise.

Section 27 – Provisions of Income tax Act, 1961 to apply with certain modification in relation to Developers and Entrepreneurs

The provisions of the Income-tax Act, 1961, as in force for the time being, shall apply to, or in relation to, the Developer or entrepreneur for carrying on the authorised operations

in a Special Economic Zone or Unit subject to the modifications specified in the Second Schedule.

Section 51 - Act to have overriding effect.

(1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Section 80IAB of the Income Tax Act, 1961

Deductions in respect of profits and gains by an undertaking or enterprise engaged in development of Special Economic Zone.

(1) Where the gross total income of an assessee, being a Developer, includes any profits and gains derived by an undertaking or an enterprise from any business of developing a Special Economic Zone, notified on or after the 1st day of April, 2005 under the Special Economic Zones Act, 2005, 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 one hundred per cent of the profits and gains derived from such business for ten consecutive assessment years:

Provided that the provisions of this section shall not apply to an assessee, being a developer, where the development of Special Economic Zone begins on or after the 1st day of April, 2017.

(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 a Special Economic Zone has been notified by the Central Government :

Provided that where in computing the total income of any undertaking, being a Developer for any assessment year, its profits and gains had not been included by application of the provisions of sub-section (13) of section 80-IA, the undertaking being the Developer shall be entitled to deduction referred to in this section only for the unexpired period of ten consecutive assessment years and thereafter it shall be eligible for deduction from income as provided in sub-section (1) or sub-section (2), as the case may be :

Provided further that in a case where an undertaking, being a Developer who develops a Special Economic Zone on or after the 1st day of April, 2005 and transfers the operation and maintenance of such Special Economic Zone to another Developer (hereafter in this section referred to as the transferee Developer), the deduction under sub-section (1) shall be allowed to such transferee Developer for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee Developer.

(3) The provisions of sub-section (5) and sub-sections (7) to (12) of section 80-IA shall apply to the Special Economic Zones for the purpose of allowing deductions under sub-section (1).

Explanation.—For the purposes of this section, "Developer" and "Special Economic Zone" shall have the same meanings respectively as assigned to them in clauses (g) and (za) of section 2 of the Special Economic Zones Act, 2005.

17. The brief facts of the case are that the assessee has undertaken development of SEZ project after obtaining requisite approval from Board of Approval, Ministry of Commerce, Government of India in accordance with SEZ Act and Rules. Subsequently, the assessee entered into an agreement with Co-developer M/s. DLF Assets P. Ltd. wherein it was agreed that assessee will construct a bare shell building and transfer the same to M/s. DLF Assets P. Ltd. for further development and lease of the same to eligible tenants. It was also agreed that the land on which such building is constructed will not be sold to co-developer M/s. DLF Assets P. Ltd and will be leased out for definite period. The entire transaction of development of bare shell buildings and transfer of the same to Co-developer was duly approved as authorized operation by BOA. The summary of various approvals obtained by BOA is as under:

a. That SEZ project undertaken by the assessee was approved by Government of India (BOA) vide letter dated 23/10/2006 which was subsequently notified in Official Gazette. **(PB-2 Page 183-185)**

b. Vide letter dated 21/06/2007, approval was granted to the assessee to carry out authorized operations in SEZ which included development of infrastructure facility (Bare shell building blocks). (**PB-2 Page 188-190**)

c. The MOU filed vide letter dated 08/01/2007 before BOA for treating M/s. DLF Assets P. Ltd. as co-developer for the purpose of developing of SEZ project was approved by Ministry of Commerce and Industry, Government of India (SEZ Section) vide approval dated 01/05/2007. (**PB-2 Page 191-222 and 236-239**)

d. Vide approval letter dated 18/06/2007, BOA approved authorized operations that could be carried out by M/s. DLF Assets P. Ltd. which interalia included development of warm shell. (**PB-2 Page 241-242))**

e. The MOU dated 29/11/2006 got culminated into definitive agreement dated 20/03/2008 which was duly considered while granting approval to M/s. DLF Assets P. Ltd. vide letter dated 01/06/2009. (**PB-2 Page 243-298 and 299-302**)

18. In addition to above approvals, the assessee also sought clarification from SEZ Board of approval under Ministry of Commerce, Government of India which were answered vide letter dated 18/01/2011 and 20/01/2011. The BOA vide letter dated 18/01/2011 categorically affirmed that development of bare shell buildings and sale of the same to Co-developer for development consideration is an ***authorized operation*** under SEZ Act. **(refer Q 5 to Q8)**. This position was further reiterated in reply dated 20/01/2011. The clarifications issued by BOA are of utmost importance while adjudging the eligibility to claim deduction u/s 80IAB as the BOA has explicitly clarified that activity carried out by the assessee developer and co-developer are duly approved.

19. It is pertinent to note that CIT-IV, Delhi during revisionary proceedings u/s 263 specifically verified the authenticity of clarification vide letters dated 18/01/2011 and 20/01/2011 rendered by the BOA, Ministry of Commerce and same were affirmed by the BOA, Ministry of Commerce vide communication dated 17/01/2012 (PB-1 Page 110). The revenue in its submission before Hon'ble ITAT has attempted to rake up fresh controversy regarding the relevance of these clarifications issued by the SEZ Division of Ministry of Commerce. It has been contended by the revenue that clarification dated 18/01/2011 and 20/01/2011 have not been issued by the BOA but instead Ministry of Commerce and as such these clarifications are irrelevant. In this regard it is clarified as under:

- The veracity of these clarifications issued by BOA was never disputed by the assessing officer or even by CIT either during the original assessment, revisionary proceeding u/s 263 and consequential assessment proceeding u/s 143(3)/263. Moreover, the assessment order having been passed u/s 143(3)/263 and once the genuineness of these clarification already stood verified and accepted by CIT-IV, Delhi in revisionary proceedings u/s 263, the revenue is not justified in contending that clarifications were not issued by BOA. The contention of the revenue is self-defeating and in direct conflict with genesis of the present proceeding i.e. revisionary order u/s 263 of the Act. Further, these very clarifications were duly examined and considered by Coordinate Bench of Hon'ble ITAT in the case of sister concern DLF Ltd. (ITA No. 2126 and 2749/D/13 dated 27/05/2019)

- In any case, these clarificatory letters were issued by SEZ Division of Ministry of Commerce, which is part of BOA and as such the objection of the revenue is

outrightly misconceived, misleading and an attempt to distort facts. It may be noted that the latter dated 18/01/2011 and 20/01/2011 were issued under the hand of Sh T. Srinidhi, Joint Secretary and Sh. R.K. Pandey, Under Secretary who are the members of BOA at that relevant point of time. The factual position to this effect is supported from copy of minutes of 44th board meeting held on 14/01/2011 wherein the names of Sh. T. Srinidhi and Sh. R.K. Pandey is appearing as participating member of BOA. It is important to note that Chairman of BOA is Secretary, Department of Commerce and Director/Joint/Dy Secretary, Ministry of Commerce and Industry, Department of Commerce is Member Secretary of BOA. The list of members of BOA as given on SEZ Website (http://sezindia.nic.in/cms/introduction.php) is as under:

The Board of Approval has been constituted by the Central Government in exercise of the powers conferred under the SEZ Act. All the decisions are taken in the Board of Approval by consensus. The Board of Approval has 19 Members. Its constitution is as follows:

List of Members

S.No.	*Department*	*Members*
(1)	***Secretary, Department of Commerce***	***Chairman***
(2)	*Member, CBEC*	*Member*
(3)	*Member, IT, CBDT*	*Member*
(4)	*Joint Secretary (Banking Division), Department of Economic Affairs, Ministry of Finance*	*Member*
(5)	***Joint Secretary (SEZ), Department of Commerce***	***Member***
(6)	*Joint Secretary, DIPP*	*Member*
(7)	*Joint Secretary, Ministry of Science and Technology*	*Member*
(8)	*Joint Secretary, Ministry of Small Scale Industries and Agro and Rural Industries*	*Member*
(9)	*Joint Secretary, Ministry of Home Affairs*	*Member*
(10)	*Joint Secretary, Ministry of Defence*	*Member*
(11)	*Joint Secretary, Ministry of Environment and Forests*	*Member*
(12)	*Joint Secretary, Ministry of Law and Justice*	*Member*
(13)	*Joint Secretary, Ministry of Overseas Indian Affairs*	*Member*
(14)	*Joint Secretary, Ministry of Urban Development*	*Member*
(15)	*A nominee of the State Government concerned*	*Member*
(16)	*Director General of Foreign Trade or his nominee*	*Member*
(17)	*Development Commissioner concerned*	*Member*
(18)	*A professor in the Indian Institute of Management or the Indian Institute of Foreign Trade*	*Member*
(19)	***Director or Deputy Secretary, Ministry of Commerce and Industry, Department of Commerce***	***Member Secretary***

- It is pertinent to mention that SEZ Division of Ministry of Commerce is responsible for Secretarial and allied administrative work of BOA. The decisions/clarifications/notifications issued by the BOA are communicated through SEZ division of Ministry of Commerce and as such there is absolutely no ground or basis for disputing the genuineness and relevance of these clarification. It may be appreciated that all the approvals by BOA received by the assessee for setting of SEZ were communicated through SEZ division of Ministry of Commerce only. The functions of SEZ Division of Ministry of Commerce as noted from its website https://commerce.gov.in/about-us/divisions/sez-divisions/special-economic-zones-sez/ are extracted hereunder:
    - *Formulation of policy for Special Economic Zones and time to time review of policy issues pertaining to SEZs.*
    - ***Operational matters related to SEZs-developer, co-developer and units*** *(matters not in the domain of Development Commissioners).*
    - ***Secretariat work related to the meeting of the Board of Approval.***
    - *Setting up of Special Economic Zones and their Authority.*
    - ***Notification, partial-denotification , full-denotification and addition in area of SEZs.***
    - *Maintenance of sezindia website.*
    - *Handling court Cases, RTI Application, PG, MP/VIP, PMO references related to EoU*
    - ***Issuance of clarification/instruction in connection to operational/policy matter related to SEZs.***

In view of the above, it is established beyond any doubt that clarification dated 18/01/2011 and 20/01/2011 were issued by BOA vide communication through SEZ Division, Ministry of Commerce and as such the same are fully relevant and wholly supports the case of the assessee. In any case, these are only clarificatory communications which only support and buttress the approvals already granted to assessee developer and Co-developer.

20. In the above background, the submissions of the revenue are countered hereunder:

21.1 At the outset, it is pertinent to highlight that in the assessment order, the assessing officer has rejected the claim of deduction primarily on following grounds:

A. The transaction of transfer of building to co-developer amounts to transfer of capital asset and gain arising therefore is taxable as per section 45 of the Income Tax Act, 1961 and same is not eligible for deduction u/s 80IAB.

B. Complete transfer of rights in the building situated in SEZ is not permissible under section 80IAB of the Income Tax Act, 1961.

