IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT
BEFORE SHRI PAWAN SINGH, JUDICIAL MEMBER AND
Dr. ARJUN LAL SAINI, ACCOUNTANT MEMBER
ITA No. 1849 & 1867/AHD/2014 (AY 2008-09)
(H*earing in* ***Virtual*** *Court)*

Bharuch Enviro Infrastructure Ltd. 117-118,GIDC Estate, Ankleshwar, Gujarat-393 002 **PAN : AAACB 8075 F**		Dy. Commissioner of Income Tax, Bharuch Circle Bharuch-392001
Assistant Commissioner of income Tax, Bharuch Circle, Above Bank of Baroda, Station Road, Bharuch-392001	Vs	Bharuch Enviro Infrastructure Ltd. 117-118,GIDC Estate, Ankleshwar, Gujarat-393 002
Applicant		Respondent

Assessee by	Shri Saurabh Soparkar, Senior Advocate with Shri Parin Shah Advocate
Revenue by	Shri Deependra Kumar, Sr-DR
Date of hearing	01.11.2021
Date of pronouncement	27.12.2021

Order under section 254(1) of Income Tax Act

PERPAWAN SINGH, JUDICIAL MEMBER:

1. These cross-appeals by assessee as well as Revenue are directed against the order of ld. Commissioner of Income tax (Appeals)-III, Baroda dated 07.03.2014for assessment year (AY) 2008-09, which in turn arise against additions in assessment order passed by Assessing Officer under section 143(3) of the income Tax Act, 1961 (hereinafter referred to as 'the Act')vide assessment order dated 30.12.2010.

2. Brief facts of the case as extracted from the orders of lower authorities are that assessee is a Company registered under the provisions of Companies Act. The assessee was set up to create, execute and operate a Centralized Secured Land fill facility for the disposal of solid waste generated by the Industries in District Bharuch, Gujarat. The assessee-company had agreement with Gujarat Industrial Development Corporation ("GIDC" for short) for disposal of hazardous waste management and disposal vide agreement dated 15.05.2002. The assessee filed its return of income for assessment year 2008-09, claiming deduction under section 80IA of Rs.1.75 crores. Along with return of income the assessee furnished prescribed Form 3CA & 3CD as required under section 44AB of the Income -tax Act. The assessee also furnished report in prescribed Form No. 10CCB for claiming deduction under section 80IA. The case of assessee was selected for scrutiny.

3. During the assessment the assessing officer noted that assessee commenced its activities on 01.04.1998.The assessee is digging and huge pits are constructed as per the International Standard with the help of German Technology. The hazardous waste filled up into the pit and when pit is completely filled up, its top is covered. This activity being carried out on a continuous basis. The assessee has set up its own Common Incinerator Project for treating hazardous solid waste. The commercial activity of Incinerator unit commenced on

22.01.2005. During the previous year, the assessee dumped solid waste amounting to Rs.29,18,082/- under the said Land Filling Waste Undertaking-I and Rs.7,18,53,471/- under the Land Filing Waste Undertaking-II and treated (solid waste) amounting to Rs.13,18,82,217/- under Incinerator Undertaking. The Assessing Officer while examining the claim of assessee under section 80IA on multiple projects noted that assesseeclaimed benefits of section 80IA separately for its Land Filling Waste Undertaking-I and II and Undertaking Incinerator. The Assessing Officer raised question as regards in calculation in 80IA in respect of deduction in all three Undertakings i.e., Land Filling Undertaking-I, Land Filling Undertaking-II and Undertaking Incinerator separately. On the questions raised by the Assessing Officer, the assessee filed its reply vide reply dated 09.11.2010.The contents of reply filed by assessee is extracted by Assessing Officer in para-5 at page 3 to 11 in his assessment order. In the reply, the assessee in sum and substance stated that with the initiative of Ankleshwar Industrial Association and Ankleshwar Environmental Preservation Society as per the guidelines of Ministry of Environment and Forest Govt. of India (MoEF) / World Bank, a consortium is formed and under the roof of consortium, the assessee-company was incorporated in the year 1997, with the object to create, execute and operate Centralized Secured Land Fill facility for the disposal of solid waste generated by the Industries of Bharuch District. Over

a period of time, in line with the main object started to different undertakings to treat the solid waste of different quality generated by industries through Land Filling Project and Incinerator Plant.

4. For Land Filling Project No.I, the assessee stated that it has commenced its activity on 01.04.1998.The land is being dug and huge pits are constructed as per the International Standards with the help of German technology. The hazardous waste is dumped into this pit and when the pit is completely filled-up, the top is again covered by specially designated liners. This activity is being carried out on a continuous basis. During the previous year relevant to assessment year i.e., 2008-09, the assessee treated the solid waste amounting to Rs.29,18,082/- under the said Land Filling Solid Waste Project No.1.

5. For Land Filling Solid Waste Project No.II, the assessee stated that during the previous year relevant to assessment year 2007-08, the assessee was allotted plot of land ad measuring 1,26,256 Sq.mtrs. for its Land Filling Project-II, from Gujarat Industrial Development Corporation(GIDC). The assessee fulfilled all the conditions specified in sub clause (a) to (c) of section 80IA(4)(i) of the Act and assessee is entitled for deduction.

6. For Incinerator Plant (undertaking), the assessee submitted that in line with main object and to provide clean environmental atmosphere, the assessee-company has set up its own common Incinerator Project for treating hazardous

solid waste of special nature which cannot be dumped. The assessee's commercial activity of this unit commenced on 22.01.2005.The Incinerator system consists of rotary kiln type main incinerator followed by post-combustion chamber, evaporation cooler, lime and carbon injection system, bag filter, wet scrubber, ID fan etc., chimney, continuous monitoring system, feeding arrangement etc., During the previous year relevant to assessment year under consideration, the assessee treated solid waste amounting to Rs.13,18,82,217/-. So far as for allowing liability of deduction under section 80IA for providing infrastructure facilities for the treatment of solid waste generated by the industries under the Land Filling Project and Incinerator Plant, the assessee submitted that pursuant to insertion of sub-clause (c) in Explanation to section 80IA(4)(i) with effect from 01.04.2001 by new sub-clause so as to include 'Solid Waste Management System' within the meaning of infrastructure facility, the assessee-company is covered under the amended definition of "Infrastructure Facility" and fulfills all the conditions as specified in sub-clause (a) to (c) of section 80IA(4)(i). Accordingly the assessee is eligible for claim of deduction under section 80IA of the Act in respect of eligible business in each Undertaking Land Filling Project from 20.02.2003 and Incinerator Plant for assessment year 2005-06.The assessee also furnished the detailed particulars of all three Undertakings, allowable allowability of

deduction, ownership status, agreement with the Central Government or a State Government or a local authority or any other statutory body, land area year of claim, description of plant and machinery and the process and submitted that the assessee is entitled for deduction under section 80IA of the Act separately for each of three Undertakings for ten consecutive years from the date of claim made in the return of income. It was also submitted that each Undertaking had been set up on different date. Accordingly commercial activity on different date, each Undertaking has different technical set up. Project under Land Filling Project and Incinerator treat the waste of different type. Financial accounts of operating cost are maintained separate for each Undertaking. It was also stated that the Assessing Officer himself accepted in his assessment order for assessment year 2007-08 passed under section 143(3) of the Act on 22.12.2009 that assessee-company has two independent Undertakings. Accordingly, deduction ought to be allowed undertaking-wise for providing infrastructure facilities. The assessee also relied on the certain case law.

