IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES “B” : HYDERABAD
(THROUGH VIDEO CONFERENCE)

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.	A.Y.	Appellant	Respondent
186/Hyd/18	2009-10	Dy.Commissioner of Income Tax, Central Circle-2(1), Hyderabad	M/s.Indu Projects Ltd., Hyderabad [PAN: AAACI8812M]
187/Hyd/18	2010-11		
188/Hyd/18	2011-12		
189/Hyd/18	2012-13		

For Assessee : Shri Md.Afzal, AR
For Revenue : Shri Y.V.S.T.Sai, CIT-DR

Date of Hearing : 07-01-2022
Date of Pronouncement : 28-02-2022

O R D E R

PER BENCH :

These Revenue’s four appeals for AYs.2009-10 to 2012-13 arise from the CIT(A)-12, Hyderabad’s order(s); all dated 14-11-2017 passed in appeal Nos.0051, 0050, 0049 & 0047/ 2015-16, involving proceedings u/s.143(3) r.w.s.153A r.w.s.263 of the Income Tax Act, 1961 [in short, ‘the Act’]; respectively.

Heard both the parties. Case files perused.

2. The Revenue pleads the following identical substantive grounds in all these four appeals:

"1) Whether on the facts and circumstances of the case, and in law, the ld. CIT(A) erred in a holding that the provision of deduction u/s 80IA(4) is applicable to constituent of the JV/Consortia without appreciating that the assessee has not entered into an agreement with the Central Government or a State Government or a Local Authority or any other Statutory Body.

2) Whether on the facts and circumstances of the case, and in law, the ld. CIT(A) erred in not appreciating that the assessee herein is not a developer but merely a contractor in respect of the project not directly awarded to it?

3) Whether on the facts and circumstances the case, and in law, the ld. CIT(A) erred in not appreciating that the facts of the case are not in conformity with clarificatory amendment to section 80IA of IT Act (Explanation 2 to Section 80 IA vide Finance Act 2007) which was introduced to unambiguously explain that only those enterprises that have entered development agreement with Central or State or Local authorities and invest their own funds to develop such facilities will only be eligible for benefit of deduction.

4) Whether on the facts and circumstances of the case, and in law, the ld. CIT(A) erred in allowing the claim of deduction u/s 80-IA which was made first time in the return filed u/s 153A without appreciating the fact that the provisions of section 153A could not operate to advantage of the assessee, who chose not to make a claim in the manner lawfully open to it u/s 139(1) or 139(5) of the Act.

5) Whether on the facts and circumstances of the case, and in law, the ld. CIT(A) erred in not appreciating that the Provisions of sections 153A to 152C cannot be interpreted to be further innings for AO and/or assessee beyond provisions of sections 139, 147 and 263, as such no fresh claim or deduction could be claimed or allowed by AO.

6) Whether on the facts and circumstances of the case, and in law, the ld. CIT(A) erred in not following the principle laid down by the Hon'ble Supreme Court in the case of CIT v. Sun Engineering Works (P) Ltd. (1992) 198 ITR 297 (SC) wherein the Hon'ble Supreme Court has held that in reassessment proceedings the assessee cannot claim deduction which was neither claimed nor allowed in original assessment and it is not open to the assessee to seek a review of concluded items.

7) Whether on the facts and cirCl1mstances of the case, and in law, the ld. CIT(A) failed to appreciate that in this case already original

assessment was completed u/s 143(3) which has become final and it is not open for the assessee to use another proceedings under section 153A of the Act to reopen the concluded assessments.

8) Whether On the facts and in the circumstances of the case and in law, the ld. CIT(A) eared in not appreciating that as per provisions of section 80AC inserted w.ef· 1.4.2006 no deduction u/s 80IA shall be allowed unless the assessee furnishes a return of income claiming such deduction for such assessment year on or before the due date specified under sub-section (1) of section 139 and the same cannot be extended to return filed u/s 153A.

9) The appellant craves leave to amend or alter any ground or add any other grounds which may be necessary".

3. We next note that the CIT(A)'s identical detailed discussion; involving varying sums of Section 80-IA deductions claimed in all these four assessment years, deciding the instant issue in assessee's favour reads as follows:

5.0 <u>Disallowance of deduction claimed u/s.80IA(4): Rs.26,79,51,792/-</u>:

5.1 While finalizing the assessment order, the AO disallowed the deduction u/s.80IA(4) of Rs.26,79,51,792/- claimed by the assessee on the premise that the appellant is not eligible for deduction u/s.80IA(4), firstly because appellant has made such claim for the first time in the Return of Income filed u/s.153A; and secondly, because the appellant did not enter into the contract agreement with the Government or Statutory Body on its own, but through a consortium, namely M/s.Indu-Navayuga-Abhishek Consortium. The assessee is in appeal against the said disallowance.