21.2 Further, the revenue in its fresh submissions before Hon'ble ITAT, not arising from assessment order or appellate order, has canvassed various irrelevant aspects not relating to the claim of deduction u/s 80IAB and as such a deliberate attempt has been made to improve upon the assessment order which is wholly impermissible and beyond scope. In fact, the points raised in the written submission altogether omit the issue of capital gain v. business income which was the bone of contention before High Court as well as in the assessment order and revenue is trying to make out a new case vide its written submission. In this regard, reference is made to following case laws:

i. Mahindra & Mahindra Ltd. v. DCIT [2009] 30 SOT 374 (Mumbai) (SB) [affirmed by Bom HC reported in [2014] 48 taxmann.com 150 (Bombay)]

19.6 After considering the rival submissions and perusing the relevant material on record we find that the Assessing Officer has undoubtedly examined the provisions of DTAA between India and U.K. for deciding the taxability or otherwise of the sums paid to the non-resident. The assessee vide its letter dated 6-2-1999, reproduced on pages 9 onwards of the assessment order, categorically stated in para 5.3 that the DTAA between India and U.K. was applicable. The Assessing Officer has also not disputed this fact. He has referred to various Articles of DTAA between India and U.K. at several places of his order viz., para 49, 50, 52, 55 etc. At no stage it has been denied by the Assessing Officer that DTAA between India and U.K. was not applicable. In such a situation it is impermissible for the learned D.R. to come out with a submission contrary to the finding of the Assessing Officer that DTAA with U.K. was not relevant as both the lead managers were residents of countries other than UK. In view of the admission of the Assessing Officer and the further elaboration of the point in the light of DTAA between India and U.K., we cannot permit the learned D.R. to take contrary stand from the one taken by the Assessing Officer. In our considered opinion the learned Departmental Representative has no jurisdiction to go beyond the order passed by the Assessing Officer. He cannot raise any point different from that considered by the Assessing Officer or CIT(A). His scope of arguments is confined to supporting or defending the impugned order. He cannot set up an altogether different case. If the learned D.R. is allowed to take up a new contention de hors the view taken by the Assessing Officer that would mean the learned A.R. stepping into the shoes of the CIT exercising jurisdiction under section 263. We, therefore, do not permit the learned D.R. to transgress the boundaries of his arguments. Similar view has been taken by the Jodhpur Bench of the Tribunal in the case of Kwal Pro Exports v. Asstt. CIT [2008] 110 ITD 59. This contention is therefore repelled as devoid of any merit.

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It is no doubt true that the learned D.R. can make any arguments in support of the stand taken by the Assessing Officer but there are certain inherent limits of his

arguments inasmuch as he cannot transgress the boundaries made by the Assessing Officer. In other words, the learned D.R. can support the action of the Assessing Officer with any arguments, he can rely on any case law in support of the Assessing Officer's case, but he cannot make out altogether a new case which was not the subject-matter of consideration by the Assessing Officer or the learned first appellate authority. To find fault in the assessment order is outside the domains of the arguments of the learned D.R. as such power vests with the learned CIT under section 263 for revising any order which is erroneous and prejudicial to the interest of the revenue. We are, therefore, not inclined to accept these grounds as they do not emanate from the orders of the authorities below.

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It is essential to bear in mind that the revenue only represents the Assessing Officer who can do no better than to justify his own action on the grounds which have been discussed in the assessment order or perhaps even on extended grounds. Undoubtedly, there can be occasions when Assessing Officer fails to bring an income to tax or grants excessive deduction and the remedy for these lapses are prescribed by the provisions of sections 147, 154 and 263, etc. but all these sections have certain time-limits within which these sections can be invoked. Whether it is a rectification of a mistake or initiation of proceedings for income escaping assessment, or even a revision proceeding, everything must be completed within the prescribed time-limit.

To suggest that even a proceeding before the Tribunal is a continuation of assessment proceedings and, therefore, the Assessing Officer can be allowed to make up for his deficiencies will amount to rendering all these time-limits as nugatory and redundant.

The Tribunal's powers do not go beyond the points or grounds raised before it. It is not the scheme of the Act that entire assessment is open before the Tribunal and it must consider the same. Ground which was raised by the revenue was confined to profits relatable to commercial units and, therefore, it was not really open to the Tribunal to go beyond the said ground. As such the revenue's appeal was to be dismissed.

21.3 Keeping in view the above, the submission of the revenue as per Para 11 are rebutted as under:

a. The assessee is only developing bare shell building and not engaged in activity of operation and maintenance of the SEZ. The provision of section 80IAB mandates carrying out cumulative activity of development, operation and maintenance of SEZ.

e. The activity of the assessee cannot be called approved operation within SEZ. Income from sale/transfer of building is not eligible for deduction.

Our Submission

(Not raised by assessing officer)

It is already clarified that provision of section 80IAB grants deduction in respect of activity of development of SEZ and there is no condition that assessee should also be engaged in operation and maintenance. We have clarified this very issue vide **para 13 to 16** of our synopsis filed earlier. In fact the assessee was granted specific approval by BOA in respect of Development and sale of Bare Shell Building blocks and as such the contention of the revenue is misplaced.

Further, vide **para 24** of that synopsis, it has been explained that assessee is not only engaged in development of bare shell but also carrying out operation and maintenance of infrastructure facilities within SEZ.

In any case, the provision of section 80IAB only envisage development of SEZ and nowhere postulates operation or maintenance activity as prerequisite of development of SEZ. The reference to proviso to section 80IAB which provides for availability of deduction to transferee developer upon transfer of operation and maintenance of SEZ is misplaced as such proviso is only for granting deduction to transferee for the remaining period and cannot be interpreted to mean that act of developing SEZ compulsorily includes operation and maintenance of SEZ. The revenue is trying to read something in the section which is not the intention of the statute.

Moreover, even in section 80IA where the words 'operations and maintenance' have been specifically used, the legislature was wise enough to use the word 'or' between them so that carrying out of three activity of development, operation and maintenance does not become a cumulative criteria for claim of deduction. Refer decision of Bombay High Court in the case of **CIT v. ABG Heavy Industries Ltd. 322 ITR 323 (Bom) (SLP of revenue dismissed by Supreme Court [2011] 336 ITR 15).** The relevant finding of Hon'ble High Court is reproduced hereunder:

> *23. In the view which we have taken, all the assessment years in question to which this batch of appeals relates would be governed by the same principle. The subsequent amendment of section 80-IA(4A) of the Act to clarify that the provision would apply to an enterprise engaged in (i) developing; or (ii) operating and maintaining; or (iii) developing, operating and maintaining an infrastructure facility was reflective of a position which was always construed to hold the field. Before the amendment that was brought about by Parliament by the Finance Act of 2001, we have already noted that the consistent line of circulars of the Board postulated the same position. The*

amendment made by Parliament to section 80-IA(4) of the Act set the matter beyond any controversy by stipulating that the three conditions for development, operation and maintenance were not intended to be cumulative in nature.

In these circumstances, the assessee is fully eligible to claim deduction in respect of profit arising from activity of development and transfer of bare shell building blocks. Thus, the argument of the revenue is baseless and does hold good in view of specific provisions of SEZ Act read with 80IAB of the Income tax act, 1961.

On the issue of interpretation of activity of development as envisaged in section 80IAB, we would like to refer to **very important observation** of **Hon'ble Jammu and Kashmir High Court in the case of CIT v. TRG Industries (P.) Ltd. [2017] 297 CTR 58 (J&K)** wherein the Hon'ble Court held that once the assessee is recognized as developer and engaged in the business of developing infrastructure facility, the benefit of deduction is available and it is not open to assessing officer to read more into the provision and to described the nature of work that will qualify. The relevant finding is reproduced hereunder:

"*13. The first and the foremost requirement is that the assessee developer should come within the ambit of Section 80-IA (4)(i)(a)(b) which the assessee satisfies. There is no dispute since there is a valid contract as required. The next requirement for the benefit to be extended under the said provision is that the enterprise should provide an infrastructure facility in relation to establishing a road, a bridge or a rail system or Airport. There is no specific intendment as to the nature of work to be undertaken as is evident from the explanation. Therefore, the word contained therein has wide amplitude. The Assessing officer was not correct in prescribing certain limits and describing the nature of work. In other words, the assessing authority attempts to dissect the contract and hold that it does not justify the claim for deduction. That we are not inclined to accept. If the requirement of Section 80-IA (4)(i) and Section 80-IA (4)(i)(c) explanation is satisfied, then the benefit has to flow.*

14. The provisions of Section 80-IA (4)(i) applies to an enterprise carrying business of a developer, who satisfies the requirement of Section 80-IA 4(i)(a)(b)and provides an infrastructure facility as set out in the explanation.

15. If the provision is read as a whole and the explanation is read in terms of the said provision, it would be amply clear from the facts of the present case that the assessee in this case is an enterprise carrying on the business of a developer has entered into an agreement with the Central Government or the State Government or an authority prescribed under Section 80-IA (4)(i)(b) and has provided the infrastructure facility in terms of explanation to Section 80-IA(4)(i)(c), the details of which are set out in the chart.

16. The Assessing Officer has tried to read more into the provision by describing what is the nature of work that will qualify for the benefit of deduction under Section 80-IA(4). The authority is bound to consider the claim as is contained in the provisions. If certain works are accepted as infrastructure facility and other works denied at the whim of one or other authority it will lead to an incongruous result whereby different assessing officers will take different yardsticks. The proceedings will thereby become arbitrary and capricious."

In the present case, the assessee has been recognized as developer by BOA and the activity of development of bare shell building blocks has been approved as authorized activity of development of SEZ. In these circumstances, on application of principle laid by the Hon'ble High Court in above decision, the revenue is not justified in disputing the nature of activity which constitute development of SEZ particularly when the very section does not prescribe or specify any list of operations. The decision of Hon'ble J&K High Court is wholly applicable to the facts of the present case and knocks down the very foundation of revenue's case.

We would also like to bring your Honors attention to finding recorded by Hon'ble Mumbai bench of ITAT in the case of **ACIT v. Bharat Udyog Ltd. [2009] 118 ITD 336 (Mumbai)** wherein while dealing with the issue of claim of deduction u/s 80IA, the Hon'ble Court held that deduction is available to developer of Infrastructure facility and assessee is not required to maintain or operate the same. The relevant finding is reproduced hereunder:

Sub-clause (c) of section 80-IA(4) is applicable to an enterprise which is engaged in 'operating and maintaining' the infrastructure facility on or after 1-4-1995. 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 an enterprise before or after any cut off date cannot arise. When the Act provides for deduction under section 80-IA(4) , undisputedly for an enterprise, which is only 'developing' the infrastructure facility, unaccompanied by 'operating and maintaining' thereof by such entity, there cannot be any question of providing a condition for such an enterprise to start operating and maintaining the infrastructure facility on or after 1-4-1995. Since the assessee was only a developer of the infrastructure project and it was not maintaining and operating the infrastructure facility, sub-clause (c) of sub-section (4) of section 80-IA was not applicable. [Para 8]

Further, from the assessment year 2000-01, deduction under section 80-IA(4) is available if the assessee carries on the business of any one of the abovementioned 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

would be paid for the cost incurred by it; otherwise, how would the person, who develops the infrastructure facility project, realize its cost ? If the infrastructure facility, just after its development, is transferred to the Government, naturally the cost would be paid by the Government. 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 deve-loper 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 infrastructural facility, for the simple reason that he is not having the right/authorization to operate the infrastructure facility and to collect toll therefrom and has no other source of recoupment of his cost of development. Therefore, the business activity of the nature of build and transfer also falls within eligible construction activity, that is, activity eligible for deduction under section 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 section 80-IA.

b. As the bare shell building was transferred to Co-developer, the activity of development was not carried out in entirety.

Our Submission

(Not raised by the assessing officer)

The activity of development of SEZ has to be read with reference to provisions of SEZ Act and authorized operations. Once a developer is performing authorized operations of development of bare shell building, the same constitutes activity of development of SEZ and profit arising therefrom is eligible for claim of deduction u/s 80IAB.

There is no pre-condition that assessee must complete the building in entirety for a valid claim of deduction.

In the present case, there is specific approval for construction of bare shell (office space) and assessee having been recognized as developer of SEZ by BOA, there remains no dispute with regard to claim of deduction u/s 80IAB.