7. The Assessing Officer after considering the reply of assessee with regard to Land Filling Units No. I & II held that assessee's claim that both Undertakings are separate project and accordingly claimed separate deduction under section 80IA for each unit, although in previous year, the assessee has one pit and all solid project waste was dumped in it but before this undertaking, the assessee

has filled up six pits from its beginning of i.e., from 01.04.1998 to 31.03.2008. On the basis of land agreement made separately for each pit, the assessee claimed deduction under section 80IA for each separately although there is no change in method of disposing off hazardous solid waste. The assessee carrying its activity on a continuous basis. Thus, the claim of assessee for treating each pit as separate project on the basis of separate land agreement and books of account does not entitle the assessee for deduction under section 80IA of each project separately.

8. For Incinerator plant, the Assessing Officer held that in this plant hazardous solid waste of special nature is treated. The sludge is burnt at a very high temperature ranging from 1200 to 1400 degree centigrade. Sludge is in the nature of semi solid or solid+ terry or LCV+ Aquas etc., Sludge is first passes through incinerator plant where it's burnt on high temperature. On burning the waste is converted into ash, which is dumped into a pit. The Assessing Officer concluded that the assertion of assessee that both are separate projects is not acceptable as common Incinerator project is a plant in which hazardous solid waste of nature is burnt before dumping the ash into a pit. The assessee has claimed deduction under section 80IA for Land Filling Project Pit –I for six years and for Incinerator Plant for the first time. Since both the projects are same and co-related, one-where solid waste is directly dumped into a pit and

other one is a project in which sludge is first treated and remaining ash is dumped into a pit. Thus, both are part of an ongoing composite project of solid waste management. The Assessing Officer also concluded that deduction under section 80IA project-wise is not allowed. Deduction under section 80IA is allowed by AO for Land fill project-I and land fill Project-II and Incinerator by treating as a part of composite project. The assessee already taken benefit of last seven years, therefore, are entitled to claim further deduction under section 80IA for remaining three years i.e.upto assessment year 2011-12.

9. Further Assessing Officer noted that assessee claimed deduction under section 80IA(4) of Rs.1.74 crores after claiming deduction under section 80G of the Act of Rs.55,000/-.The assessee was asked to justify deduction under section 80IA on interest income of Rs.34,84,029/- on fixed deposit with bank and Rs.11,05,000/- on account of Membership fees for Incinerator project. The assessee filed its reply dated 09.11.2010.The reply of assessee is recorded in para-8.1 of the assessment order. In the reply, assessee in sum and substance stated that during the previous year the assessee earned interest of Rs.34,84,029/- on fixed deposit with bank and received Rs.11,05,00/- as Membership fees for Incinerator project. The said income is duly offered to tax and claimed deduction under section 80IA of the Act. This fixed deposit are kept to comply with the norms, terms & conditions as laid down by Gujarat

Pollution Control Board ('GPCB' in short) in their Rules and Regulations as per norms of GPCB. The assessee is required to maintain the site upto thirty years after closure of site. Accordingly, the assessee is required to keep the amount of funds, generated out of eligible profit, into the fixed deposit to meet the expenditure to be spent in future period for which provision is being made every year in the books of accounts. The assessee submitted that interest received on deposit and membership fees is attributable to eligible business and ought not to be reduced while computing eligible profit for the purpose under section 80IA. In alternative, the assessee submitted that when it came the interest is to be excluded while computing the profit eligible for deduction under section 80IA of the Act, then at least 10% of the same ought to be allowed and deduction for earning said income. The reply of assessee was not accepted by Assessing Officer. The Assessing Officer held that Undertaking must itself be source of that profit and undertaking must directly yield such profit and does not mean to earn any other profit. Accordingly, the interest income from other source was not treated as a part of profit and gain earning from Undertaking.

10. The Assessing Officer further noted that as per Note-6, forming part of statement of total income, assessee-company has filed with return of income, the assessee claimed that it was required to maintain site for thirty years after its closure and was required to create a super fund to meet the damages, if any,

caused in case of loss of to the ecology due to failure of the system. The assessee was collecting operating charges from its customers at the time of dumping of solid waste and services are to be provided till thirty years after closure. During the previous year relevant to assessment year under consideration, the assessee has transferred a sum of Rs.1.25 crores to super fund and made a provision of post-closure care expenditure of Rs.29,84,694/-. The assessee filed its reply in November, 2010 and 16th December 2010 and contended that the provision of Rs.29,84,694/- in respect of old and new projects had been made for post-closer care expenses. The post-closure care expenses nothing but ascertained liability to be incurred at future rate to take care of the site, which is now being utilized for the pit construction. A provision for post-care closure expenses had been made in proportionate of the Land Filling upto the year end, based on assessee's estimation of the total current cost of post project care. Such current cost is revised and demonstrated as each year and year-end to take cognizance of change in the regulatory requirement the working was furnished. The assessee also disclosed the expenses of such provision, which includes assessment year monetary expenses, leachate treatment expenses, insurance expenses in respect of public health safety repair and maintenance of electric water pump in the bore well security expenses, gardening expenses, laboratory expenses, electricity expenses, office

& administration expenses. The assessee also explained that Assessing Officer in assessment proceedings for assessment years 1999-00 confirmed in query No.2 in their letter dated 28.03.2002 that "it is also to be noted that after closure of land fill at least for 30 years company has to take measure for collection of leachate and gas emission generate, if any." Copy of which was furnished. The assessee also relied on certain case law. The reply of assessee was considered by Assessing Officer, however, the same was not found favorable to him. The Assessing Officer held that assessee's claim expenditure for post-care closer of project expenditure on the ground that it is an expenditure to be incurred in future out of income received during the year. The assessee has not established that provision is an ascertain liability. The method of determination was also treated as assumption and without any basis and accordingly held that post-closure expenditure cannot be estimated with reasonable ascertain and cannot be allowed against current profit and accordingly disallowed the post-care expenditure. The Assessing Officer also made addition on disallowance of such post-closure expenses in book profit under section 115JB.

11. The Assessing Officer further noted that assessee has debited expenses of Rs.1,07,44,898/- (Rs.1.07 crores) under the head "pit covering expenses" in Schedule-15 of profit and loss account. The Assessing Officer noted that assessee has incurred actual expense for pit covering of Rs.2,71,67,344/- as

against the provision of Rs.1,07,44,898/- and write back of amounting to Rs.30,25,245/- in respect of excess provision made in earlier years and disallowed in the order passed under section 143(3) of the Act in the financial year 2007-08. The assessee was asked to claim as to why such expenses should not be disallowed for the reasons that only provision was made for expense and not incurred during the year under consideration. The assessee filed its reply dated 09.10.2010. The reply of assessee is extracted on pages 32 to 39 of the assessment order. In reply the assessee contended that as per guidelines issued by GPCB from the assessee was required to close each site in a specific manner as per the guidelines issue after pits are completely filled. The assessee-company following the mercantile system of accounting. The assessee had been providing for pit covering expense for assessment year 2001-02 for expenditure for closure of Land Filling Project No.I and now for Land Filling Project-II under "pit covering expenses". The liability of incurring expense as soon as the pit are dug out and accordingly the rate at which customer are charging for the disposal of solid wastes include the charging of recovering expenses to be incurred to be on failure after pits are duly filled. During the previous year the Land Filling Project No.I was completed and covered as per the standard laid down by GPCB. Further pits are constructed on the new Land Filling Project accordingly assessee ought to provide pit covering expenses for new project in a

manner so that pit covering expense to be incurred at a later date and are recovered at the derived rate multiplied by the quantity of sludge received during the year. The assessee made provision of pit covering expense of Rs.1.07crores in respect of new projects. The same has been made by multiplying the total quantity of sludge received during the year @ Rs.90 per.mt. The working was also provided the assessee and further explained that during the previous year, the assessee incurred actual expense of Rs.2.71 crores for covering such expense in respect of Land Filling Project No.I. Considering the fact that capacity each pit in the Land Filling Project No.I to hold the solid wastes changes from time to time as depends upon the quantity and quality of sludge received during the year. In case, the sludge received contents powder or very particles, it can be compressed and dumped into the pits in huge quantity, whereas in case of sludge having solid sand or of hard contents, it cannot be compressed and accordingly very small quantity of the same can be dumped into the pits during previous year on compilation of Land Filling Project No.I the balance remaining in the provision for pit covering expenses of Rs.30,25,245/- is written back in the accounts and same is duly offered to tax in the return of income. The assessee further explains that in respect of aforesaid expense in assessment years 2001-02 to 2006-07, the Assessing Officer allowed expenses on actual payment basis except assessment year 2005-06. The