5.1.1 In the course of the assessment proceedings, the AO looked into the detailed activity of the assessee company and examined the claim of deduction made u/s.80IA(4) of I.T.Act. For the purpose, the AO called for the details of projects/works carried out by the assessee during the year, on which deduction was claimed u/s.80IA(4). The AO examined

the agreement copy for the projects undertaken by the assessee, in light of the conditions laid down by the provisions of sec.80IA(4) and the observations made by various Judicial Authorities, including the decision of Hon'ble ITAT, Hyderabad in the case of M/s.Sushee Hitech Constructions & M/s.Ramky Infrastructure Ltd, etc., wherein, the criteria enumerated for claiming deduction u/s.80IA(4) of I.T.Act are as under:

a) The duty of the developer should not be restricted only to the civil works.

b) The developer is under obligation to 'design' a project and get it approved by the owner of the project.

c) Though the ownership of the site rests with the owner, the developer exercises complete domain over the land or project during the process of development.

d) The developer does not raise bills at each and every step of construction.

e) The developer is authorized to raise funds by private placement or by financial institutions.

f) No material is supplied by the owner. The expenses for the materials are to be borne by the developer itself.

g) The developer is expected to undertake risks.

5.1.2 Based on the examination of the applicability of the said conditions, the AO observed that during the year under reference, the assessee had undertaken three projects, total net profit of which was worked out at Rs.26,79,51,792/-, and claimed as exempt u/s.80IA(4), while computing the total income as per return of income. However, it was noticed and observed by the AO, that in the said projects, the work was awarded not to the assessee, but to the JV/Consortium namely, M/s.Indu-Navayuga-Abhishek Consortium and M/s.SCL-Indu-KBL-WEG(JV), wherein the assessee company is one of the constituent members. Based on said facts, the AO observed that deduction u/s.80IA(4) is available only to the enterprise which enters into an agreement with Government/Statutory Body and in the present case, since the agreement is entered into by the JV/Consortium, the assessee

company, being a constituent of the said JV/Consortium, was not eligible for deduction under section 80IA(4).

5.2 The appellant has appealed against the said disallowance, and in the course of appellate proceedings, the appellant has filed comprehensive explanation about the eligibility of its claim, basing on various facets of the work executed by it so as to entitle it for the deduction under section 80IA(4), which are also duly supported by various principles evolved by decisions of courts. The salient aspects of the appellant's submission dated 26-05-2017 run as under:

1. *"The National Highway Authority of India (NHAI) has awarded the work of Design, Engineering, Construction, Development, Finance, operation and maintenance of four laning, the existing two lane section from Km 285 to (near Padalur) to Km 325 (near Trichi) on NH-45 in the state of Tamilnadu on Build Operate Transfer (BOT) basis (package 6C) to the consortium of M/s Navayuga-Indu-Abhishek vide their letter No.11015/7/2001/Tech/GM(WB-II)/NH-45/BOT/254, dt: February 28, 2006. The consortium have promoted and incorporated Indu-Navayuga Infras Projects Ltd, referred as Project Company as Special Purpose Vehicle (SPV) for implementing the said project. The Project Company entered into an agreement with NHAI for implementation of the said agreement on 30.05.2006. The Project Company has decided to implement the construction part of the project works into two packages namely, EPC Package-A (Road works) and EPC Package-B (Bridge works). As the assessee is having requisite know how and wherewithal to execute the road works, therefore, the same was allotted to the assessee. An agreement referred as EPC Agreement (A) was entered on 27.07.2006 by Project Company i.e. Indu-Navayuga Infra Projects Pvt Ltd and the assessee i.e. Indu Projects Ltd. wherein, the terms and conditions of the execution of the work allotted to the assessee were brought on writing.*
2. *In respect of irrigation scheme –link VII-Package 22 which is Pranahitha Chevella lift irrigation scheme, the assessee submitted all the relevant documents along with the allotment letter and joint venture agreement. The letter of Superintending Engineers letter dt: 20.10.2008, clearly states the nature of work which is considered to be development work referred in 80IA(4) of the IT Act. The work of construction of flat protection wall along with Buggavanka and construction of high level bridge near old bus stand leading to Ravindra nagar Kadapa Town, the learned AO states that the assessee has not produced the agreement copy. It is to be submitted that during the course of assessment proceedings the assessee filed all the necessary documents in respect of claims made u/s 80IA(4), most of the documents are submitted, without routing through the inward section to save the time i.e. directly to the AO, during the course of hearing before finalizing the rejection of the claim the AO not pointed any deficiency in the claims, therefore, it is respectfully submitted that the assessee is under genuine impression that the assessee filed all the*

documents including agreements during the course of assessment proceedings, however, there may be an inadvertent omission on the part of Accountants, therefore fresh copies of agreement are enclosed for kind consideration of the learned Commissioner.