Reference is made to decision of Hon'ble **Mumbai ITAT** in the case of **NCC SMC JV v. DCIT (679/Mum/ 2010**) wherein it was held as under:

10.3 If the facts of the present case are to be examined in the light of aforementioned decision of Honble Bombay High Court, then it can be said that for

> claiming deduction under section 80 IA(4), it is not necessary for the assessee to develop the entire project in order to qualify for a deduction under section 80 IA(4). If the provisions are so construed then it will be a condition impossible of compliance because of the magnitude of the entire project. For qualifying deduction under section 80 IA(4) what would be necessary will be that the work carried on by the assessee must be an integral part of the project and if it is so, then it cannot be said that assessee is not eligible for deduction under section 80 IA(4) for the reason that the assessee on its own did not develop an infrastructure project. Therefore, observations of the AO that assessee did not develop an infrastructure project and only part of the work was carried out cannot disentitle the assessee to claim the deduction.

In any case, the BOA has approved development and sale of bare shell building blocks as authorized operation, there is no basis to dispute the claim of statutory exemption u/s 80IAB as section 80IAB only contemplates assessee as a developer.

c. Clarification from Ministry of Commerce dated 18/01/2011 and 20/01/2011 are not from BOA and as such they cannot be relied upon

Our Submission

(Not raised by the assessing officer)

The veracity of these clarifications issued by BOA was never disputed by the assessing officer or even by CIT either during the original assessment, revisionary proceeding u/s 263 and consequential assessment proceeding u/s 143(3)/263. Moreover, the assessment order having been passed u/s 143(3)/263 and once the genuineness of these clarification already stood verified and accepted by CIT-IV, Delhi in revisionary proceedings u/s 263, the revenue is not justified in contending that clarifications were not issued by BOA. The contention of the revenue is self-defeating and in direct conflict with genesis of the present proceeding i.e. revisionary order u/s 263 of the Act. Further, these very clarifications were duly examined and considered by Coordinate Bench of Hon'ble ITAT in the case of sister concern DLF Ltd. (ITA No. 2126 and 2749/D/13 dated 27/05/2019)

In any case, these clarificatory letters were issued by SEZ Division of Ministry of Commerce, which is part of BOA and as such the objection of the revenue is outrightly misconceived, misleading and an attempt to distort facts. It may be noted that the latter

dated 18/01/2011 and 20/01/2011 were issued under the hand of Sh T. Srinidhi, Joint Secretary and Sh. R.K. Pandey, Under Secretary who are the members of BOA at that relevant point of time. The factual position to this effect is supported from copy of minutes of 44th board meeting held on 14/01/2011 wherein the names of Sh. T. Srinidhi and Sh. R.K. Pandey is appearing as participating member of BOA. It is important to note that Chairman of BOA is Secretary, Department of Commerce and Director/Joint/Dy Secretary, Ministry of Commerce and Industry, Department of Commerce is Member Secretary of BOA. The list of members of BOA as given on SEZ Website (http://sezindia.nic.in/cms/introduction.php) is as under:

The Board of Approval has been constituted by the Central Government in exercise of the powers conferred under the SEZ Act. All the decisions are taken in the Board of Approval by consensus. The Board of Approval has 19 Members. Its constitution is as follows:

List of Members

S.No.	*Department*	*Members*
(1)	***Secretary, Department of Commerce***	***Chairman***
(2)	*Member, CBEC*	*Member*
(3)	*Member, IT, CBDT*	*Member*
(4)	*Joint Secretary (Banking Division), Department of Economic Affairs, Ministry of Finance*	
(5)	***Joint Secretary (SEZ), Department of Commerce***	***Member***
(6)	*Joint Secretary, DIPP*	*Member*
(7)	*Joint Secretary, Ministry of Science and Technology*	*Member*
(8)	*Joint Secretary, Ministry of Small Scale Industries and Agro and Rural Industries*	*Member*
(9)	*Joint Secretary, Ministry of Home Affairs*	*Member*
(10)	*Joint Secretary, Ministry of Defence*	*Member*
(11)	*Joint Secretary, Ministry of Environment and Forests*	*Member*
(12)	*Joint Secretary, Ministry of Law and Justice*	*Member*
(13)	*Joint Secretary, Ministry of Overseas Indian Affairs*	*Member*
(14)	*Joint Secretary, Ministry of Urban Development*	*Member*
(15)	*A nominee of the State Government concerned*	*Member*
(16)	*Director General of Foreign Trade or his nominee*	*Member*
(17)	*Development Commissioner concerned*	*Member*
(18)	*A professor in the Indian Institute of Management or the Indian Institute of Foreign Trade*	*Member*
(19)	***Director or Deputy Secretary, Ministry of Commerce and Industry, Department of Commerce***	***Member Secretary***

It is pertinent to mention that SEZ Division of Ministry of Commerce is responsible for Secretarial and allied administrative work of BOA. The decisions / clarifications / notifications issued by the BOA are communicated through SEZ division of Ministry of Commerce and as such there is absolutely no ground or basis for disputing the genuineness and relevance of these clarification. It may be appreciated that all the approvals by BOA received by the assessee for setting of SEZ were communicated through SEZ division of Ministry of Commerce only. The functions of SEZ Division of Ministry of Commerce as noted from its website https://commerce.gov.in/about-us/divisions/sez-divisions/special-economic-zones-sez/ are extracted hereunder:

- *Formulation of policy for Special Economic Zones and time to time review of policy issues pertaining to SEZs.*
- ***Operational matters related to SEZs-developer, co-developer and units*** *(matters not in the domain of Development Commissioners).*
- ***Secretariat work related to the meeting of the Board of Approval.***
- *Setting up of Special Economic Zones and their Authority.*
- ***Notification, partial-denotification , full-denotification and addition in area of SEZs.***
- *Maintenance of sezindia website.*
- *Handling court Cases, RTI Application, PG, MP/VIP, PMO references related to EoU*
- ***Issuance of clarification/instruction in connection to operational/policy matter related to SEZs.***

In view of the above, it is established beyond any doubt that clarification dated 18/01/2011 and 20/01/2011 were issued by BOA vide communication through SEZ Division, Ministry of Commerce and as such the same are fully relevant and wholly supports the case of the assessee. In any case, these are only clarificatory communications which only support and buttress the approvals already granted to assessee developer and Co-developer.

d. ITAT Order in the case of DLF Ltd. is erroneous as scope of 'authorized operation' has not been examined in that judgment. The ITAT has erred in relying upon clarification given by Ministry of Commerce.

Our Submission

The issue of authorized operation was duly examined by Hon'ble ITAT under identical circumstances in the case of DLF Ltd.. The relevant finding is contained in Para 68 and 71 of the order. (PB-3 Pg 471 and 476)

It is clarified that scope of authorized operation is laid down by BOA and assessing officer has no jurisdiction to question the validity of approval for carrying out specified authorized operations. In the present case, the BOA has specifically approved development of bare shell building as authorized operation and as such there is no scope of any dispute with regard to development activity carried out by the assessee. (PB-2 Pg 188-190)

The claim is fully and squarely covered by the decision of Hon'ble ITAT in the case of DLF Ltd. where under very similar circumstances, the claim of deduction u/s 80IAB was allowed in favour of the assessee.

f. The assessee does not have any revenue stream from units in SEZ and as such the income earned by the assessee is not eligible for deduction.

Our Submission

(Not raised by the assessing officer)

At the outset, it is submitted that apart from developing of bare shell building blocks, the assessee is also providing maintenance service in respect of infrastructure facilities as mentioned in agreement at **PB-2 Page 247 read with PB-2 Pg 273** for which the assessee is earning maintenance income and as such it would be factually wrong to say that assessee is not having revenue stream from units operating in SEZ.

Even otherwise, section 80IAB grants deduction for activity of development of SEZ read in context of authorized operations under SEZ act.

Further, the issue of deduction will arise when the assessee derives profit from development activity which can be of various types such as construction of infrastructure facility, leasing activity, operation or maintenance activity etc. These are independent activities as manifest from provisions of section 80IAB itself as the benefit is available to developer as well as Co-developer.

It is apparent that upon carrying out of activity of development of infrastructure facility, the revenue will arise in the hands of the assessee upon transfer/sale of such infrastructure facility to third party (Co-developer in present case). In fact, it is not mandatory for the developer of infrastructure facility to run/operate such facility and earn income.

In these circumstances, the revenue stream will be from sale of building constructed in SEZ which satisfy the primary condition of 'development of SEZ' in terms of section 80IAB and there is no requirement to earn income from units operating in the SEZ.

In any case, the income earned by the developer on sale of infrastructure facility to Co-developer who in turn will operate and lease out the said facility to different units and as such there is indirect but clear nexus between the revenue derived by the assessee and ultimate use of infrastructure facility by respective units within SEZ.

Thus, the interpretation advanced by the revenue is misconceived and contrary to purpose and spirit of SEZ Act.

g. Advance lease rentals have been camouflaged as development consideration. The recognition of revenue as POCM is improper as the assessee has merely leased out the building to Co-developer by receiving lease rentals in advance and shown the transaction as sale of building.

h. The revenue in the form of development consideration has been recognition in short span of time so as to claim the benefit of deduction u/s 80IAB of the Act.

Our Submission

(Not raised by the assessing officer. Further, the CIT in order u/s 263 has specifically accepted the fact that there was sale of building in return of development consideration)

The entire transaction of development and transfer of bare shell building to Co-developer was approved by BOA. The agreement so approved also contained specific clause regarding determination of development consideration which was as per Rent capitalization method. (Clause 2.9 PB-2 Pg 250)

It may be appreciated that Income capitalization method is a well recognized method for determination of sale consideration in case of sale of project. Further, this method has been provided under **Schedule III of Wealth Tax Act**. Moreover, in the present, the bare shell buildings sold to Co-developer were only meant for onward leasing and in absence of any right of further sale, rent capitalization method was appropriate method for determining development consideration.

Now, since the rent capitalization method itself includes calculation of value based on net maintainable rent, there could be no presumption that assessee has received advance rental value in place of sale consideration.

The sale of constructed bare shell building was done in accordance with SEZ Rules and after obtaining permission from BOA and as such the allegation of the revenue that there no sale but lease bare shell building is highly arbitrary and based on conjectures and surmises.

With regard to application of Percentage completion method for recognition of revenue, it is submitted that assessee is a real estate developer and POCM is a prescribed revenue recognition method as per AS-7. Further, it is not the case that assessee has only shown profit from SEZ in order to claim deduction and in fact in AY 2012-13 and subsequent years, the assessee suffered loss owing to which the deduction u/s 80IAB was not claimed. The copy of assessment order for AY 2012-13 is placed at PB-1 Page 118-125.

Thus, the contention of the revenue that profit was shown under POCM to claim benefit of deduction is without any rationale. Moreover, there being no dispute with regard to correctness of books of account and revenue recognized in Profit & Loss a/c and same having been accepted by the assessing officer, the argument with regard to applicability of POCM does not arise.

i. **Approval was granted with the condition that assessing officer has right to examine the taxability of income from SEZ. The use of word 'Lease rental' includes development consideration.**

Our Submission

(Not raised by the assessing officer)

This argument of the revenue is misplaced and totally out of context. The Hon'ble ITAT in the case DLF Ltd. vide **para 70 and 72** has clearly observed that the disclaimer in the approval granted to Co-developer only empower the assessing officer to examine the taxability of lease of land and same is not applicable to transaction of sale of bare shell.

It is further submitted in present case also; the BOA vide approval dated 01/06/2009 (PB-2 Page 299-301) has inserted identical disclaimer at para (xvii) which is also applicable only to the issue of lease of land and not development consideration. The factual position to this effect is also supported from objection raised by representative of Department of Revenue (Sh Raman Chopra) vide letter dated 26/05/2009 wherein the sole objection was with regard to taxability of lease of land and not sale of bare shell building. (Pg 215 of PB-1 filed for AY 2009-10).