Assessing Officer disallowed Rs.13,39,170/- after deducting actual expenses amounting to Rs.82,73,744/- from the provision made for the previous year. The assessee further submitted that the action of Assessing Officer in earlier years was upheld by Ld. CIT(A) and that the assessee's appeal is pending before the Tribunal. The reply of assessee was not accepted by Assessing Officer. The Assessing Officer held that provision is estimated on the basis of amount of solid waste received and it cannot be said that pit closure expenses are determined with reasonable certainty in this manner. The assessee made provision of Rs.1.07crores and incurred actual expenses of Rs.2.71 crores. It is not clear as to why provision is required to be made when actual expenditure is being incurred and when the pit cover expenses arises. The assessee is in the business of providing facilities of disposal in solid waste management by the Industries of Ankeleswar in order to prevent pollution control provision. The guidance of PCB is the assessee has not been able to explain the difference between the provision made and actual expenditure incurred on pit covering which would be expected to be made immediately if the need arises for covering of pit. The assessee is in line of business considering in their of pit covering expense the actual expenditure incurred not uncertain provision represent the actual liability of the assessee to incur such expense even end on

mercantile system of accounting. The Assessing Officer accordingly allowed the claim of expense of Rs.2.71 crores against the provision of Rs1.07 crores.

12. Aggrieved against various additions in the assessment order, the assessee filed appeal before Ld. CIT(A). Before Ld. CIT(A) the assessee filed detail and exhausted written submission on different issues. The ld CIT(A) during the appellate stage issued notice of enhancement dated 29th November 2013 as to income from Land fill Project-I should not be held as ineligible for deduction under section 80IA. The assessee filed its detailed reply vide reply dated 24th December 2013. The ld CIT(A) after considering the submissions of the assessee held Land Fill Project-I is not new infrastructure facility and not eligible for deduction under section 80IA. For Land fill Project-II, the ld CIT(A) held it is new infrastructure facility and eligible for deduction under section 80IA from the date of operation. It was also held that Land fill Project-I & Land Fill Project-II are same infrastructure facility and accordingly deduction will be available in respect of these facilities till 2011-12 only. So far as Incinerator Project is concerned the ld CIT(A) held that it is new infrastructure and eligible for deduction under section 80IA for 10 years from AY 2007-08. Further, it was held that Incinerator Project-I and Incinerator Project-II are not separate undertaking and hence not eligible for deduction under section 80IA separately. The Ld. CIT(A) upheld the action of Assessing

Officer in reducing the profit of 80IA by reducing the interest income on fixed deposit of Rs.34,84,029/-. The Ld. CIT(A) also upheld the disallowance of provision of post-closure clear expense of Rs.29,84,694/- and provision for pit covering expense. However, the assessee was given allowed relief to the assessee by treating the advance received from customers/ members as income of assessee as the same is not refundable as it was received for specific purpose. Further aggrieved, both parties have filed their respective cross-appeals. The assessee has raised the following grounds of appeal:-

*"1. On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax (Appeals) ('CIT(A)')erred in holding that the appellant is not entitled for deduction under section 80IA(4)(i)(b) in respect for Landfill Project 1 since it is not a '**new**' undertaking as per provisions of section 80IA(4) of the Act.*

2. On the facts and in the circumstances of the case and in law, without prejudice, the CIT(A) erred in upholding the action of the Assessing Officer ('AO') in holding that Landfill Project 1 and Landfill project 2 are not separate undertakings and hence not eligible for deduction under section 80IA(4) of the Act separately.

3. On the facts and in the circumstances of the case and in law, the CIT(A), erred in holding that Incinerator Project 2 is not a separate undertaking and not eligible for deduction under section 80IA of the Act separately despite the fact that the said undertaking had started its operation from AY 12-13 and the said issue was not raised in the appeal before the CIT(A).

4. On the facts and in the circumstances of the case and in law, the appellant submits that the observations in respect of deduction claimed in respect of Incinerator Project 2 be expunged.

*5. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the action of the AO in reducing from the "**profits and gains of the business**" an amount of Rs.34,84,029/- in respect of interest income earned on fixed deposit with Bank.*

6. On the facts and in the circumstances of the case and in law, the CIT(A) erred in not giving any finding in respect of the ground of appeal relating to allow 10% of interest income as deduction towards expenditure incurred for earning other income.

7. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the action of the AO in disallowing an amount of Rs.29,84,694/- in respect of provision for post closure care expenditure.

8. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the action of the AO in disallowing an amount of Rs.1,07,4,898/- in respect of provision for pit covering expenses.

9. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the action of the AO in adding back the following amount while computing the book profits under section 115JB of the Act.
(a) Provision for post closure expenditure – Rs.29,84,694/-
(b) Provision of pit covering expenses - Rs.1,07,44,898/-"

13.Revenue in its cross-appeal has raised the following grounds of appeal:-

"1. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in

(i) directing in allowing deduction claimed u/s 80IA of the IT Act separately in respect of Incinerator Project by holding that it was a different enterprise and therefore, assessee was eligible for deduction u/s. 80IA(4) for both the Incinerator plants upto 10 years from A.Y 2007-08 thereby ignoring the fact that as per the functioning of the units, both the projects, viz., Landfill Project and Incinerator project, were of same nature and co-related, one, where solid waste was directly dumped into a pit and other, where sludge was first treated and remaining ash was dumped into a pit.

(ii) Not appreciating the fact that the receipt of Rs.2,82,29,057/- being advance receipts from customers/members is to be treated as income of the assessee since the same is non-refundable and received from customers for specific purpose, and hence, the nature of receipt is very certain. Also ignoring the fact that the clients/customers makes the payment to the assessee after deduction of TDS and treat this payment as revenue expenditure in their books of account. Moreover, assessee is claiming all the expenses incurred during the year pertaining to the burning of sludge or keeping it in godown, but the income is deferred to future period, which is not tenable and against the provisions of law and as held by Hon'ble Apex Court decision in the case of British Paints India Ltd. 188 ITR 44, any system of accounting results in distorted picture of the true state of affairs of the business for the purpose of computing the chargeable income, the AO may modify the same."

14. We have heard the submissions of Ld. Senior Counsel (AR), Saurabh N Soparkar and assisted by Shri Parin Shah, Advocate for assessee and Shri Deependra Kumar, Ld. Sr. Departmental Representative (DR) for the Revenue. We have also gone through the orders of lower authorities and the other material placed before us. Firstly, we are discussing the various grounds of appeal raised by the assessee in its appeal.