3. *The turnover for the subject assessment year in respect of the eligible projects was at Rs.84,16,92,131/- and the expenses in relation to these projects was at Rs.57,37,40,339/-, the eligible profit was at Rs.26,79,51,792/-. The assessee filed return of income in response to 153A notice claiming this profit as deduction u/s 80IA (4) by filing the Form No.10CCB of the IT Act.*
4. *The learned Assessing Officer alleged that the assessee has not provided certain information as mentioned in the Page 11 of the assessment order, it is humbly submitted that this allegation of the learned Assessing Officer is not correct in the facts and circumstances and material submitted during the course of assessment proceedings. The assessee prepared separate statements in respect of each projects and the same was submitted before the AO along with Form No.10CCB copy of which is placed in the paper book.*
5. *In response to the show cause notice the assessee explained the nature of project and also clarified that the decision of the Hon'ble Supreme Court in the case of Sun Engineering Works Pvt Ltd was rendered considering the provisions of section 147 and 148 of the IT Act, wherein, the notice u/s 148 is issued with a belief that the income chargeable to tax has escaped assessment, whereas, notice u/s 153A is issued for computing the total income for the six assessment years, the provisions of the Act applies to this return, as if such return were a return required to be furnished u/s 139 of the IT Act, therefore, it was submitted that the rationale of the Hon'ble Supreme Court in the case of Sun Engineering Works Pvt Ltd is not applicable in respect of returns filed u/s 153A of the IT Act...*

..

8. *The other fact for disallowing the claim u/s 80IA (4) according to the Assessing Officer is that the assessee did not enter into contract agreement with Government or Statutory body. In this regard it is respectfully submitted that the project company, M/s Indu- Navayuga Infra Projects Ltd, entered into an agreement with NHAI for implementation of the project allotted. The assessee being one of the constituent of the project company executed the work of development of road, whereas, the other constituent executed the work of bridges. The project company has not executed any work but the entire work is allotted to its constituents. The project company neither claimed any expenditure nor claimed any deduction u/s 80IA (4) of the IT Act. The assessee who has executed the work in respect of development of roads has only claimed the deduction u/s 80IA (4), therefore, the claim is allowable. The joint venture or consortium is only a paper entity and has not executed any work itself, therefore, for all practical purposes the contract was awarded to the constituent of the joint venture and the work was executed by them. As per the provisions of section 80IA (4) the benefit of deduction under this section is to be given only to the enterprise which carried on the classified business. Therefore, it is respectfully submitted that the contract entered into by the joint venture/consortium is to be considered as contract entered by the assessee and the assessee should be allowed the claim of 80IA (4) of the IT Act. Identical issue came up in the case of M/s Transtory (India) Ltd, Guntur Vs Income Tax Officer, before the Hon'ble ITAT,*

5.2.1 It was further submitted by the appellant that the above aspects were considered by the Assessing officer and there is no dispute that the appellant acted as a developer. It was explained that if all the aspects are evaluated, the appellant is compliant to all these aspects to claim deduction and they were also found to be in order by the Assessing officer. It was also submitted that by taking into account scope of appellant's work and above components, it cannot be called a contractor simplicitor but a developer of eligible projects entitled to deduction under section 80IA(4). It was also submitted that the Assessing officer after careful examination of appellant's submission with reference to books of account, scope of work as reflected in the contract documents vis a vis the conditions laid down in the Act and above factors, accepted the claim of eligibility of the appellant. However, while accepting the eligibility as per the statutory norms, the Assessing officer denied the claim of the appellant, since according to him, the works were executed by the appellant as a JV constituent but not directly. In other words, AO was of the view that only direct contract work undertaken by an entity from specified authorities is eligible for deduction subject to fulfillment of the conditions but not the work executed as the constituent of a Consortium. This resulted in denial of the claim u/s.80IA(4) to the tune of Rs. 26,79,51,792/-.

5.2.2 The second ground on which the AO disallowed the claim is that the assessee is not eligible for the claim of deduction u/s.80IA, because the claim was made for the first time in the return of income filed in response to notice u/s.153A. Relying on the decision of Hon'ble Supreme Court in the case of CIT Vs. Sun Engineering Pvt. Ltd., 198 ITR

297 and that of Hon'ble Rajasthan High Court in the case of Jai Steel (India) Vs. ACIT (2013) 259 CTR 281 (Raj), the AO rejected the claim of the assessee.