This issue is fully supported from the judgment of Coordinate Bench in the case of DLF Ltd..

j. The assessing officer disallowed the claim of deduction on the ground that conditions/requirements of SEZ Act were not fulfilled.

Our Submission

Factually incorrect. The assessing officer has not disputed the fact that assessee has fulfilled all the requirement/conditions of SEZ. In fact, the assessing officer vide Para 6.1 Page 13 and Para 6.4 Page 16 has admitted that development and transfer of building was allowed by BOA of Ministry of Commerce. Further, during the proceedings u/s 263, the CIT has duly called for clarification from BOA, Ministry of Commerce and fact of approval was not disputed by CIT.

Accordingly, there is no dispute with regard to fulfilment of condition/requirements of SEZ Act.

Moreover, the clarificatory letter dated 18/01/2011 and 20/01/2011 dispel all the doubts over the compliance of SEZ Act wherein it has been explicitly clarified by the BOA that assessee is engaged in approved operations of development of SEZ and eligible for deduction in respect of sale of bare shell building blocks.

k. The assessee has earned exorbitant profit on sale of bareshell. No comparison between profit earned from SEZ project and Non SEZ project was done. Adequacy, appropriateness and quantum of deduction has not been examined in DLF Ltd. case. (Issue raised in Additional ground)

Our Submission

(Not raised by the assessing officer)

The assessing officer has conducted enquiry from Joint sub-registrar, Rangareddy, Telangana calling for market value of land and structure rate in Gachibowli village. However, no further action was taken by the assessing officer and no comparable instance was brought on record to dispute the reasonableness of development consideration received by the assessee. It is clear that assessing officer was satisfied with the method of determination of development consideration keeping in mind that SEZ status and approval by BOA.

In these circumstances, when the issue of adequacy, appropriateness and quantum of deduction was not the subject matter of assessment, it is not open for the revenue to raise this issue before Hon'ble ITAT in the light of legal position clarified in para 17.2 above.

In any case, the quantum of profit is not relevant for adjudging the validity of claim of deduction u/s 80IAB of the Act. The issue arising from assessment order is validity of claim u/s 80IAB only. The SEZ was set-up by the assessee developer and assessee undertook huge risk and associated cost for development of the project. Moreover, the bare shell buildings have been sold to another eligible developer and in absence of any adverse revenue implication, the quantum of deduction cannot be the criteria to disallow the claim.

The quantum of profit is based on system of accounting followed by the assessee and same being not in dispute, it is not open to raise any dispute or controversy in respect of the same. Further, as per accounting system followed, in some years there is profit and in some years there is loss. In fact, as clarified above, the assessee has suffered loss to the extent of Rs. 218 cr in AY 2012-13. In any case, in the absence of any comparable instance or finding by assessing officer, the contention of the revenue is without any basis or merits.

As in the case of DLF ltd., no argument regarding adequacy, appropriateness and quantum of deduction was taken before ITAT and as such there is no error in the order of Hon'ble ITAT.

l. **CIT(A) should have exercised co-terminus power and invoked section 80IA(10). The report of field enquiry conducted by the assessing officer was ignored by CIT(A). Omission by AO cannot lead to granting of relief. The CIT(A) should have conducted further enquiry u/s 250(4). Reference to Delhi High Court decision in the case of Jansampark Advertising and Marketing P Ltd. 231 Taxman 384. (Issue raised in Additional Ground)**

Our Submission

Connection with Serial (k) above.

The assessing officer did not invoke provision of section 80IA(10) and as such the argument at this stage before Hon'ble ITAT does not hold good.

Further, there was no occasion for the AO to invoke section 80IA(10) as the transaction of sale of bare shell is between the two eligible assesses and same falls outside the scope of section 80IA(10). It is imperative to mention that assessing officer in the assessment order has categorically mentioned that no transfer pricing analysis is warranted in this case and as such the field enquiry conducted by the assessing officer was irrelevant in absence of any adverse material or information to show that development consideration for sale of bare shell building blocks was excessive. In any case, the assessing officer has not worked out how and to what extent it is excessive or any reference to any independent comparable, any fresh controversy before Hon'ble ITAT is highly irrelevant and misleading.

It is not the case where assessing officer has omitted to do something but a case where enquiry was done and dropped upon satisfaction of the facts. In these circumstances, the CIT(A) has no occasion to invoke provision of section 80IA(10) particularly when the same was not even the basis for disallowance of claim of deduction.

It may be appreciated that provision of section 80IA(10) read with section 80IAB are only for the purpose of modifying the quantum of claim of deduction. However, in the present case, the assessing officer disputed the very eligibility to claim deduction u/s 80IAB on

the ground of nature of income i.e. business income v. capital gain and as such the issue of adjustment in terms of section 80IA(10) does not arise for consideration at all.

The decision of Delhi High Court in the case of Jansampark Advertising as referred by the revenue is on different footing and not applicable to the facts of the case. In that case, the issue was with regard to addition of share capital u/s 68 and the basis of relief granted by CIT(A) was not discernible from the appellate order. Further, in that case, the issue was with regard to section 68 where initial onus was on the assessee. CIT(A) deleted the addition merely on the ground that AO failed to carry out enquiry.

However, in the present case, the CIT(A) has properly dealt with the assessment order and allowed relief on the basis of ITAT order in the case of DLF Ltd. and as such the contention raised vide additional ground is meritless. Judgment referred in para 17.2 are very relevant in this context.

m. The incentive provisions warrants strict interpretation and in case of doubt, the view favouring the revenue must be taken. Reference to Apex Court judgement in Dilip Kumar's case.

Our Submission

In fact, the decision in the case of Dilip Kumar supports the case of the assessee as the claim of deduction u/s 80IAB being in accordance with approval of BOA under SEZ Act and consequential provisions of section 80IAB, it is not open to revenue to distort provisions of SEZ Act and section 80IAB and raise any controversy.

n. ITAT is the final fact-finding authority and the principle of substance over form must be applied in the present case. Reference to decision of Kol ITAT in the case of Edward Keventors.

Our Submission

This argument supports the case of the assessee. On application of principle of substance over form, it becomes sufficiently clear that claim of assessee developer is fully in accordance with provisions of SEZ Act, approvals by BOA and section 80IAB of the Income Tax Act, 1961, there is no ground to dispute claim of statutory benefit in

conformity with objects and scope of SEZ Act. It may be appreciated that development of SEZ Act was undertaken as part of regular business operation of the assessee developer and the approved transaction of sale of bare shell building blocks to Co-developer was given effect to in entirety. Moreover, the entire activity of setting up of SEZ and development operations carried therein being carefully scrutinized and approved by specialized and dedicated wing of Government of India, there can be no dispute with regard to bonafide intention and clear facts of the case.

The decision of Hon'ble ITAT in the case of **Edward Keventors** as quoted by the revenue is in the context of manipulative transaction of booking loss on sale of shares where assessee undertook circular transactions of sale of equity shares of 100% holding company within the group to claim bogus loss. It is amply clear that facts of that case are on totally different footing and the ratio laid down by Hon'ble ITAT in that case is not applicable to the facts of the present case.

It may be appreciated that in the present case, the transaction of development and sale of bare shell building blocks has been undertaken after due approval from BOA under SEZ Act and the bonafide and commercial intent of the transaction is not in dispute. In fact, the SEZ project is successfully going on till date and various units operating therein and both the assessee and Co-developer have derived reasonable profits from the project in accordance with commercially entered terms.

Further, the provisions of SEZ Act are for development of worldclass facility infrastructure facility and keeping in view the object and spirit of SEZ Act, the assessee executed the project and as such the objections of the revenue are highly arbitrary and misplaced.

22. In the light of above, the claim of deduction u/s 80IAB is in accordance with law and the order of CIT(A) may kindly be upheld.

23. The assessee will be pleased to provide any further clarification as may be called for and reserves right to respond to any further issue raised by the appellant revenue.

For DLF Commercial Developers Ltd.

SD/- **27/09/2021**

8. The gist of arguments and contentions raised by both the sides can be summarized as under:

Arguments of the revenue:

i) The assessee is only involved in development of project and having not carried out operation and maintenance of the project, the statutory requirement of sec. 80IAB has not been complied with.

ii) Development and sale of bare shell building structure is not an authorized operation.

iii) Reliance on clarification communication dtd. 18/01/2021 and 20/01/2021 issued by Ministry of Commerce and Industry is misplaced as same were not issued by Board of Approval and as such these clarifications have no relevance.

iv) Profit from sale of bare shell structure is in the nature of capital gain and not business income.

v) In the alternative, consideration for sale of bare shell structure is in the nature of advance lease rental and the benefit should be apportioned and spread over during the period of lease.

vi) The asseessee has generated exorbitant profit and same being not in confirmity with provisions of sec. 80IA(10), such profit is not eligible for deduction u/s. 80IAB.

vii) Reference to decision of DLF is also not relevant as issue of exorbitant profit in terms of provisions of

sec. 80IA(10) was not examined by ITAT. Further reference to clarification vide communication dtd.18/01/2021 and 20/01/2021 by Tribunal in that case is also misplaced.

Arguments of the assessee:

i) The SEZ project and activity of development of Bare Shell building blocks is approved by BOA vide specific approvals dated 21/06/2007.

ii) The fact of approval and development of bare shell building and its sale being authorized operation was categorically confirmed by BOA vide clarification dated 18/01/2011 and 20/01/2011 issued by Ministry of Commerce and Industry.

iii) That the question before Hon'ble High Court and issue raised by the assessing officer in assessment order u/s 143(3)/263 being limited to nature of income from the sale of bareshell building blocks i.e. whether income so derived is business income or capital gain and allowability of deduction in respect of the same, the various arguments raised by the Ld. DR in written synopsis are extraneous to the subject matter of dispute before ITAT and are untenable.

iv) That assessee is a real estate developer and carrying out development of bare shell building blocks and operation and maintenance of other

infrastructure facility in SEZ is part of its core business activity and as such there is no case of any income assessable under the head capital gain

v) It was further submitted that as per CBDT Circular no. 16/2017 dated 25th April, 2017, income arising from SEZ is to be treated as business income under the head "Profit and gains of business".

vi) That clarification dated 18/01/2011 and 20/01/2011 were issued by SEZ Division of Ministry of Commerce were in fact issued by members of BOA on behalf of BOA.

vii) That the provisions of section 80-IAB requires development of SEZ as precondition and there is no cumulative requirement of carrying out activity of operation and maintenance of SEZ.

viii) That section 80-IAB is offshoot of SEZ Act, 2005 and upon satisfaction of condition laid down by BOA, the assessee is eligible for claim of deduction u/s 80-IAB.

ix) That the formula for working out development consideration for transfer of bare shell building blocks was based on capitalization of income approach and same being approved by BOA as part of Co-developer agreement, there can be no dispute regarding the correctness of development consideration.

x) That the issue of valuation in terms of section 80IA(10) is alien to the issue of eligibility to claim u/s 80-IAB and same is irrelevant.

xi) Even otherwise, the issues raised for the first time before Tribunal are out of context as no such issues were raised by the revenue before High Court or considered even by the assessing officer in consequential order.

Decision

9. We have carefully gone through the facts of the case and submission of the parties. The only issue under consideration is statutory claim u/s. 80IAB in respect of SEZ Approved Project. The background of the controversy has been brought out in para 2 to 5 above. In order to examine the case of the revenue, it is necessary to make reference to the provisions of sec. SEZ Act and provisions of sec. 80IAB. These provisions have already been extracted in the reply of the parties as extracted supra.