15. Ground No. 1 relates to deduction under section 80IB(4) in respect of Land Fill project No.I by holding it as not a new undertaken. The learned Senior Counsel for the assessee submits that the assessee had its commenced the business activities in Land Filling Project-I in AY 1999-00. And after inclusion of solid waste management system as an eligible 'infrastructure facility' by the Finance Act 2000 w.e.f AY 2000-01, the assessee had vide letter dated 9th February 2002 approached GIDC to enter into a formal written agreement to enable them to fulfill the necessary conditions to claim deduction under section 80-IA of the Act, copy of which is filed at page 333-335 of the Paper Book (PB). The assessee company entered into an agreement with GIDC on 15th May 2002 and started claiming deduction under section 80-IA of the Act from AY 2002-03 onwards being the fifth year of operations and the first year of the claim. The learned CIT(A) has held that Land Fill project- I is not a new undertaking on the ground that the appellant had not entered into an agreement during the FY 2001-02 being the year in which the appellant became eligible to claim deduction under section 80-IA(4) in view of the amendment to the provisions of section 80-IA(4) of the Act. The learned Senior Counsel submitted that as soon as the assessee became aware of the amendment regarding the eligibility of claim, an application was immediately made to GIDC after consulting their Tax Consultants i.e. 9th February 2002 (i.e during the FY 2001-02). Further, the

formal agreement was immediately entered into on 15 May 2002. It is submitted that the appellant made an application to GIDC for entering into an agreement in FY 2001-02 itself though the final agreement was entered into 15 May 2002. Accordingly, the said undertaking ought not to be treated as not a new infrastructure facility only on the ground that the agreement was not entered in FY 2001-02. Further, the learned Senior Counsel invited our attention to the provisions of Section 80-IA(4)(i) and Explanation (c) to the aforesaid provision which reads as under;

"(4) This section applies to-

(i) any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii)developing, operating and maintaining any infrastructure facility which fulfills all the following conditions, namely:-

(a) it is owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;

(b) it has entered into an agreement with the Central Government or local authority or any statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility:

(c) ***it has started or starts operating and maintaining the infrastructure facility on or after 1st day of April, 1995****:*

…….

Explanation- For the purpose of this clause, ***"infrastructure facility" means-***

(a) a road including toll road----------;

(b) a highway project---;

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

(d) a port , airport, inland waterway, inland port or navigational channel in the sea; "

16. The learned Senior Counsel submitted that the assessee has fulfilled all the conditions as laid down under the provisions of section 80-IA(4)(i) of the Act and accordingly, is eligible to claim the deduction under section 80-IA of the Act. It is submitted that the word 'new' used in section 80-IA(4)(i)(b) only implies that the facility must have started operating on or after 1st April 1995. The word 'new' has reference to a facility not existing before 1stApril 1995 from which date the incentive was given to new infrastructure facility. When the assessee had put forward the proposal before GIDC, it was to set up a new infrastructure facility. No such infrastructure facility existed there before. The facility need not be new on the date on which an assessee chooses to claim deduction under section 80-IA, since the section permits an assessee to claim deduction at his option for any 10 consecutive years out of the first 20 years from the date of commencement. Hence, in the first year of claim the unit maybe as old as 6th years. If the unit has to be a new unit in the first year of claim for deduction then the option provided in the section would become redundant. Further, it is also to be noted that the fourth condition uses the expression "it has started or starts operating.." The Counsel explained that this wording clearly supports the view that an enterprise which has started developing, operating and maintaining the facility on or after 1st April 1995 will be eligible for deduction. Accordingly, it was submitted that the

infrastructure facility set up by the appellant after 1st April 1995 constitutes a 'new' facility since it was not in existence before the appellant set it up. To support his submissions the learned Counsel for the assessee relied on the decision of the Madras High Court in the case of Shri Nagesh Chundur Vs CIT (358 ITR 521- Mad). The ld Counsel explained that in the said case, the assessee was claiming deduction under section 10A of the Act since it was a registered Software Technology Park ('STP') and fulfilled the requisite requirements as per the provisions of the Act. The assessee sought registration as a STP on 27th March 2002 whereas it had commenced production in the Financial Year 1999-00 itself. The revenue contended that since the assessee was already in the said business, it does not qualify to be a 'new' industrial undertaking. The Tribunal decided the issue in favour of the assessee and has held that "*the fact of the assessee being in the business prior to the date of the registration of the STPI would not stand in the way of granting relief to the assessee*". On further appeal before the High Court issue was held in favour of the assessee.

17. The learned Senior Counsel submitted that it is well settled position that if a deduction or exemption is granted subject to fulfillment of conditions, an assessee is entitled to claim the deduction/ exemption from the year in which he satisfies the conditions, so long as he is within the overall exemption period.

In the instant case, as stated above the assessee entered into an agreement with GIDC on 15thMay 2002 and started claiming deduction under section 80-IA of the Act from AY 2002-03 onwards being the fifth year of operations and the first year of the claim. It is further submitted that sub-section (2) of section 80-IA lays down that the deduction specified in sub-section (1) may at the option of the assessee be claimed for any 10 consecutive years out of 20 years beginning from the year in which the undertaking develops or begins to operate the infrastructure facility. Thus, the assessee can choose to claim deduction for any 10 consecutive assessment years between AY 1998-99 to AY 2017-18. In the instant case, the assessee-company has opted to claim deduction from AY 2002-03 being the 5th year of the operation which is as per the provisions of section 80-IA(2) of the Act. There is no provision for withdrawal of deduction in the subsequent years if the said deduction has been allowed in the initial year. The learned Senior Counsel submitted that once the deduction under section 80-IA of the Act is allowed in the initial year of the claim, then in the subsequent years the conditions cannot be re-examined with a view to determine the eligibility of the assessee making the claim for deduction. In such cases the deduction ought to be allowed for the stipulated duration as specified in the provisions of section 80-IA of the Act. It is pertinent to note that, there is no provision for withdrawal of deduction for the subsequent years

for breach of certain conditions if the said deduction has been allowed in the initial year in section 80-IA of the Act. In this connection, reliance is placed on the decision of the Hon'ble Gujarat High Court in the case of PCIT vs. Maps Enzymes Ltd [2019] (111 taxmann.com 73) that the deduction under section 80-IA once allowed in the initial year cannot be re-examined or denied in any of the subsequent years out of the stipulated period of deduction allowable to the assessee as per the provisions of the aforesaid section. In the instant case, the deduction under section 80IA in respect of Land Fill- I, was allowed in the assessment order passed under section 143(3) for the AY 2002-03 i.e. the initial year of claim. Accordingly, the deduction in respect of Land Fill cannot be denied in subsequent assessment years for breach of conditions if the claim has been allowed in the initial assessment year. In view of the above, it is submitted that the appellant has fulfilled all the conditions as laid down in section 80IA(4) of the Act and accordingly, deduction under section 80-IA in respect of the infrastructure facility ought to be allowed to the appellant. To buttress his submissions the ld Counsel relied on the following decisions;

- Shri Nagesh Chunder Vs CIT 358 ITR 521 (Mad),
- CIT Vs Satellite Engineering Ltd (113 ITR 208 Gujarat),
- PCIT Vs Maps Enzymes Ltd [2019] 111 taxmann.com 73 (Gujarat High Court),
- Saurashtra Cement & Chemical Ltd Vs CIT (123 ITR 669) (Gujarat),
- CIT Vs Paul Brothers (216 ITR 548 Bombay).