5.2.3 On this issue, in support of its claim, the following submissions were made by the appellant:

"6. It is pertinent to mention here that the Hon'ble ITAT 'A' Bench of Hyderabad in the case of M/s KNR Constructions Ltd Vs DCIT, Central Circle-3, in identical facts and circumstances wherein, the said assessee was also involved in the execution of development of road allotted by NHAI, after considering the decisions of Hon'ble Supreme Court CIT Vs Sun Engineering Works Pvt Ltd (1992) 198 ITR 297 and also Hon'ble Rajasthan High Court decision in the case of Jai Steel (India) Vs ACIT, held that the assessee is entitled to claim deduction u/s 80IA in the return filed in response to the notices issued u/s 153A for the relevant six assessment years, where the assessment had been originally completed u/s 143(3) of the IT Act. In the following judicial pronouncements also similar view is upheld which are as under:

i. Naresh T.Wadhwani Vs DCIT (ITAT Pune) ITA No.18, 19 & 20/PN/2013, wherein, it was held that the claim u/s 80IB (10) of the IT Act is allowable even in relation impugned additional offered in a statement u/s 132(4) recorded during the course search and seizure proceedings and in the return filed in response to notice u/s 153A of the IT Act.

ii. DCIT Vs Eversmile Constructions Co. (P) Ltd, 143 TTJ 322, (2012) wherein, it was held that there cannot be any scope for arguing, the assessee has been rendered powerless to even lodge a claim in respect of which deduction was not allowed earlier, the Assessing Officer fully empowered to consider the question of deductibility as per the provisions of the IT Act.

iii. In the case of M/s Sai Samrath Constructions Vs DCIT (ITA No.248/PN/2013) the Hon'ble ITAT of Pune, held that the Assessing Officer was directed to allow the deduction u/s 80IB (10) of the IT Act, even in relation to the income surrendered during the course of survey on account of the undisclosed receipts from housing project.

iv. In the case of M/s Malpani Estates Vs ACIT (ITA No.2296 to 2298/PN/2012) the Hon'ble ITAT of Pune, held that the assessee's claim for deduction u/s 80IB (10) is allowable even with regard to the enhanced income assessed u/s 143(3) r.w.s 153A of the IT Act.

7. Considering the facts and circumstances of the case and also the rationale of M/s KNR Constructions Vs DCIT, ITA No's 946 to 948/H/2015, of the jurisdictional ITAT, Hyderabad and also the rationale of the above mentioned judicial pronouncements, the Hon'ble Commissioner is requested to allow the claim made in return filed, in response to notice u/s 153A of the IT Act, which was not claimed in original return of income."

5.3 I have carefully perused the submissions of the appellant and the observations of the AO in assessment order. As could be seen from the facts/information brought on record, the assessee company is engaged in infrastructural activity of various kind and during the year under consideration, **the work was awarded to JV/Consortia, but executed by assessee company as constituent of the said JV.** On profit of the said work, the assessee claimed deduction of Rs.26,79,51,792/- u/s.80IA(4). The AO examined these projects as regard to their eligibility for deduction 80IA(4), with reference to the conditions as stipulated in provisions of section 80IA(4) and the observations of judicial decision. Though satisfied with the eligibility of profit of the said projects of Rs.26,79,51,792/-, the AO denied the benefit of deduction u/s.80IA(4), on the ground that the said amount represents the profit attributable to projects/works awarded to the consortium, where the assessee company is only a constituent and the claim of deduction on such profits is violation of provisions of 80IA(4), as the contracts have been awarded by Govt./Statutory Authorities only to such Joint Ventures/Consortia. In this regard the AO disregarded the submissions of the assessee, that the profits so earned by assessee company through JVs/Consortia neither formed part of total income of JVs nor any deductions u/s.80IA(4) were claimed by JVs, on such incomes.

5.3.1 The issue of assessability of incomes of JV/Consortium, and its constituents has been settled by ITAT, Visakhapatnam, in the case of M/s.Transtroy India Ltd. Vs. ITO (supra), which has been further supported by the decision of ITAT, Lucknow in the case of PNC Constructions Co Pvt Ltd Vs DCIT (37 Taxmann.com 361), which has been further upheld by Allahabad High Court (55 Taxmann.com 21). Turning to the facts of the case at hand, it is seen that the AO disallowed the appellant's claim of deduction u/s.80IA(4), merely on the ground that

the profits are attributable to the projects awarded to the Consortium, of which the assessee/appellant is a constituent. This claim was held to be not allowable as deduction in the hands of the constituent, which is contrary to the decision given by **Hon'ble ITAT, Vishakapatnam** in the case of **M/s.Transtroy India Ltd Vs ITO (supra) (ITA No.540 of 2009)**. As per the said decision, the assessee, being a constituent of the JV/Consortia, having executed the contract, is held to be justified in claiming the deduction u/s.80IA(4).