10. We have noted that in the above said case, the approval was duly granted to the respondent assessee by Board of Approval being statutory authority in terms of provisions of SEZ Act, 2005. Vide approval dated 23/10/2006, the assessee company was recognized as a 'Developer' for the purpose of setting up of SEZ for IT/ITES sector. The sale of

bare shell building blocks was duly approved as permissible activity as part of SEZ Project.

11. The revenue at the original stage has only raised the issue of statutory benefit u/s. 80IAB. However, subsequently, they have raised additional grounds, which are extracted hereunder:-

> *1. "The Ld. CIT(A) erred in holding that reasonableness of amount received was an issue related merely to method of valuation, thereby, failing to notice that the extraordinary profit was contrary to the explicit provisions of sub section (3) of section 80-1AB of the Income Tax Act, 1961".*
>
> *2. "The Ld. CIT(A) erred in burshing aside the aforesaid by observing that the AO had discussed but not eventually taken into account the price of transaction, ignoring the principle that acts of omission by the Assessing Officer cannot, ipso facto, comprises the basis of granting relief by an Appellate Commissioner as held by the Hon'ble Jurisdictional High Court in CIT-Il vs Jansampark Advertising & Marketing Pvt Ltd (231 Taxman 384)"*

12. Having heard detailed arguments of both sides in respect of additional ground, we ae inclined to admit the same as this issue is integral part of the issue in dispute.

13. The assessment order being subject matter of dispute has been passed by the AO pursuant to order of the High Court dtd.22/02/2018. It is noted that the issue raised before High Court was only to the effect that the income from

the project was in the nature of capital gain and not business income and as such benefit of statutory provision u/s. 80IAB is not admissible. The AO in the consequential order has primarily raised very same objection that income from the approved project is in the nature of capital gain and not eligible for deduction u/s. 80IAB. The CIT(A) decided the issue in favour of the assessee as per following finding:

> *"6.5 During the course of appellate proceedings, the Ar has also brought on record the order of Hon'ble ITAT Delhi in the case of DLF Ltd. vs. Addl. CIT in ITA Nos. 2126/Del/2013 and 2749/Del/2013 for AY 2008-09, in which vide order dated 27.05.2019, the Hon'ble ITAT has decided similar issues in the case of group company of the appellant, which are also raised in the present case. These issues are-*
>
> *.....*
>
> *6.6 On perusal of the above order, it is observed that the Hon'ble ITAT Delhi has clearly held that the transfer of bare shell buildings is an authorized operation of developing of SEZ as per the SEZ Act, 2005 and the profit earned from transfer of bare shell buildings constitutes part of the operating profit and the said income/profit is eligible for deduction u/s 801AB of the Act. It has also been held that the income from sale of buildings is purely in the nature of business income and the same cannot be re-characterized as capital gains. Similar additions made in subsequent years by the AO have been allowed by my ld. predecessors also. The facts of the present case are similar to the facts in the above referred case and therefore, following the decision of Hon'ble ITAT Delhi (supra), it is held that the appellant is entitled for deduction u/s*

801AB of the Act in respect of the profit earned from transfer of bare shell buildings and the sale of bare shell buildings cannot be treated as transfer of Capital Asset.

6.7 The AO has also held that the transfer of bare shell buildings has been done at artificially high value in order to claim the benefit of deduction u/s 801AB of the Act. It is further held that the appellant has opted for Rent Capitalization Method in order to arrive at the fair market value of the sold assets. In this regard, it is observed that the AR has duly explained the reason for the method of valuation adopted by the appellant. Moreover, it is observed that out of the three methods prescribed, not one method has been made mandatory and the basic princip6le which needs to be looked into is that the transaction is held that arm's length price. In this case, the appellant has explained that the price was determined commercially by both the parties on the basis of prevailing market rent rates and the same was incorporated in the MOU and the co-developer agreement. It is also observed that in this year under consideration, the appellant has shown the revenue on the basis of 42.71% by applying POCM method and the balance amount has been recognized as revenue in the subsequent years and in those years, the rate/value of the transaction has already been accepted by the AO. Moreover, a perusal of the assessment order also shows that although the AO has discussed the issue of price of transaction, but the AO has not taken the same into account while computing total income of the appellant. In view of this, I am of the opinion that no adverse view can be taken about the pricing of the transaction of sale of bare shell buildings.

6.8 Keeping in view the above facts and discussion and following the decision of Hon'ble ITAT Delhi (Supra) and of the ld. CIT(A) in the case of appellant in AYs 2009-10 to 2011-12, it is held that the appellant is entitled for deduction u/s 801AB of the Act in respect of the profit earned from transfer of bare shell buildings and the sale of bare shell buildings cannot be treated as transfer of Capital Asset. Accordingly, the addition made by the AO is deleted and the grounds of appeal are allowed."

14. Having gone through the facts of the case and keeping in mind the arguments advanced by both the sides, we now take up various issues for consideration and adjudication. In this context, it will be appropriate to take note of relevant provisions of SEZ Act, 2005 and Sec. 80-IAB which have been specifically referred to by the parties:-

Section 2 – Definition

c) "authorised operations" means operations which may be authorised under sub-section (2) of section 4 and sub-section (9) of section 15;

(e) "Board" means the Board of Approval constituted under sub-section (1) of section 8;

(f) "Co-Developer" means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (12) of section 3;

(g) "Developer" means a person who, or a State Government which, has been granted by the Central Government a letter

of approval under sub-section (10) of section 3 and includes an Authority and a Co-Developer;

(p) "infrastructure facilities" means industrial, commercial or social infrastructure or other facilities necessary for the development of a Special Economic Zone or such other facilities which may be prescribed;

(za) "Special Economic Zone" means each Special Economic Zone notified under the proviso to sub-section (4) of section 3 and sub-section (1) of section 4 (including Free Trade and Warehousing Zone) and includes an existing Special Economic Zone;

Section 4 -

Establishment of Special Economic Zone and approval and authorisation to operate to, Developer

(2) After the appointed day, the Board may, authorise the Developer to undertake in a Special Economic Zone, such operations which the Central Government may authorise.

Section 27 –

Provisions of Income tax Act, 1961 to apply with certain modification in relation to Developers and Entrepreneurs

The provisions of the Income-tax Act, 1961, as in force for the time being, shall apply to, or in relation to, the Developer or entrepreneur for carrying on the authorised operations in a Special Economic Zone or Unit subject to the modifications specified in the Second Schedule.

Section 51 –

Act to have overriding effect.

(1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Section 80-IAB –

Deductions in respect of profits and gains by an undertaking or enterprise engaged in development of Special Economic Zone.

(1) Where the gross total income of an assessee, being a Developer, includes any profits and gains derived by an undertaking or an enterprise from any business of developing a Special Economic Zone, notified on or after the 1st day of April, 2005 under the Special Economic Zones Act, 2005, 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 one hundred per cent of the profits and gains derived from such business for ten consecutive assessment years:

Provided that the provisions of this section shall not apply to an assessee, being a developer, where the development of Special Economic Zone begins on or after the 1st day of April, 2017.

(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 a Special Economic Zone has been notified by the Central Government :

Provided that where in computing the total income of any undertaking, being a Developer for any assessment year, its profits and gains had not been included by application of the provisions of sub-section (13) of section 80-IA, the undertaking being the Developer shall be entitled to deduction referred to in this section only for the unexpired period of ten consecutive assessment years and thereafter it shall be eligible for deduction from income as provided in sub-section (1) or sub-section (2), as the case may be :

Provided further that in a case where an undertaking, being a Developer who develops a Special Economic Zone on or after the 1st day of April, 2005 and transfers the operation and maintenance of such Special Economic Zone to another Developer (hereafter in this section referred to as the transferee Developer), the deduction under sub-section (1) shall be allowed to such transferee Developer for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee Developer.

(3) The provisions of sub-section (5) and sub-sections (7) to (12) of section 80-IA shall apply to the Special Economic Zones for the purpose of allowing deductions under sub-section (1).

Explanation.—For the purposes of this section, "Developer" and "Special Economic Zone" shall have the same meanings respectively as assigned to them in clauses (g) and (za) of section 2 of the Special Economic Zones Act, 2005.

15.1 In order to appreciate the nature of controversy, we may make reference to relevant facts as relating to development of SEZ Project :

15.2 As noted elsewhere in this order, the assessee company being a real estate developer, with an intention of developing SEZ, moved a proposal to Board of Approval for setting up of SEZ at Gachibowli Village, Shrilingampalli Mandal, Ranga Reddy District, Hyderabad. The object of the assessee company was to undertake systematic development of SEZ and construction of Bare Shell Office building Blocks for onward sale to Co-developer. It is noted that the entire process right from obtaining permission for setting up of SEZ to carrying out activity of development and transfer of bare shell building blocks to Co-developer was approved by BOA at various stages. Further, the lower authorities have not disputed the existence of approval by the designated authority. The gist of approvals as enclosed in the paperbook filed by the respondent assessee is as under:

- Approval dated 23/10/2006, by the Ministry of Commerce & Industry (SEZ Section) approving the setting up of a sector specific SEZ for IT/ITES sector at Ranga Reddy District, Hyderabad, Andhra Pradesh.
- Copy of notification dated 26/04/2007 issued by the Ministry of Commerce and Industry, Department of Commerce (thereby notifying the total area of 10.617 hectares at Gachibowli village, Shirlingampalli Mandal, Ranga Reddy District in the state of Andhra Pradesh as SEZ.

- Approval dated 21/06/2007 granted to assessee by BOA specifying authorized operations in respect of SEZ Project
- Approval dated 01/05/2007 by BOA recognizing M/s. DLF Assets P. ltd. as Co-developer in the SEZ project.
- Copy of corrigendum dated 06/11/2007 to approval dated 01/05/2007
- Approval dated 18/06/2007 granted to Co-developer by BOA specifying authorized operations in respect of SEZ Project
- Approval dated 01/06/2009 granted to Co-developer by BOA approving the definitive Co-Developer Agreement dated 20/03/2008.

15.3 The thrust of argument of respondent assessee was that once the approval was granted by BOA and assessee complied with all requisite conditions, there remains no dispute regarding the issue of deduction u/s 80-IAB as the provisions of SEZ Act have overriding effect.

16.1 The assessee also made reference to clarification dated 18/01/2011 and 20/01/2011 issued by SEZ Section of Ministry of Commerce and Industry wherein it has been elucidated that activity of construction of bare shell building blocks and its transfer to Co-developer is authorized operation under SEZ Act, 2005.

16.2 However, the revenue in its written synopsis has attacked the validity of these clarifications on the ground that said clarifications were issued by Ministry of Commerce and Industry, Government of India and same cannot be

considered to have been issued by Board of Approval constituted under SEZ Act.

16.3 We would like to deal with this contention of the revenue raised for the first time before us even though the validity of said clarifications was never disputed by the assessing officer, CIT u/s 263 or CIT(A). We do not find any substance in this argument of the revenue. The Ld. Counsel for the assessee in his rejoinder has placed on record the administrative set up and constitution of Board of Approval from which it becomes clear that SEZ Section of Ministry of Commerce has been entrusted upon the duty to issue clarifications and notification on behalf of the BOA. It is further noted that the officials issuing the clarifications dated 18/01/2011 and 20/01/2011 participated in BOA meeting as members and as such it is more than apparent that clarifications were in fact issued by the BOA only. Our attention was also drawn to the independent verification conducted by CIT during revisionary proceedings u/s 263 vis-à-vis the authenticity of these clarifications and it is noted that the enquiry letter dated 02/12/2011 addressed and sent to BOA was answered in affirmative thereby confirming the sanctity of these clarification. Thus, the revenue's challenge to the validity and applicability to the clarifications issued by the BOA is of no consequence and merely for the purpose of creating unnecessary controversy. In any case, these letters are merely clarificatory in nature and only support the approval accorded by the Board of Approval.