18. On the other hand the ld Sr DR for the revenue submits that the assessee tried to make both the project separately by entering in to agreement with GIDC with retrospective effect from 12.03.2007. The assessee has made agreement with GIDC only after the claim of the assessee was disallowed by A.O. At the time of establishment of Land fill Project –II, no new establishment came in to existence. The nature of work being done by both the project is identical, therefore, the claim of the assessee based on the backdate agreement cannot be considered. Thus, no cognizance can be taken of the agreement dated 12.10.2012 and both the land Fill Project is to be treated as same infrastructure facility and deduction under section 80IA would be available till A.Y. 2011-12 only.

19. We have considered the rival submissions of the parties and deliberated on the various case laws relied by learned Senior Counsel. We find that during the assessment the AO raised quarry about the eligibility of deduction under section 80IA of Unit No.I, Unit-II and incinerator. The assessee is its reply specifically stated that pursuant to insertion of sub-clause (c) in Explanation to section 80IA(4)(i) with effect from 01.04.2001 by new sub-clause so as to include Solid Waste Management System within the meaning of infrastructure facility, the assessee-company is covered under the amended definition of "Infrastructure Facility" and fulfills all the conditions as specified in sub-clause

(a) to (c) of section 80IA(40(i). Accordingly the assessee is eligible for claim of deduction under section 80IA of the Act in respect of eligible business in each Undertaking Land Filling Project and Incenerator. The assessee also furnished the detailed particulars of all three Undertakings, allowable allowability of deduction, ownership status, agreement with the Central Government or a State Government or a local authority or any other statutory body, land area year of claim, description of plant and machinery and the process and submitted that the assessee is entitled for deduction under section 80IA of the Act separately for each of three Undertakings for ten consecutive years from the date of claim made in the return of income. It was also submitted that each Undertaking had been set up on different date. Accordingly commercial activity on different date, each Undertaking has different technical set up. Project under Land Filling Project and Incinerator treat the waste of different type. Financial accounts of operating cost are maintained separate for each Undertaking. The AO while passing the assessment order allowed the deduction under section 80IA in respect of all three unit i.e Land fill Unit-I, Land Fill Unit No.II and Incinerator by treating all the units as a composite undertaking.

20. On appeal against the finding of AO in treating all undertaking as composite undertakings, the ld CIT(A) issued show cause notice dated 29 November 2013

was issued to the appellant to explain as to why income from Land Filing Project –I should not be held ineligible for deduction under section 80-IA(4) of the Act and accordingly, entire deduction claimed on account of such income should not be disallowed and the assessment accordingly enhanced. The assessee filed detailed explained dated 24.12.2013 as recorded in para 4.2.2 of order of CIT(A). the ld CIT(A) after considering the explanation of assessee held the assessee started claiming deduction under section 80IA(4) on an infrastructure facility which was already on operation since 01.04.1998. Before him the assessee's AR claimed that the assessee started claiming deduction under section 80IA(4) when it became eligible on account of amendment made in the relevant provisions. The ld CIT(A) held that eligibility was available to the assessee from F.Y. 2001-02 itself and hence if the assessee had entered into an agreement with GIDC during this Financial Year, it could have been eligible for deduction under section 80-IA(4) on account of such infrastructure facility already inexistence, as this infrastructure facility had been started after 1st of April, 1995. But since this has not been done, hence the assessee is not eligible for deduction under section 80-IA(4) on Landfill Project No. '1' as this is not a new infrastructure facility established in pursuance of an agreement entered into by the appellant with GIDC.

21. Before us, the learned Senior Counsel for the assessee vehemently argued that it is well settled position in law that if a deduction or exemption is granted subject to fulfillment of conditions, an assessee is entitled to claim the deduction/ exemption from the year in which he satisfies the conditions, so long as he is within the overall exemption period. It was further argued that sub-section (2) of section 80-IA lays down that the deduction specified in sub-section (1) may at the option of the assessee be claimed for any 10 consecutive years out of 20 years beginning from the year in which the undertaking develops or begins to operate the infrastructure facility and that the assessee can choose to claim deduction for any 10 consecutive assessment years between AY 1998-99 to AY 2017-18 and the assessee-company has opted to claim deduction from AY 2002-03 being the 5th year of the operation which is as per the provisions of section 80-IA(2) of the Act. There is no provision for withdrawal of deduction in the subsequent years if the said deduction has been allowed in the initial year. The learned Senior Counsel submitted that once the deduction under section 80-IA of the Act is allowed in the initial year of the claim, then in the subsequent years the conditions cannot be re-examined with a view to determine the eligibility of the assessee making the claim for deduction. We find convincing force in the submissions of the learned Senior Counsel of the assessee.

22. We find that Hon'ble Jurisdictional High Court in PCIT Vs Maps Enzymes Ltd (supra), while considering the question of law whether Tribunal erred in law and on facts in deleting the disallowance of claim under section 80JJA of Act, though the years was eight year of business operation. The Hon'ble Court held that Tribunal committed no errors, not to speak of law in passing the impugned order. It was held that when the department thought fit to grant the deduction for four consecutive years, there was no reason to raise any objection with regards to maintainability of such deduction under section 80JJA in the fifth and final assessment year. Similar view was taken by jurisdictional High Court in PCIT Vs Quality BPO Services (P) ltd Vs CIT (Tax Appeal No. 439 of 2016) and By Hon'ble Bombay High Court in Simple Foods Products Ltd Vs CIT (2017) 84 taxmann.com 239 (Bom).

23. Hon'ble Gujarat High Court in Saurashtra Cement & Chemical Industries Ltd vs. CIT (123 ITR 669) has held as under:

> "The Tribunal was perfectly justified in taking the view that if the relief of tax holiday was granted to the assessee company for the asst. yr. 1968-69, the assessee was entitled to continuance of that relief for the subsequent four years and the ITO would not be justified in refusing to continue the allowance for the assessment year under reference, i.e., 1969-70, without disturbing the relief for the initial year
>
> The next question to which the Tribunal addressed itself, and in our opinion rightly, was whether the ITO was justified in refusing to continue the relief of tax holiday granted to the assessee-company for the asst. yr. 1968-69, in the assessment year under reference, that is, 1969-70, without disturbing the relief granted for the initial year. It should be stated that there is no provision in the scheme of s. 80J similar to the

one which we find in the case of development rebate which could be withdrawn in subsequent years for breach of certain conditions. No doubt, the relief of tax holiday under s. 80J can be withheld or discontinued provided the relief granted in the initial year of assessment is disturbed or changed on valid grounds. But without disturbing the relief granted in the initial year, the ITO cannot examine the question again and decide to withhold or withdraw the relief which has been already once granted."

24. In the case of CIT vs. Paul Brothers (216 ITR 548), the Hon'ble Bombay High Court has held as under:

"Either in s. 80HH or in section 80J, there is no provision for withdrawal of special deduction for the subsequent years for breach of certain conditions. Hence unless the relief granted for the asst.yr. 1980-81 was withdrawn, the ITO could not have withheld the relief for the subsequent years.(See Gujarat High Court decision in the case of Saurashtra Cement and Chemical Industries Ltd.vs. CIT (1979) 11 CTR (Guj) 139 : (1980) 123 ITR 669 (Guj)).

Hence, the approach of the Tribunal on all the counts has been perfectly legal. Question No. 2thus will have to be answered in the negative and in favour of the assessee."