5.3.2 The case of **M/s.KNR Constructions Ltd., Hyderabad (ITA No.946/H/2015)**, relied upon by the appellant in support of its claim of deduction u/s.80IA for the first time u/s.153A, has also been perused. The relevant portion of the decision of Hon'ble ITAT, 'A' Bench, Hyderabad vide its common order dated 16-10-2015 in ITA Nos.946/H/2015 to 948/H/2015 for the AYs 2006-07, 2007-08 and 2008-09 and 983/H/2015 to 986/H/2015, for the AYs 2009-10, 2010-11, 2011-12 & 2012-13, is reproduced below:

> *"In the case of ACIT Vs. VN Devodoss 157 TTJ 165 cited by the Ld.Counsel for the assessee, the Chennai Bench of this Tribunal had an occasion to decide a similar issue as involved in the present case. In this context, reliance was placed by the Tribunal on the provisions of section 153A(1)(a) which provide that where a search is initiated under section 132, the A.O. shall issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years in the prescribed form and verified in the prescribed manner and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139. It was held by the Tribunal that it is because of this provision of law stated in section 153A(1)(a) that a statutory presumption is made that a return filed under section 153A is a return required to be filed under section 139(1) of the Act. The Tribunal also took note of the non-obstante clause contained in section 153A and held that said provision over-rides all other provisions stated in the Act in matters of filing of return of income consequent to a search and therefore, the return filed in pursuance of notice issued under section 153A is as good as a return filed under section 139(1). It was also held that where an assessee has filed its return of income as prescribed by law, even if as a consequence of search carried out under section 132 and in consequence of notice issued under section 153A, the assessee is obviously entitled for claiming corresponding deductions provided in law and the deduction claimed in return filed under section 153A cannot be denied on the ground that the claim was not made*

earlier. The Tribunal also relied on the decision of its Coordinate Bench in the case of DCIT Vs. Eversmile Construction Co. P. Ltd., (supra) and held that the returns filed by the assessee under section 153A are to be treated as returns filed under section 139(1) by virtue of the law stated in section 153A(1)(a) and the assessees therefore, are entitled for deduction available under section 80IB(1).

7. It is thus that the decision of Mumbai Bench of this Tribunal in the case of Eversmile Construction Co. P. Ltd., (supra) as well as the Chennai Bench in the case of V.N. Devodoss (supra) is based on the relevant provisions of law including especially that of section 153A(1)(a). In the case of Hyderabad Chemicals Supplies Ltd., (ITA.No.352/Hyd/2005 dated 21.01.2011) it was held that when the decision of the Tribunal is based on the relevant provisions of law, the same is to be followed over the decision of the non-jurisdictional High Court that has been rendered without considering such statutory provisions that are directly relevant. We, therefore, follow the decision of the Chennai Bench of this Tribunal in the Oise of ACIT Vs. VN Devodoss 157 TTJ 165 (supra) as well as the decision of Mumbai Bench in the case of DCIT Vs. Eversmile Construction Co. P. Ltd., (supra) to hold that the assessee is entitled to claim deduction under section 80IA in the returns filed in response to the notices issued under section 153A for the relevant six years i.e., A.Ys. 2006-07 to 2011-12 including A.Ys. 2009-10 to 2011-12 where the assessments had been originally completed under section 143(3) prior to the date of search. We accordingly, reverse the decision of the Ld. CIT(A) rendered on this issue for A.Ys. 2006-07 to 2008-09 and uphold the same for A.Ys. 2009-10 to 2011-12. The appeals of the assessee for A.Ys. 2006-07 to 2008-09 involving this solitary issue thus are allowed whereas, the relevant ground of the Revenue's appeal on this issue for A.Ys. 2009-10 to 2011-12 are dismissed.