17. On careful analysis of provisions of SEZ Act, 2005 read with Section 80-IAB of the Income Tax act, 1961, it is observed that the SEZ Act, 2005 was enacted on 23/06/2005 for the purpose of establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto. Vide Second Schedule of the SEZ Act, amendments were made to the Income tax Act, 1961 for providing incentive to units operating in SEZ (Section 10AA, Section 54GA and section 80-LA) and entities engaged in development of SEZ (Section 80-IAB) by way of insertion of these sections. The purpose behind introduction of section 80-IAB is to encourage and incentivise the assessee to undertake development of SEZ so that object of the SEZ Act could be achieved. In simple words, the legislature has carefully designed the scheme in a way that section 80-IAB is the first step towards achieving the ultimate objective of "promotion of exports and matters connected therewith or incidental thereto" because it is only after the development of infrastructure facility in SEZ, that the entities engaged in exports will be able to operate.

18.1 In the light of fundamentals facts noted above, it clearly emerges that the claim of deduction 80-IAB is required to be examined in accordance with scheme and purpose of SEZ Act, 2005. On word-by-word reading of section 80-IAB, the following sentences holds relevance which are analysed hereunder:

i. profits and gains derived by an undertaking or an enterprise;

ii. any business of developing a Special Economic Zone, notified on or after the 1st day of April, 2005 under the Special Economic Zones Act, 2005;

iii. be allowed, in computing the total income of the assessee, a deduction of an amount equal to one hundred per cent of the profits and gains derived from such business for ten consecutive assessment years;

iv. Provided further that in a case where an undertaking, being a Developer who develops a Special Economic Zone on or after the 1st day of April, 2005 and transfers the operation and maintenance of such Special Economic Zone to another Developer (hereafter in this section referred to as the transferee Developer), the deduction under sub-section (1) shall be allowed to such transferee Developer for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee Developer;

v. The provisions of sub-section (5) and sub-sections (7) to (12) of section 80-IA shall apply to the Special Economic Zones for the purpose of allowing deductions under sub-section (1);

vi. Explanation.—For the purposes of this section, "Developer" and "Special Economic Zone" shall have the same meanings respectively as assigned to them in clauses (g) and (za) of section 2 of the Special Economic Zones Act, 2005.

18.2 We find that the tenor of section 80-IAB is to encourage development of infrastructure facility in SEZ. Further, the sub-section (1) use plain and simple term 'developing a Special Economic Zone' without any further conjunction unlike section 80-IA(4)(i). As to what constitute 'developing' has not been defined in the section and for this purpose it would be appropriate to construe the meaning of the word 'develop' in its popular sense. As per Concise Oxford Dictionary, 9th Edition, the word "develop" means - (a) to construct new buildings on land and (b) to convert land to a new purpose, so as to use its resources more fully. Further as per Collins Dictionary the definition of word "develop" is given as - to improve the value or change the use of (land), as by building.

18.3 From the above definition, it is amply clear that that the word 'develop' is of wide connotation and the benefit of deduction u/s 80-IAB is available in respect of various kinds of building and construction activity aimed towards development of SEZ notified land, not to mention that such activities must be authorized by the BOA. The assessee, in the present case, is developing bare shell building blocks which are defined in the Clause 1.1.6 of the definitive Co-Developer agreement dated 20/03/2008 as under:

> "Bare Shell Building" means the entire bare shell facilities including the built up structures with lift lobbies, external facades, fire suppression system as per building norms, cement flooring, no plaster on concrete columns, walls or

ceiling except on brick walls wherever provided, as developed by the Developer in accordance with the sanctioned plan as also shown in the plan annexed hereto as Annexure F to be granted to the Co-developer for executing the Co-Developer operations on the terms agreed hereto, but not including any Infrastructure developed by the Developer

The assessee has also developed **infrastructure utilities** under the said Co-developer agreement vide clause 1.1.17 read with Annexure H. The detail of such facilities is as under:

i. Sewage Treatment Plant
ii. Water Treatment Plant
iii. Landscaping
iv. Roads
v. Street Lighting
vi. Fire Protection System
vii. Effluent Treatment Plant
viii. Parking
ix. Telecom and Communication

18.4 We are convinced that activity of construction of bare shell building blocks having approx. built up are of 41,13,332 Sq Ft on 26.225 acres of SEZ notified land and development of allied infrastructure utilities satisfies the criteria of development based on provisions of SEZ Act and consequential approval and there is no doubt in our mind that said activities clearly tantamount to developing of SEZ in terms of section 80-IAB of the I.T. Act.

19.1 There is another angle to view the facts of the present case. When we look at section 27 and section 51 of the SEZ Act, 2005, Section 27 provides that provisions of the Income Tax Act shall apply to developer carrying out authorized operation which to our understanding necessarily means that such developer will be eligible for the benefits under Income tax Acct, 1961 as introduced through SEZ Act. Section 51 states that provision of SEZ Act will have overriding effect on any other statute including Income tax Act, 1961. Pertinently, the term 'developer' as used in section 80-IAB has been assigned the same meaning as defined in section 2(g) of the SEZ Act. Section 2(g) and 2(p) of the SEZ Act which defines the word "Developer" and "Infrastructure facilities" are as under:

> (g) "Developer" means a person who, or a State Government which, has been granted by the Central Government a letter of approval under sub-section (10) of section 3 and includes an Authority and a Co-Developer;
>
> (p) "infrastructure facilities" means industrial, commercial or social infrastructure or other facilities necessary for the development of a Special Economic Zone or such other facilities which may be prescribed;

The reference to the definition of the term "infrastructure facilities" is useful as the same clearly states that development of industrial, commercial or social infrastructure facilities amounts to development of a SEZ.

19.2 On harmonious reading of section 27, definition of word developer and infrastructure facility as given in SEZ Act, 2005 and the provisions of section 80-IAB takes us to the irresistible conclusion that a developer who is engaged in authorized operations of development of infrastructure facility shall be eligible to claim deduction u/s 80-IAB of the I.T. Act. Now, in the present case, there is no quarrel to the fact that construction of bare shell building blocks was specifically approved by the BOA as authorized operation. On application of the above conclusion to the facts of present case, we find that assessee is a BOA recognized developer carrying out authorized operation of construction of bare shell building blocks for office space and such requirement of development of SEZ under 80-IAB stands fulfilled in all aspects.

20.1 Apropos the issue of authorized operation, the revenue has also contended that development of bare shell building cannot be considered as authorized operation or activity of development of SEZ in terms of section 80-IAB of the I.T.Act, 1961. In this regard, we are inclined to accept the contention of the Ld. Counsel on behalf of the assessee that the benefit of deduction u/s 80-IAB, as per the plain reading of the section, is available to undertaking carrying out activity of development of SEZ which has to be read in consonance with authorized operations prescribed by the BOA and it is not open to the revenue to define the nature or type of work or impute artificial meaning to the term developing of SEZ as used in the section. In the discussion contained in preceding

paras, we have already deliberated upon the meaning of word 'Develop' in the context of Section 80-IAB read with SEZ Act, 2005 and held that activity of construction of bare shell building blocks satisfy the criteria of development of SEZ as envisaged u/s 80-IAB and as such the approach of the revenue cannot be countenanced.

20.2 We further find strength from the decision of Hon'ble Jammu and Kashmir High Court in the case of **CIT v. TRG Industries (P.) Ltd. [2017] 297 CTR 58 (J&K).** In that case, the Hon'ble High Court while dealing with the issue of deduction u/s 80-IA held that once the assessee has developed infrastructure facility under a contract with government or an authority, the Assessing Officer cannot describe the nature of work which will constitute infrastructure facility for the purpose of granting deduction. The observation of the Hon'ble High Court is as under:

> 13. The first and the foremost requirement is that the assessee developer should come within the ambit of Section 80-IA (4)(i)(a)(b) which the assessee satisfies. There is no dispute since there is a valid contract as required. The next requirement for the benefit to be extended under the said provision is that the enterprise should provide an infrastructure facility in relation to establishing a road, a bridge or a rail system or Airport. There is no specific intendment as to the nature of work to be undertaken as is evident from the explanation. Therefore, the word contained therein has wide amplitude. The Assessing officer was not correct in prescribing certain limits and describing the

nature of work. In other words, the assessing authority attempts to dissect the contract and hold that it does not justify the claim for deduction. That we are not inclined to accept. If the requirement of Section 80-IA (4)(i) and Section 80-IA (4)(i)(c) explanation is satisfied, then the benefit has to flow.

14. The provisions of Section 80-IA (4)(i) applies to an enterprise carrying business of a developer, who satisfies the requirement of Section 80-IA 4(i)(a)(b)and provides an infrastructure facility as set out in the explanation.

15. If the provision is read as a whole and the explanation is read in terms of the said provision, it would be amply clear from the facts of the present case that the assessee in this case is an enterprise carrying on the business of a developer has entered into an agreement with the Central Government or the State Government or an authority prescribed under Section 80-IA (4)(i)(b) and has provided the infrastructure facility in terms of explanation to Section 80-IA(4)(i)(c), the details of which are set out in the chart.

16. The Assessing Officer has tried to read more into the provision by describing what is the nature of work that will qualify for the benefit of deduction under Section 80-IA(4). The authority is bound to consider the claim as is contained in the provisions. If certain works are accepted as infrastructure facility and other works denied at the whim of one or other authority it will lead to an incongruous result whereby different assessing officers will take different yardsticks. The proceedings will thereby become arbitrary and capricious."

20.3 The above decision of Hon'ble Jammu and Kashmir High Court fortifies the apparent conclusion that development activities carried out by the assessee meet the obligation, spirit and purpose of section 80-IAB read with SEZ Act, 2005.In our considered view, the construction of bare shell building blocks in SEZ was an approved operation by BOA and same being synonymous to developing of SEZ in terms of Section 80-IAB, there is no scope left to ascribe any other meaning for the purpose of granting benefit of deduction under the Income Tax Act and any attempt to do so will defeat the purpose of SEZ act and consequential benefit extended u/s 80-IAB.

21.1 The revenue has raised another argument that assessee is only constructing bare shell building blocks and not engaged in operation or maintenance of the SEZ. The revenue has placed reliance on second proviso to section 80-IAB. The respondent assessee has repelled this argument on the ground that there is no cumulative requirement in the section 80-IAB that assessee should also operate or maintain the SEZ. We find that the argument of the revenue is without any merit. As noted above, the very language of sub-section (1) of section 80-IAB does not require anything over and above developing of SEZ. Even assuming thatactivity of operation and maintenance of infrastructure facilities may form part of development activity but non carrying out of the same cannot, in any case, disentitle the assessee from claiming the statutory benefit u/s 80-IAB once it is proved that assessee

has developed Infrastructure within the SEZ. Further, the thrust of the revenue on second proviso which grants deduction to transferee developer upon transfer of operation and maintenance is misplaced as the said proviso merely extends the benefit of deduction on the activity of operation and maintenance of infrastructure facility to the transferee developer and same cannot be read in a way to make the activity of operation and maintenance of infrastructure facility as mandatory requirement for a valid claim of deduction u/s 80-IAB of the I.T. Act.