25. In view of the above factual and legal discussions, we are of the view that once, the assessee has fulfilled all the conditions as laid down in section 80IA(4) of the Act and was allowed deduction in the earlier assessment years in respect of land fill project No.I in AY 2002-03 that is in the initial year, therefore, deduction under section 80-IA in respect of the infrastructure facility should have been allowed to the assessee. So far as the objection of the Ld. Sr DR for the revenue is concerned that the assessee has made agreement with GIDC only after the claim of the assessee was disallowed by A.O and at the

time of establishment of Land fill Project –II, no new establishment came in to existence. The nature of work being done by both the project is identical, therefore, the claim of the assessee based on the backdate agreement cannot be considered. We find that the submissions of the Ld. DR for the revenue is based on the finding of Ld. CIT(A). The assessee has entered into a separate agreement dated 16th October 2012 with GIDC with effect from 12th March 2007 and commenced its Land Fill Project-II in FY 2006-2007 and claimed deduction under section 80-IA of the Act from AY 2008-09 since the said unit is a separate infrastructure facility. Thus, Land fill II is a distinct and separate undertaking from Landfill I. In the result, the assessee succeeds on this ground of appeal.

26. In the result, ground No.1 of the appeal is allowed.

27. Ground No. 2 relates to the facts that land fill project No. I and land fill project-II are not separate undertaking for deduction under section 80IA(4). The learned Senior Counsel submitted that for the assessee submits that as per the provision of section 80-IA(1) the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall in accordance with and subject to the provisions of the section, be allowed in computing the total income of the

assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment year. For eligibility of the deduction under section 80-IA for Land Fill Project-II for considering the same as a separate undertaking, it was submitted that the assessee-company was allotted additional lands bearing Plot No.7905E to 7905H, 7924 to 7927, 9401 to 9412, 9501 to 9506 admeasuring 1,36,402 Sq Mts in Ankleshwar Estate by GIDC to create, execute and operate a Centralized Secured Land Fill Facility Project-II for the disposal of solid waste generated by the industries of Bharuch District. The assessee has also entered into a separate agreement dated **16th October** 2012 with GIDC with effect from 12thMarch 2007, copy of which is filed at page No. 105 to 108 of PB**.** The assessee had commenced its Land Fill Project-II in FY 2006-2007 and claimed deduction under section 80-IA of the Act from AY 2008-09 since the said unit is a separate infrastructure facility. Thus, Landfill II is a distinct and separate undertaking from Landfill I and therefore, deduction under section 80-IA (4) ought to be allowed separately. To support his support his contention, the learned Senior Counsel made reliance on the decisions of :

- CIT Vs Dewan Kraft System (P.) Ltd [2007] 160 Taxman 343 (Del),
- Textiles Machinery Corporation Ltd vs. CIT (107 ITR 195) (SC),
- ACIT Vs Leo Fasteners (398 ITR 462)(Mad),
- Punit Construction Co. Vs JCIT (92 taxmann.com 28)(Mum tribunal)

28. By referring, the aforesaid decisions, the learned Senior Counsel for the assessee prays that deduction ought to be allowed separately in respect of Land fill-I and Landfill II. The learned Senior Counsel submits that learned CIT(A) has observed that the agreement itself provides that the assessee had developed, operated and maintained a solid waste management system through landfill phase-II in accordance with the consolidated consent and authorization granted vide order no. 362, dated 12/04/2005 and vide their letter no. GPCB/BRH/CCA/167/10753 dated 13/05/2008 and on such order terms & conditions that may be specified by the GPCB under the relevant regulations. In this connection, it is submitted that there is no requirement of obtaining approval from GPCB as per the provisions of section 80-IA(4) for the purpose of claiming said deduction. Accordingly, in case of Landfill – II also, the assessee is entitled to claim deduction for any 10 consecutive years from AY 2007-08 to 2026-27. The assessee chooses AY 2007-08 as the initial year of claim. Accordingly, the assessee ought to be allowed deduction for 10 years beginning from AY 2007-08 to AY 2016-17 instead of AY 2002-03 to AY 2011-12 as held in the appellate order passed by the CIT(A).

29. On the other hand, the ld Sr DR for the revenue made similar submission as made against the ground No. 1 (supra) and submits to upheld the finding of Ld. CIT(A).

30. We have considered the rival submissions of both the parties and have gone through the order of the lower authorities. As recorded above the AO treated all three Project of the assessee as composite undertaking. The ld CIT(A) in its specific finding held that the assessee is eligible for Land Fill Project-II and is eligible for such deduction till AY 2011-12 only. For eligibility of the deduction under section 80-IA for Land Fill Project-II, the ld Senior Counsel for the assessee vehemently submitted that it is a separate undertaking. It was submitted that the assessee-company was allotted additional lands bearing Plot No.7905E to 7905H, 7924 to 7927, 9401 to 9412, 9501 to 9506 admeasuring 1,36,402 Sq Mts in Ankleshwar Estate by GIDC to create, execute and operate a Centralized Secured Land Fill Facility Project-II for the disposal of solid waste generated by the industries of Bharuch District. It was also brought to our notice that the assessee has also entered into a separate agreement dated **16th October** 2012 with GIDC with effect from 12thMarch 2007. The assessee had commenced its Land Fill Project-II in FY 2006-2007 and claimed deduction under section 80-IA of the Act from AY 2008-09 since the said unit is a separate infrastructure facility. These facts are not controverted by ld SR DR for the revenue. Moreover, the Land Fill Project-II is set up on the separate land allotted by GIDC in Bharuch District, which was allotted to the assessee and separate agreement was entered with GIDC on 16th October 2012 with

effect from 12.03.2007. We find that in appeal for AY 2007-08, the Ld. CIT(A) held that both the unit of the assessee i.e. Land fill Project No. I & Land Fill Project-II are different and independent unit by way of process, method, machine and infrastructure. The finding of Ld. CIT(A) was upheld by Tribunal in ITA No. 2290/Ahd/2010 dated 27.02.2017. Hence, in view of the aforesaid factual discussions the ground No. 2 of the appeal is allowed.

31. In the result, ground No. 2 of the appeal is allowed.

32. Ground No. 3 & 4 relates to the fact that Incinerator is not a separate undertaking eligible for deduction under section 80IA(4). The learned Senior Counsel for the assessee submits that in the return of income for AY 2008-09, the appellant had claimed deduction under section 80-IA in respect of the profits of the following undertakings:

Undertaking	Amount (Rs.)
Land Filling- I	44,77,173
Land Filling- II	46,36,303
Incinerator	84,07,358
Total	1,75,20,834

33. The assessing officer while passing the assessment order allowed deduction under section 80IA in respect of Land Fill I, Land Fill II and Incinerator project by treating the said undertakings as a composite undertaking. The ld CIT(A), held that the Incinerator is a new infrastructure facility and hence eligible for deduction under section 80- IA(4) of the Act for 10 years from AY 2007-08. The said finding of the ld. CIT(A) in respect of allowability of deduction in

respect of Incinerator I project has not been challenged by the Department. Further, ld. CIT(A) has held that land fill Project -I and land fill Project -II are not separate undertakings and hence, not eligible for deduction under section 80IA(4) of the Act separately. It was submitted that in the year under consideration, the assessee had claimed deduction only in respect of Incinerator I project. Incinerator II has started its operation from Assessment Year 2012-13 and the same was not a subject matter of appeal before ld. CIT(A) for the year under consideration. Therefore, the aforesaid finding given by the CIT(A) is totally incorrect and irrelevant and ought to be deleted. In view of the above, the ld Senior Counsel for the assessee submits that the aforesaid observations made by ld. CIT(A) may be deleted.