8. During the course of assessment proceedings for all the seven years under consideration, the claim of the assessee for deduction under section 80IA was also examined by the A.O. on merit and on such examination, he held that the assessee not being the owner of the infrastructure facility as required by sub-clause (a) of clause (i) of sub-section (4) of section 80IA was not e igible to claim deduction under section 80IA. In support of this conclusion, the A.O. relied on the decision of Mumbai Special Bench of ITAT in the case of B.B. Patil & Sons 35 SOT 171. The Ld. CIT(A), however, has not agreed with this stand of the A.O. According to him, the ownership of the infrastructure facility is not the intention of the provision of section 80IA(4)(i)(a) and what is contemplated therein is the ownership of enterprise. As pointed out by the Ld. Counsel for the assessee at the time of hearing before us, this issue now stands covered by the decision of Hon'ble Bombay High Court in the case of CTI' Vs. ABG Heavy Industries Ltd., 322 ITR 323 wherein it was held that after section 80IA was amended by the Finance Act, 2001, the section applies to an enterprise carrying on the "business of "(i) developing" or "(ii) operating and maintaining," or "(iii) developing, operating and maintaining any infrastructure facility which fulfills certain conditions and one of those conditions are that the ownership of the enterprise is by a company registered in India or by a consortium. Following this decision of Hon'ble Bombay High Court in the case of ABG Heavy Industries Ltd., (supra), it was held by the Coordinate Bench of this Tribunal in the case of Sushi Hitech (ITA.No.269 & 1165/Hyd/2009 and ITA.No.1171/Hyd/2010 dated 16.03.2012) that by reading of sub-clause

(a) of sub-clause (i) of sub-section (4) of section 80IA, it is clear that the enterprise carrying on development of infrastructure facility should be owned by the company and not that the infrastructure facility should be owned by a company. It was held that the provisions are made applicable to the person to whom such enterprise belongs to, as explained in sub-clause (a) and the word "Ownership" used therein is attributable only to the enterprise carrying on the business which would mean that only companies are eligible for deduction under section 80IA(4) and not any other person like individual, HUF, firm etc. This issue thus is squarely covered in favour of the assessee inter alia, by the decision of Hon'ble Bombay High Court in the case of ABG Heavy Industries Ltd.,(supra), which has been followed by the Coordinate Bench of this Tribunal in various cases and respectfully following the same, we uphold the impugned order of the Ld.CIT(A) holding that the assessee is entitled for deduction under section 80IA on merit in all the seven years under consideration. It is pertinent to note here that although this aspect of the matter relating to the assessee's claim for deduction under section 80IA is decided by the Ld.CIT(A) vide his impugned orders in favour of the assessee in all the seven years under consideration, the department has not disputed the same for AYs 2006-07, 2007-08 and 2008-09 and it is disputed only in AYs 2009-10 to 2012-13. We, therefore, dismiss the grounds raised by the Revenue on this issue in its appeals for the said four years."

5.3.3 Thus, based on the ratio of the judicial decisions cited above, it is reasonable to hold that the AO is not justified in denying the deduction u/s.80IA(4) to the assessee, as a constituent of the Consortium. Thus, on similarity of facts, the AO is directed to allow the total amount of Rs.26,79,51,792/-, claimed as deduction u/s.80IA(4). Accordingly, the grounds related to this issue are treated as **ALLOWED**.

4. Learned CIT-DR's vehement contentions *inter alia* are that the assessee is not entitled to raise the impugned Section 80-IA deduction claim in its return(s) filed in Section 153A proceedings since the same are initiated to assess only the un-disclosed income in light of Kabul Chawla [380 ITR 573] (Delhi). And that it was very much incumbent on the assessee to raise the impugned deduction claim only in the return earlier filed u/s.139(1) of the Act. Mr.Sai quotes Section 80A(5) r.w.s.80AC that an assessee ought to file a return; and that too, u/s.139(1) of the Act only claiming section 80IA deduction so as to be eligible for the same. He refers EBR Enterprises Vs. Union of India (2019) [107 taxmann.com 220

(Bombay)] that an assessee's failure in ensuring necessary compliance of the foregoing twin mandatory provisions renders its Section 80-IA deduction claim as not allowable. Case law Jai Steel (India) Vs. ACIT (2013) [259 CTR 281] (Rajasthan) and GMR Infrastructure Ltd., Vs. DCIT ITA No.1036 of 2017, dt.06-07-2021 (Karnataka) is also referred that an assessee is not entitled to raise a fresh claim in a return filed in Section 153A proceedings. The Revenue also reiterates hon'ble apex court's detailed discussion in Plastiblends India Ltd., (2017) 86 taxmann.com 137 (SC) that Chapter-VI in the Act and stricter constructions in light of Dilip Kumar & Co. (2018) [95 taxmann.com 327] to buttress the point that the assessee had raised the corresponding claims in Section 153A return(s) than those filed u/s.139(1) of the Act in violation of Section 80A(5) r.w.s.80AC of the Act. It further highlighted that the same is applicable in case of "JV" itself only than its constituent; as the case may be. Mr.Sai has also quoted a catena of case law which shall be dealt with in succeeding paragraphs.