21.2 Under similar facts, in context of section 80IA, Hon'ble Gujarat High Court in the case of **Pr.CIT v. NilaBaurat Engineering Ltd.[2017] 399 ITR 242 (Gujarat)** [SLP dismissed by Supreme Court] has held that profit arising from development and transfer of infrastructure facility will be eligible for deduction u/s 80-IA. The relevant observation of Hon'ble High Court is reproduced hereunder:

> *6. The proviso to sub-section (4) thus makes an enabling provision providing a deeming fiction whereby upon transfer of any infrastructure facility for the purpose of operating and maintaining, the transferee could claim the deduction for the remainder of the period. The crucial words here are "the transfer of infrastructure for the purpose of operating and maintaining' and thus the transferee who would now step in the shoes of the transferor for the limited purpose of operation and maintenance, could claim deduction on the profit element arising out of such activity. We may recall, under sub-section (4) of Section 80IA of the Act, an enterprise carrying on the*

business of developing, or operating and maintaining, or developing, operating and maintaining infrastructure facility would be eligible for deduction. Thus this provision itself envisages that in a given project the developer and person who maintains and operates may be different. Merely because the person maintaining and operating the infrastructure facility is different from the one who developed it, would not deprive the developer the deduction under the said section on the income arising out of such development. By virtue of the operation of the proviso, the developer would not be deprived of the benefit of deduction under sub-section (1) of Section 80IA on the profit earned by it from its activity of developing the infrastructure facility. The proviso does not operate as to depriving the developer of the benefit of the deduction even after the facility is transferred for the purpose of maintenance and operation but would split the profit element into one derived from the development of the infrastructure and that derived from the activity of maintenance and operation thereof.

Further, Hon'ble Bombay High Court in the case of **CIT v. ABG Heavy Industries Ltd. 322 ITR 323 (Bom)** (SLP of revenue dismissed by Supreme Court [2011] 336 ITR 15) in the context of section 80IA has specifically held that there is no requirement for compliance of all the three activities of development, operation and maintenance together. We also observe that it is neither feasible nor practicable for the assessee to carry out cumulative activity of development, operation and maintenance of SEZ and reading of such requirement will defeat the purpose of section 80-IAB read

with intention of SEZ Act. Accordingly, we are of the view that profit arising from the activity of construction and sale of bare shell building blocks is eligible for claim of deduction u/s 80-IAB of the Act.

22.1 With regard to the issue of profit and gains derived from any business of developing SEZ, we find that the intention behind the section is to incentivise the act of developing SEZ and as such profit and gains earned from carrying out such development falls within the purview of deduction u/s 80-IAB. The interpretation propounded by the revenue that the sale of bare shell building blocks results in capital gain which is not eligible for deduction u/s 80-IAB is too far-fetched and comes in the teeth of the very object of the section. Even going by the strict interpretation of the section, there is no pre-condition that income must be assessable under a particular head of income and mere use of words "profits and gains" or "business" does not in any way takes to us to the conclusion that only income under the head "profit and gains of business" is eligible for deduction u/s 80-IAB. This being the position, the primary reasoning of the assessing officer in denying the benefit of deduction on the ground that income from sale of bare shell building blocks is in the nature of capital gain does not find favour with us. In the light of uncalled for apprehension, the CBDT has issued **Circular no. 16/2017 dated 25th April, 2017** as per which, any development activities and nature of consequential income

will be categorized as business income for the purpose of statutory benefit.:

> "The issue whether income arising from letting out of premises/developed space along with other amenities in an Industrial Park/SEZ is to be charged under head 'Profits and Gains of Business' or under the head 'Income from House Property' has been subject matter of litigation in recent years. Assessees claim the letting out as business activity, the income arising from which to be charged to tax under the head 'Profits and Gains of Business' whereas the Assessing officers hold it to be chargeable under the head 'Income from House Property'
>
> 2. The matter has been considered by the Board. Income from the Industrial Parks/SEZ established under various schemes framed and notified under section 80-IA(4)(iii) of the Income-tax Act, 1961 ('Act') is liable to be treated as income from business provided the conditions prescribed under the schemes are met.
>
> In the case of Velankani Information Systems Pvt Ltd., [2013] 35 taxmann.com 1 (Karnataka) the Hon'ble Karnataka High Court observed that any other interpretation would defeat the object of section 80-IA of the Act and government schemes for development of Industrial Parks in the country. SLPs filed in this case by the Department have been dismissed by the Hon'ble Supreme Court.
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> In a subsequent judgment dated 30-4-2014 in ITA No. 76 & 78/2012 in the case of CIT v. Information Technology Park Ltd., [2014] 46 taxmann.com 239 (Karnataka) the Karnataka High Court has reaffirmed its earlier views. It has held that,

since the assessee-company was engaged in the business of developing, operating and maintaining an Industrial Park and providing infrastructure facilities to different companies as its business, the lease rent received by the assessee from letting out buildings along with other amenities in a software technology park would be chargeable to tax under the head "Income from Business" and not under the head "Income from House Property". The judgment has been accepted by the Board.

3. In view of the above, it is now a settled position that in the case of an undertaking which develops, develops and operates or maintains and operates an industrial park/SEZ notified in accordance with the scheme framed and notified by the Government, the income from letting out of premises/developed space along with other facilities in an industrial park/SEZ is to be charged to tax under the head 'Profits and Gains of Business'.

4. Accordingly, henceforth, appeals may not be filed by the Department on the above settled issue and those already filed may be withdrawn/not pressed upon."

22.2 In any case, it is not in dispute that assessee is real estate developer and is actively engaged in execution of real estate projects. In fact, from the main object clause in the Memorandum of Association of the assessee company, it becomes more than evident that primary object of the assessee is to acquire and develop commercial and business premises. As already noted above, the assessee has carried out substantial amount of work in SEZ which included

construction of huge built area aggregating 41,13,332 Sq. Ft. which is divided into various phases and blocks alongwith development of essential infrastructure facilities. It is worth noting that development of project of such a huge magnitude not only requires business experience and acumen but also resources. Not failing to mention that the only the work of getting approvals from designated authority under SEZ Act took time of over two years. We are afraid to observe that assessing officer has overlooked the crucial facts and ground realities relating to the SEZ project and was carried away by the mere fact that there was sale of bare shell building blocks resulting in profit. No doubt, isolated transaction of sale of a building can surely stir up the debate of capital gain v. business income, however, execution of SEZ project including planned development of several blocks of buildings, devotion of resources throughout considerable number of years and providing necessary infrastructural support facilities leaves no room for sustenance of the allegation that assessee earned capital gain on sale of bare shell building blocks.It is worthwhile to make reference to the concept of business as observed by the Hon'ble Supreme Court in the case of **Narain Swadeshi Weaving Mills v. CCE [1954] 26 ITR 765 (SC**) as relied upon the Ld. Counsel for the assesee. The relevant observation is reproduced hereunder:

> The word "business" connotes some real, substantial and systematic or organised course of activity or conduct with a set purpose. On the others hand, a single and isolated transaction has been held to be conceivably capable of falling

within the definition of business as being an adventure in the nature of trade provided the transaction bears clear indicia of trade. The question, therefore, whether a particular source of income is business or not must be decided according to our ordinary notions as to what a business is.

22.3 Undoubtedly, the execution of SEZ project and construction of bare shell building blocks along with infrastructure facilities is nothing but a systematic and organized activity in accordance with primary object of the assessee i.e. real estate development and falls under the realm of business operations.

22.4 It will not be out of context to note that even though the assessing officer has considered the income from the SEZ project as in the nature of capital gain, however, while making final computation of income, the profit computed by the assessee under Percentage Completion method has been assessed to tax after disallowing the claim of deduction u/s 80-IAB. The assessing officer has not spelt out how and in what manner the provisions of section 45 are to be applied and how the capital gain is to be worked out. We fail to see any rational behind such action of the assessing officer and it is clear the entire debate of capital gain v. business income in the context of sale of bare shell building blocks lacks conviction on part of the assessing officer. It is clear that only objection and attempt of the assessing officer was to deny benefit of statutory deduction u/s 80-IAB of the I.T. Act,

1961. Further, in respect of very same project, the assessing officer himself in AY 2012-13 has considered and accepted the loss under the head "Income from business and profession".

22.5 We have also considered and find support from the decision of Co-ordinate bench in the case of **DCIT v. DLF Ltd. in ITA No. 2749/D/13** dated 27/05/2019 as applied by the CIT(A).

22.6 Further on application of principle of strict interpretation of incentive provisions as laid down by Hon'ble Supreme Court in the case of **Commissioner of Customs (Imports) v. Dilip Kumar and Company &Ors (2018) 9 SCC 1 (FB)(SC)**, we find that in the present case, all the important elements of section 80-IAB have been satisfied and in absence of any ambiguity in interpretation of plain language of section 80-IAB read with provisions of SEZ Act, the said judgment does not advance the cause of the revenue.

22.7 Culmination of the aforesaid discussion takes us to an ineluctable conclusion that the facts of the present case ticks all the right boxes for valid claim of deduction u/s 80-IAB of the I.T. Act, 1961.

23.1 Before concluding, we deem it proper to address the contention of the revenue vide additional ground regarding the issue of reasonableness of development consideration received by the assessee on sale of bare shell building blocks

to Co-developer M/s. DLF Assets P. Ltd.. The argument of the revenue hinges on the fact that assessee has claimed excessive deduction by inflating the price of development consideration charged from related concern/co-developer M/s. DLF Assets. P. ltd.. In fact, the revenue has gone to the extent of treating the sale of bare shell building as in the nature of lease and disputing the method used for determining the Development consideration.

23.2 We are constrained to observe that the arguments regarding reasonableness of development consideration are de-hors the issue of eligibility of claim of deduction u/s 80-IAB. As noted elsewhere in this order, the revenue's in its initial ground raised by Tribunal is aggrieved by the order of CIT(A) allowing the claim of deduction 80-IAB and as such the primary dispute before us is eligibility of deduction and not quantum or reasonableness of claim. However, vide additional ground, the Revenue has raised the issue of quantum of deduction before us.

23.3 Be that as it may, we have already answered the issue of eligibility of claim of deduction u/s 80-IAB in favour of the assessee. Further, on closer perusal of the assessment order, we find that even though the assessing officer made some effort in gathering the local circle rate of immovable and constructed property for the purpose of comparison with the rate of development consideration charged by the assessee, however, nothing further was done to work out the arm's

length price in terms of section 80-IAB(3) read with 80-IA(10). The first appellate authority while noting the above also rendered positive finding about the correctness of method adopted by the assessee for determining rate to be charged for development consideration. To our mind, the issue of reasonableness of deduction and working of quantum is not fully arising out of the assessment order and is not related to the principal issue of eligibility of deduction u/s 80-IAB which formed the basis of revisionary order u/s 263 and Hon'ble High Court's order. However, for the sake of completeness, we would like to give finding on this aspect as well.

23.4 The Ld. Counsel for the assessee countered the contention of the revenue on the ground that the rate of development consideration for transfer of bare shell building blocks was determined on the basis of income capitalization method. It was further submitted that the said formula was duly approved by BOA in its approval to definitive Co-developer agreement.

23.5 On careful consideration of controversy in hand, we find that CIT(A) has rightly noted that income/lease capitalization method is a recognized method for determination of transfer value of bare shell building blocks. The formula so used forms part of the approved definitive Co-developer agreement and is reproduced hereunder:

Clause 2.9 The Parties agree that the Development Consideration shall be determined on the Project Completion Date, on the basis of following formula:

X = (A/B) – (C+D)

Where:

X = Development Consideration

A = Average rental value as on the Project Completion Date for the Warm Shell Buildings as computed by the Co-Developer*

B = Prevailing capitalization rate for the Warm Shell Buildings in accordance with international standards on the Project Completion Date, as determined by the Developer

C = Charges incurred by the Co-Developer for conversion of Bare Shell Building into Warm Shell Buildings

D = The rent for 1 year

**For unoccupied portions of the Warm Shell Buildings, the average rental value shall be calculated on the basis of the highest rental value mentioned in the last five agreements entered into with tenants for the occupied portions of a Warm Shell Building.*

The assessee has also placed on record the working of rate per sq ft in accordance with formula approved by the board. It is not even the case of the revenue that development consideration is not in accordance with approval formula as laid down in the approved agreement.