34. On the other hand the ld Sr DR for the revenue supported the order of Ld. CIT(A).

35. We have considered the rival submissions of the parties and have gone through the orders of the lower authorities. The assessing officer while passing the assessment order allowed deduction under section 80IA in respect of Land Fill I, Land Fill II and Incinerator project by treating the said undertakings as a composite undertaking. The ld CIT(A) held that Incinerator is a new infrastructure facility and hence eligible for deduction under section 80- IA(4) of the Act for 10 years from AY 2007-08. This finding of ld CIT(A) is not

challenged by revenue before Tribunal, thus, it has attained finality. So far as finding of the ld CIT(A) with regard to Incinerator-II is concerned it was not a subject matter of appeal before ld. CIT(A) for the year under consideration, therefore, we are in agreement with the submissions of the learned Senior Counsel for the assessee that such finding given by the CIT(A) is totally incorrect and uncalled for while deciding the appeal for AY 2008-09.

36. In the result, ground No. 3& 4 of the appeal is allowed.

37. Ground No. 5 relates to reducing interest income earned of fixed deposits with Bank for the purpose of claiming deduction 80IA. The learned Senior Counsel for the assessee submits that this ground f appeal is covered in favour of the assessee by the decision of Tribunal in assessee's own case for AY 2007-08 dated 27th February 2017, copy of which is filed on record.

38. On the other hand the ld Sr DR for the revenue relied on the order of the lower authorities.

39. We have considered the rival submissions of the parties and have gone through the order of the lower authorities carefully. We have also seen the order of the Tribunal in assessee's own case for AY 2007-08 in ITA No. 2223/AHD/2010, wherein on similar set of fact similar interest income, the coordinate bench by following order of AY 2002 -03 to 2004-05 passed the following order;

> "9. We now proceed to deal with assessee's appeal ITA No.2223/Ahd/2010. Its first substantive ground pleads that both the lower authorities have erred in excluding interest income of Rs.42,88,461/- and one time membership fee for incinerator plan of Rs.11.20 lacs for the purpose of computing Section 80IA deduction claim by following hon'ble apex court's decision in Pandian Chemical's case 262 ITR 278 (SC) that the same could not be held to have been derived from the above stated solid waste disposal plant.
>
> 10. Heard both sides. It emerges that the assessee's interest income in question arises from fixed deposits maintain with bank in order to comply with Gujarat Pollution Control Boards, norms, terms and conditions since it has to upkeep the site in question for a period of 30years of closure date. Both the learned representatives very much agree that a co-ordinate bench in assessees' cases itself for assessment years 2002-03 to 2004-05 in ITA Nos. 733, 1424, 4389 & 4408/Ahd/2007 has already reversed similar exclusion thereby treating identical interest income as eligible profits for the purpose of Section 80IA deduction. We quote the very reasoning herein as well assessee's former limb of the impugned disallowance pertaining to interest income."

40. Considering the consistent decision of the Tribunal on similar set of fact on similar component of income, and following the principle of consistency, we direct the AO to follow the order of Tribunal in AY 2007-08 dated 27.02.2017 and recomputed the eligible deduction under section 80IA accordingly.

41. In the result, ground No. 5 of the appeal is allowed.

42. Ground No. 6 raised in alternative to ground No.5, to allow 10% interest income as deduction for expenditure incurred for earning such interest income. At the time of hearing the appeal the ld Senior Counsel for assessee submitted that he is not pressing this ground of appeal.

43. On the contrary the ld SR DR for the revenue raised no objection for not pressing this ground of appeal.

44. Considering the submissions of learned Senior Counsel for the assessee, ground No. 6 of the appeal is dismissed as not pressed.

45. In the result, ground No. 6 of the appeal is dismissed.

46. Ground No. 7 relates to disallowance of post closer expenses of Rs. 29,84,694/-. The learned Senior Counsel for the assessee submits that this ground f appeal is also covered in favour of the assessee by the decision of Tribunal in assessee's own case for AY 2007-08 dated 27th February 2017.

47. On the other hand the ld Sr DR for the revenue relied on the order of the lower authorities.

48. We have considered the rival submissions of the parties and have gone through the order of the lower authorities carefully. We have also seen the order of the Tribunal in assessee's own case for AY 2007-08 in ITA No. 2223/AHD/2010, wherein on similar set of fact similar interest income, the coordinate bench by following order of AY 2002 -03 to 2004-05 passed the following order;

> "13. The assessee's third and fifth substantive ground inter alia plead that both the lower authorities have erred in disallowing its provision made for post closer expenses of Rs.27,82,379/- as well as adding the same in its book profits computation u/s.115JB of the Act. Both the learned counsel agree herein as well that the above stated co-ordinate bench decision has already deleted identical disallowance in earlier assessment years (supra) and latter issue of Section

115JB is rendered academic. We appreciate this fair stand to accept assessee's instant substantive grounds."

49. We further find that in

50. Considering the consistent decision of the Tribunal on similar set of fact on similar component of income, and following the principle of consistency, we direct the AO to follow the order of Tribunal in AY 2007-08 dated 27.02.2017 and allow / delete the disallowance of provisions of post closer expenses.

51. In the result, ground No. 7 of the appeal is allowed.

52. Ground No.8 relates to disallowance of provision of pit covering expenses of Rs. 1.07 Crore.The learned Senior Counsel for the assessee submits that this ground f appeal is also covered in favour of the assessee by the decision of Tribunal in assessee's own case for AY 2007-08 dated 27th February 2017.

53. On the other hand the ld Sr DR for the revenue supported the orders of the lower authorities.

54. We have considered the rival submissions of the parties and have gone through the order of the lower authorities carefully. We have also seen the order of the Tribunal in assessee's own case for AY 2007-08 in ITA No. 2223/AHD/2010, wherein on similar set of fact similar interest income, the coordinate bench by following order of AY 2002 -03 to 2004-05 passed the following order;

"14. The assessee's fourth & sixth substantive ground challenge disallowance of provision made for pit covering expenses of Rs.1,40,83,813/- as well as inclusion

thereof in computing Section 115JB book profits. We notice herein as well that it has succeeded on the very issues before the tribunal in earlier assessment years (supra). The Revenue fails to rebut all these factual and legal developments post facto filing of the instant appeals. We therefore accept assesse's these two grounds as well. Its appeal ITA No.2223/Ahd/2010 succeeds."

55. Considering the consistent decision of the Tribunal on similar set of fact on similar component of income, and following the principle of consistency, we direct the AO to follow the order of Tribunal in AY 2007-08 dated 27.02.2017 and allow / delete the disallowance of provisions of pit covering expenses.

56. In the result, ground No. 8 of the appeal is allowed.

57. Ground No. 9 relates to making of adjustment of disallowance of provisions of post closer and pit covering expenses under book profit under section 115JB. Considering the facts that we have already deleted the disallowance of provisions of post closer and provision for pit covering expenses, therefore, this issue has become academic.

58. In the result, the appeal of the assessee is allowed.

ITA No. 1867/Ahd/2014 by Revenue

59. Ground No.1 relates to direction of ld CIT(A) in allowing deduction under section 80IA in respect of Incinerator Project by holding it as a separate enterprises. The learned Senior Counsel for the assessee submits that this ground f appeal is also covered in favour of the assessee by the decision of

Tribunal in assessee's (appeal by revenue) own case for AY 2007-08 dated 27th February 2017.