5. The assessee has drawn a strong support from the CIT(A)'s detailed findings extracted in the preceding paragraphs. Mr.Afzal invited our attention to assessee's detailed representation submitted before hon'ble President of the tribunal u/s.255(3) of the Act, seeking to constitute a Special Bench in light of various conflicting decisions on various facts of Section 80-IA deduction. He thus sought to postpone the hearing in all these four cases till the time any decision is taken at hon'ble President's end.

We find no merit in the assessee's foregoing adjournment request in light of this application filed before hon'ble President, Income Tax Appellate Tribunal. We make it clear that we had heard all these four cases way back on 07-01-2022. This bench thereafter has received the assessee's foregoing application dt.28-12-2021 (not filed on earlier hearing occasions), as forwarded from office of the hon'ble President, for appropriate comments regarding Special Bench's constitution after hearing both the parties. Now the said application is fixed for hearing on 02-03-2022 for the first time. A perusal thereof makes it clear that the assessee has sought for Special Bench constitution in its appeal ITA No.1335/Hyd/2017 fixed for 30-05-2022 than any of these four cases for the reasons best known to itself. It has also not prayed for clubbing of all these appeals as well. We thus quote Regulation 98(A) and "Appendix-XIX" (B) that the scope of assessee's foregoing application would not be expanded beyond the specified appeal. We also wish to quote hon'ble apex court's landmark decision ITAT Vs. DCIT (1996) [218 ITR 275] (SC); as considered in Jagati Publications Ltd. Vs. President (2015) [377 ITR 31] (Bombay) that a Special Bench's constitution has to be in light of the foregoing regulation or by the hon'ble President, ITAT as per the relevant facts and circumstances of each and every case which nowhere exist as the assessee itself has not even preferred its petition in above terms. Its impugned adjournment request fails therefore.

6. We next deal Revenue's foregoing legal arguments that the assessee ought to have raised its Section 80-IA claim in Section 139(1) return only. Its case strongly relies upon Section 80-IA r.w.s.80AC of the Act *inter alia* stipulating that "where the assessee fails to make a claim in his return of income for any deduction ...., no deduction shall be allowed to him thereunder" and that "no such deduction shall be allowed to him unless he furnishes a return of his income for such assessment year on or before the due date specified under sub-section(1) of Section 139" ; respectively.

We note that crux of the instant issue lies in non-obstante clauses in Section 153A itself wherein the legislature has made it clear that "Notwithstanding anything contained in Section 139, Section 147, Section 148, Section 149, 151 and Section 153 ....". The same sufficiently suggests that once Section 139 itself is not applicable in an instance involving Section 153A proceedings, all other consequences flowing therefrom in case of an assessee having not claimed Section 80-IA deduction in section 139(1) return are deemed to have been rendered non-operative. Coupled with this, hon'ble jurisdictional high court in Gopal Lal Bhadruka Vs. DCIT (2012) (346 ITR 106) (AP HC) has also made it clear that *an Assessing Officer framing Section 153A assessment can very well take note of all other material apart from the incriminating and seized one during the course of search for the purpose of framing assessment u/s.153A as he supposed to total income.*

This tribunal's co-ordinate bench's order in M/s.KNR Constructions Ltd. Vs. DCIT in ITA No.946 to 948/H/2015, dt.16-10-2015 has also settled the issue now that the Hon'ble

Rajasthan high court's decision in Jai Steel (India) Vs. ACIT (2013) [259 CTR 281] (Rajasthan) (supra) nowhere dealt with instance of a deduction claim under Chapter-VI as the assessee therein had raised a general fresh claim of expenditure of sale tax only. The very factual position continues in EBR Enterprises Vs. Union of India (2019) [107 taxmann.com 220 (Bombay)] (supra) as well wherein the hon'ble high court had come across an issue of Section 80-IA deduction claim, not involving Section 153A proceedings, as are the facts before us. It rather emerges that their lordships yet another recent decision in PCIT Vs. JSW Steel Ltd. (2020) [115 taxmann.com 165 (Bombay) has taken note of the foregoing non-obstante clauses in line in Section 153A(supra) in holding that an assessee in Section 153A return can very well raise such a new claim of deduction.

7. Mr.Sai at this stage sought to distinguish the foregoing judicial precedent that it only deals with an instance of "abated" assessment wherein the Assessing Officer is empowered to decide all the issues emanating therefrom even other than those confined to a search assessment. We find no merit in the Revenue's instant technical argument as Section 153A nowhere draws any distinction of an "abated" or "un-abated" assessment so far as an assessee's eligibility to raise a new deduction claim under Chapter-VI therein is concerned. We thus uphold the CIT(A)'s lower appellate findings in principle.