23.6 Further, it is important to note that BOA while granting approval to the definitive Co-Developer agreement invited comments from representative of the department of revenue

(DOR). As a matter of record, the DOR conveyed no objection to the formula so used for determining the development consideration and the objection was limited to the issue of lease of land vide letter dated 26/05/2009. Pursuant to such objection, the BOA in its approval inserted the disclaimer and gave right to the department to examine the taxability of income from lease of land only. It is implicit that the method of valuation of development consideration and the issue of transfer of bare shell building to Co-developer was acceptable to the representative of department of revenue at the time of granting of approval by the BOA.

23.7 We also find that the under very similar circumstances, the issue of method and valuation of development consideration was examined by Coordinate Bench in the case of sister concern **JCIT v. DLF Info City Developers (Chennai) Ltd. in ITA No. 5366/Del/2012 order dated 21st February,2014**wherein the Tribunal affirmed the correctness of rent capitalization method, capitalization rate and rate of development consideration determined in accordance with the same for transfer of bare shell buildings in SEZ:

> 20. In ground Nos. 11 to 13 (revenue's appeal) the issue raised is about the determination of development consideration. We find that the AO has not considered any factual aspect of the case as regards reasonableness of deduction and has disallowed entire deduction after considering the legal issues only. Section 80IA(8) provides for adjustment in the profit if the value of the goods or services

does not correspondent to the market value of such goods or services on the date of such transaction. The assessee objected the applicability of S. 80IA(8)on the reasoning that there is no transaction of transfer of goods or services from one eligible business to any of its other non-eligible business. Since the transaction in the present case has been made only with the eligible business of separate and distinct assessee i.e co-developer who is also entitled to deduction u/s 80IAB of the Act, we are of the view that the Ld. CIT(A) has rightly accepted the above contention of the assessee.

21. The AO has not only questioned the applicability of rent capitalization method for determining development consideration of bare shells, the AO has also pointed out as to why other methods of valuation should not be applied but has not discussed about the suitability or applicability of such methods in the facts of the present case or about the effect and consequences of such method in determining development consideration. It is also not a case, where reference can be made to the Departmental Valuation Officer (DVO) for determining the development consideration of bare shells u/s 142(1) without rejecting the books of account of the assessee (as the same has not been rejected by the AO). And since Section 55A is not applicable in the case of the assessee, it can also not be referred thereunder. Thus the Ld. CIT(A) in our view has rightly held the action of the AO in referring the matter to the DVO as misplaced. The Ld. CIT()A has also rightly not agreed with the contention of the AO that the Rent capitalization method adopted by the assessee is not prescribed or approved by any accounting policy or by any method of valuation of properties. Whereas the rationale

behind Rent Capitalization Method is an intentionally accepted method of valuation of properties and has got legal recognition in Rule 3 of Schedule III of the Wealth Tax Act, wherein value of the property is determined on the basis of Net Maintainable Rent.

22. The Ld. CIT(A) has worked out value of development consideration on the basis of marketing of value of bare shell at Rs.6225 by applying capitalization rate of 9.5% on annual net maintainable rent of Rs.657.64 as against actual value of development consideration at Rs.6947. The assessee is ground No. 2 of its appeal has disputed adoption of capitalization sale of 9.5% as against 9% applied by the assessee and working of net maintainable rent. We find substance in the contention of the Ld. AR in this regard as while doing so the Ld. CIT(A) has totally disregarded this important and material aspect of the fact that the BOA has approved the working formula as per agreement dated 20/3/2008. Clauses 2.9 and 2.6 (page No. 130 and 129 of the paper book) thereof are relevant, which are being reproduced hereunder:-

Clause 2.9 (paper book Page 130)

"The parties agree that the Development Consideration shall be determined on the Project Completion Date, on the basis of the following formula:

X= (A/B)-(C+D)

X - Development Consideration

A - Average rental value as on the project completion date for the Warm Shell buildings, as computed by the Co-Developer*

B - Prevailing Capitalisation rate for the Warm Shell buildings in accordance with international standards on the project completion date, as determined by the developer.

C - Charged incurred by the Co-developer for conversion of Bare Shell buildings

D - The rent for 1 year

* For unoccupied portions of the Warm Shell buildings, the average rental value shall be calculated on the basis of the highest rental value mentioned in the last five agreements entered into with tenants for the occupied portions of a Warm Shell Buildings."

However, consideration so worked out shall be subject to minimum of Rs.6550/- as per clause 2.6 (Paperbook Page 129)

Clause 2.6 (Paperbook Page 129)

"In consideration for the developer agreeing to execute this agreement, the Co-developer shall make the payment of such amount as Development Consideration in favour of the Developer as is agreed to between the Parties, subject to minimum payment of Rs. 6,550.00 (Rupees Six Thousand Five Hundred Fifty Only) per square feet of building space within the SEZ Building (the "Minimum Payment"). The Parties agree to make and accept, subject to applicable law, part payment of the said development consideration in the manner agreed to in this agreement, including on the respective Transfer and Hand-over dates."

Relevant points for consideration

23. We agree with the plea of the Ld. AR that following are the relevant point for consideration of the issue:-

i. There was no dispute at the assessment stage regarding reasonableness of development consideration and the issue was raised only during appellate proceedings.

ii. The development consideration was from one eligible business to another eligible business and both developer and co-developer were approved under SEZ Act for exemption u/s. 80IAB and as such there is no adverse revenue implication.

iii. That entire income was derived from approved project and it is not open to have one income for assessment purposes and different income for granting exemption.

iv. The development consideration is on the basis of approved formula laid down in the co-developer's agreement duly approved by Board of approvals.

v. Income was on the basis of books of accounts and there is no dispute about genuineness of transaction or a case of rejection of books of accounts.

vi. Average rent was not properly worked out as CIT(A) has disregarded car parking charges, which is independent source of income and not part of rent of premises and as such same cannot be disregarded. Further, adjustment of vacancy allowance is unwarranted in the context of working of capitalized value as concept of vacancy allowance is not relevant for determination of value of asset and same is relevant only for the purpose of computation of income under the head "Income from house property".

vii. Agreed capitalization rate of 9% was duly acted upon by both the parties and same cannot be disregarded as same is in accordance with approved formula mentioned in clause 2.9 of the approved co-developer agreement (Paper book page

130) ~ Further, capitalization rate of 9% is not in dispute in asstt. year 2007-08, 1st year of exemption, the same cannot be disputed in subsequent years.

viii. Rent capitalization rate of 9% is as per internationally recognized norms and even as per formula laid down in Wealth Tax Rules. (Schedule-III) Capitalization rate of 8% was provided for working out value of property.

ix. The CIT(A) has even disregard the fact that co-developer's agreement was for 49 years and capitalize value was determined on thebasi s of present average rent.

24. We are thus of the considered view that the Ld. CIT(A) was not justified in adopting the capitalization sale of 9.5% as against 9% adopted by the assessee. While setting aside this action of the Ld. CIT(A), we direct the AO to accept the approved working of the assessee in this regard and allow the consequential relief. Ground No.2 of the appeal of the assessee is thus allowed. The Ground No. 3 is an alternative ground to Ground No. 2, hence it does not need adjudication. Issue raised in Ground Nos. 11 to 13 of the Revenue is thus decided against the revenue.

23.8 The facts, terms of arrangement and method for valuation of development consideration in the present case are similar to that in the case of DLF Info City Developers (supra), thus the observation and finding of the Coordinate Bench are relevant and applicable.

23.9 In these circumstances, once the method for determining the transfer value of bare shell building blocks was approved by the BOA which is a designated authority comprising of

representative from various ministry and departments, we see no reason to entertain the unfounded objection of the revenue regarding the correctness of the method which is not only to rake up fresh controversy but also contrary to the very concept of approvals and authority of BOA under SEZ Act, 2005. Not to forget, the provisions of SEZ Act have overriding effect. Thus, the issue raised by the revenue regarding the method of valuation is misconceived and does not warrant deeper delving on our part keeping in view the decision of Coordinate bench in the case of DLF Info City Developers (Supra).

23.10 As a result, the original as well as additional grounds raised by the revenue are answered in negative and the appeal is dismissed.

Now taking up the appeals for AY 2009-10, 2010-11 and 2011-12. The grounds raised by the revenue in these appeals are as under:

AY 2009-10 – ITA No.2503/DEL/2013

Whether the CIT(A) under the facts and circumstances of the case and in law was justified in deleting addition of Rs. 400,33,67,733/- made by the Assessing Officer made on account of disallowance of deduction u/s 80IAB of the I.T. Act, 1961?

Whether the CIT(A) under the facts and circumstances of the case and in law was justified in treating the income from sale of assets as business income as against the capital gain assessed by the Assessing Officer?

AY 2010-11 – ITA No. 4435/DEL/2013

1. Whether the CIT(A) under the facts and circumstances of the case and in law was justified in deleting the addition of Rs. 2,30,62,92,834/- made by the AO made on account of disallowance of deduction u/s 80IAB of the Act.

2. Whether the CIT(A) under the facts and circumstances of the case and in law was justified in treating the income from sale of assets as business income as against the capital gain assessed by the AO?

AY 2011-12 - ITA No. 168/DEL/2016

Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) has erred in law and on facts of the case in holding that the assessee was eligible for the claim of the deduction u/s 80IAB of the IT Act amounting to Rs. 1,03,98,55,436/-.

24. As noted earlier, the common issue running across all these appeals is the issue of deduction u/s 80-IAB of the Income Tax Act, 1961. It is further noted that the facts of all these appeals are exactly same as arising in respect of the same project and there is no change in the nature of activity, agreement or income which is subject matter of claim of deduction u/s 80-IAB of the Income Tax Act, 1961. The approval accorded by BOA is relevant and covers all these years also.

25. We are conscious of the fact that the appeal relating to AY 2009-10 and 2010-11 were earlier decided by Coordinate bench vide order dated 17/04/2014 thereby dismissing the appeal of

the revenue by relying upon the orders of Tribunal in sister concern cases. The appeals relating to AY 2008-09, 2009-10 and 2011-12 travelled to Hon'ble High Court. As noted elsewhere, for AY 2008-09, the Hon'ble High Court directed the assessing officer to pass assessment order consequent to revisionary order u/s 263 and for AY 2009-10 and 2010-11, issue was restored back to Tribunal for independent adjudication.

26. While deciding the appeal for initial AY 2008-09 in ITA No. 9227/Del/19, we have at length dealt with various aspects of claim of deduction u/s 80-IAB and have independently reached to the considered conclusion that the assessee company has made a valid claim of deduction u/s 80-IAB in respect of SEZ Project at Ranga Reddy District, Hyderabad.

27. In absence of any distinguishing feature and keeping in view the finding rendered in appeal for AY 2008-09 which is the first year of claim of deduction, we uphold the order of CIT(A) allowing the claim of deduction u/s 80-IAB of the Income Tax act, 1961. Thus, the appeals filed by the revenue in ITA No. 2503/Del/13, 4435/Del/13 and 168/Del/16 are dismissed.

28. In the result, all the appeals of the Revenue are dismissed.

Order pronounced in the open Court on 17th November, 2021.

Sd/-	Sd/-
[PRASHANT MAHARISHI]	**[AMIT SHUKLA]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

DATED: 17th **November, 2021**