60. On the other hand the ld Sr DR for the revenue supported the orders of AO.

61. We have considered the rival submissions of the parties and have gone through the order of the lower authorities carefully. We have also seen the order of the Tribunal in assessee's own case for AY 2007-08 in ITA No. 2290/AHD/2010, wherein on similar set of fact similar interest income, the coordinate bench passed the following order;

> "2. We come to Revenue's appeal ITA No.2290/Ahd/2010. Its first substantive ground pleads that the CIT(A) has erred in facts as well as law in directing the Assessing Officer to compute assessee's deduction claim u/s.80IA of the Act separately for its land filling and incinerator projects; separately.
>
> 3. We come to relevant facts. This assessee is a company engaged in solid waste management. It dumps the solid/semi solid waste in specifically dug pits for the very purpose as well as burns the same at a very high temperature of around 1400centigrade. This later process is called incinerator wherein installation of machinery is required at the site in question. The Assessing Officer framed a regular assessment on 22.12.2009 holding that the above two projects i.e. land filling and incinerator amounted to a composite project for treatment of solid waste meaning thereby that the same were not to be treated as separate projects so as to be independently considered for the purpose of granting Section 80IA deduction.
>
> 4. The CIT(A) reverses Assessing Officer's findings as under:
>
> > "4.3 I have considered the submission of the Id. AR and facts of the case. On perusal of various appellate orders passed .by my predecessors, it is seen that the appellant has been allowed deduction u/s.80IA of the Act since A.Y.2002-03 in respect of its Land

Filling Project-1. Further, on perusal of notes to computation for assessment year 2005-06 and 2006-07, the assessee has made its claim for allowability of deduction u/s.80IA of the Act for its Incinerator Unit. It is also brought to my notice that the Assessing Officer has considered this issue of claim in Para no.-4-1 in the assessment order passed u/s.143(3) of the Act for A.Y 2006-07. Further, in support, the appellant has relied on decision by Mumbai Bench-1 in the case of

- JCIT Vs. Associated Capsules Pvt. Ltd (2008-TIOL-247-ITAT MUM).

- CIT Vs. Anand Affiliates (2008-TIOL-662-HC- P & H-IT), the ratio of which is applied

- Textiles Machinery Corporation Ltd vs. CIT (1977-107-ITR-195(SC)

- CIT Vs. Brigade Enterprises (p) Ltd (Manu / IL/0019/2008)

Relying on the said decisions, the appellant establishes asjjnder that the Appellant has two different undertakings and each of them fulfils independently all the conditions as stipulated u/s.80IA of the Act;

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Thus, I find merit in the Assessee's submission wherein it is established that both the Units are different and independent by way of process, method, mechanics, different machinery/ infrastructure, having entered into separate agreements with the authorities concerned. I also have gone through various case laws relied by the assessee which squarely cover the issues under consideration. In the light of aforesaid discussion and on the facts of the case and respectfully following the decision relied by the assessee, I direct the Assessing Officer to re-compute the deduction u/s.801A of the Act separately for both the units and allow the same accordingly."

5. We have heard rival submissions. It emerges that the assessee has amply demonstrated during the course of lower proceedings that two projects in question are in fact separate ones. We afforded amply opportunity to learned Departmental Representative to rebut all the above extracted evidence / pleadings to the effect that the two projects i.e. land filling and incinerator one are very much separate. The Revenue fails to quote any material against the same. We accordingly find no reason to interfere with the CIT(A)'s conclusion under challenge. This former substantive ground thus fails."

62. Considering the consistent decision of the Tribunal in AY 2007-08 dated 27.02.2017, on similar set of fact on similar issue and following the principle of consistency, we do not find any merit in the ground of appeal raised by the

revenue. Hence, we concur with the order of ld CIT(A) and dismiss the ground of appeal raised by the revenue.

63. Ground No.2 raised by the revenue relates in treating the advance receipt of Rs. 2.82 Crore received from members/ customers as income of assessee. The learned Senior Counsel for the assessee submits that this ground f appeal is also covered in favour of the assessee by the decision of Tribunal in assessee's own case for AY 2007-08 dated 27th February 2017.

64. On the other hand the ld DR for the revenue supported the order of AO.

65. We have considered the rival submissions of the parties and have gone through the order of the lower authorities carefully. We have also seen the order of the Tribunal in assessee's own case for AY 2007-08 in ITA No. 2290/AHD/2010, wherein on similar set of fact similar interest income, the coordinate bench passed the following order;

> 6. The Revenue's latter substantive ground seeks to restore the addition of Rs.10,34,19,765/-collected by the assessee in the nature of non refundable receipts treated income in the course of assessment and deleted in lower appellate proceeding. The Assessing Officer inter alia was of the view that the assessee could not refuse solid waste receipt if accompanied with payment once the carrier reached its godown or site, its client made payment after deducting TDS thereby recording it in its books of accounts as revenue expenditure, the burning of sludge in question was to be completed as assessee's behest, it claimed all expenses pertaining to the said waste disposal activity and he further denied assessee's contention that all operating expenses in its case are incurred irrespective of the fact whether or not the sludge waste stood burnt or stored in godown. The Assessing Officer therefore

treated the entire advance sum as income as well as for the purpose of computing book profit.

7. The CIT(A) accepts assessee's contentions against the said addition as under:

> "5.3 I have considered the submission of the Id. AR and facts of the case. I find that the appellant is consistently following the mercantile method of accounting since inception of the company and following accounting standard AS-9 which is being duly disclosed in the Notes forming part of the Annual Accounts, the Income of the appellant accrues only when the wastes received is burnt. Accordingly, the Appellant has rightly accounted the proceeds of the solid wastes which are being not burnt till the close of year as advance in the accounts. Further, I find that in the assessment order passed u/s. 143(3) of the Act, the Assessing Officer has neither discussed nor given findings that on the adoption of accounting standard AS-9 in respect of the specific nature of business of the appellant, the accounts give incorrect or improper results so as to reject the method adopted for recognizing the revenue in view of the provision of section 145 of the Act.
>
> The Appellant has relied upon the following decisions;
>
> The Income Tax Appellate Tribunal in the case of Treasure Island Resorts (P) Ltd. Vs. DCIT (90 ITD 814)(HYD)
>
> By the Apex Court in the case of Calcutta Co. Ltd Vs. CIT (1959) 37 ITR.
>
> I find that the foresaid decisions are correctly support the facts of the instant case and accordingly, relying on the aforesaid submissions of the appellant and facts of the case, I direct the Assessing Officer to treat the amount of Rs.10,34,19,765/- as advance received from customers / members instead of as income in computing both normal income as well as book profit u/s.115JB of the Act."

8. Heard both sides. The relevant issue between the parties is as to whether the assessee's advance receipts from its customers amounting to Rs.10,34,19,765/- in the nature of non refundable receipts are to be treated as income in entirety pertaining to relevant assessment year or not. We find that hon'ble jurisdictional high court's decision in (2015) 15 taxmann.com 429 (Guj.) CIT vs. Unique Mercantile Services Pvt. Ltd. decides a similar question pertaining to membership fee spreading over to a time span of more than one assessment year to be taxable on pro rata basis. We adopt the same reasoning herein as well and direct the Assessing Officer to assess the above stated non refundable receipts by adopting similar proportionate computation formula. This Revenue's ground is accordingly accepted for statistical purposes. The Revenue partly succeeds in its appeal ITA No.2290/Ahd/2010."

66. Considering the consistent decision of the Tribunal in AY 2007-08 dated 27.02.2017, on similar set of fact on similar issue and following the principle of consistency, we direct the AO to follow the order of Tribunal in earlier year. In the result, this ground of appeal is allowed for statistical purpose.

67. In the result, the appeal of the revenue is partly allowed.

Order pronounced in open court on 27/12/2021and the result was also placed on the notice Board.

Sd/-	Sd/-
(Dr ARJUN LAL SAINI)	**(PAWAN SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Surat, Dated: 27/12/2021
Dkp. Out Sourcing P.S

Copy to:

1. Appellant-
2. Respondent-
3. CIT(A)-
4. CIT
5. DR
6. Guard File

By order

// True Copy //

Assistant Registrar, ITAT, Surat