8. We next find merit in Revenue's contentions seeking to apply Explanation to Section 80-IA of the Act, inserted by the legislature vide Finance Act, 2007 with retrospective effect from 01-04-2000 followed by the latter similar Explanation substituting the earlier one by the Finance Act, No.2 of 2009 (with effect from the same date) that the impugned deduction is not eligible to an assessee carrying out works contracts. A perusal of the assessment orders in the lead AY.2009-10 suggests that the assessee had claimed the impugned deduction regarding its agreement with Indu Navyuga Infra Projects Ltd. *qua* design, engineering, construction, development, finance, operation and maintenance Agreement dt.27-07-2006, Pranahita-Chevella Lift Irrigation Scheme link-VII dt.20-11-2008 and construction of protection wall as well as the high level breach; respectively. We make it clear that the assessee has not placed on record any of the three corresponding agreements before us for the reasons best known to itself despite the fact that these appeals had been filed in the year 2018. The question as to whether such civil construction projects involving roads, irrigation, lift channels and breaches etc. amount to "works contacts" or not stand answered in favour of the department and against the assessee in this tribunal's co-ordinate bench's order in ITA No.1832/Hyd/2017 M/s.Navayuga IVRCL & SEW JV and others for AY.2006-07 dt.24-05-2021 as follows:

"3. Both the learned representatives next submitted that the Tribunal's 'B' bench has heard the said former assessee's appeals ITA No.496/Hyd/2018 & Ors on 19.02.2021 and whatever decision would be taken therein applies mutatis mutandis to the facts of the instant cases as well. We proceed in this factual backdrop to notice that the said bench's

common order in M/s. NEC-NCC Maytas Joint Venture has declined the concerned of section 80IA deduction in its order dt 12.05.2021 as under :

ITA No. & Asst. Year	Appellant	Respondent
430/Hyd/2016 2007-08	M/s. NEC NCC MAYTAS – JV, VI-1, 6-3-652, Dhruvatara Apartments, Somajiguda, Hyderabad. PAN AAAAN 3690E	ACIT, Cir.6(1), Hyderabad.
431/Hyd/2016 2008-09	-do-	-do-

O R D E R

The instant batch of nine cases pertains to a single assessee M/s. NEE-NPC-Mytas-JV. All these nine appeals arise against the Commissioner of Income Tax (Appeals)-12, Hyderabad's order dt.16.08.2017 in case No.0149/2016-17 for Assessment Year 2006-07; the CIT(Appeals)-9, Hyderabad's common order dt.31.12.2015 passed in case Nos.0273/ACIT, Circle 6(1)/2015-16; 0311/ACIT, Circle 6(1)/2015-16 and 0339/ITO, Ward 6(1)/2015-16 in Assessment Years 2007-08, 2008-09 and 2010-11; the CIT(Appeals)-9, Hyderabad's order dt.7.7.2017 in case No.0231/ITO, Ward 6(1)/2016-17 for Assessment Year 2009-10 and CIT(Appeals)-6, Hyderabad's separate orders; all dt.26.2.2018 in case Nos.1165/2014-15/B1/CIT(A)-6; 0034/2015-16/B2/CIT(A)-6; 0037/2016-17/B2/CIT(A)-6 and 0460/2016-17/B2/CIT(A)-6 for Assessment Years 2011-12 to 2014-15; respectively. Relevant proceedings in first and foremost Assessment Year 2006-07 are under section 143(3) r.w.s. 254 and u/s. 143(3) of the Income Tax Act, 1961 ('in short the Act'); respectively.

Heard both parties. Case files perused.

2. Both the learned representatives state at the outset that the assessee's identical sole substantive grievance that in all these nine cases seeks to reverse both the lower authorities' action disallowing its 80IA deduction claim(s) of Rs.2,85,67,175/-, Rs.1,62,25,941/-, Rs.1,85,37,574/- Rs.6.65,60,238/-, Rs.2,01,03,559/-. Rs.49,40,186/-, Rs.5,85,122/-, Rs.3,85,097/- and Rs.13,15,184/-; assessment years, respectively pertaining to execution of the alleged contract works forming part of M/s. Bhima Lift Irrigation Scheme in Mahaboob Nagar District, Telangana State (erstwhile undivided Andhra Pradesh). Learned counsel invited our attention to the

tribunal's first round remand order dt.8.3.2013 in assessee's appeal in ITA No.517/Hyd/2010 in A.Y. 2006-07 restoring the instant sole issue back to the Assessing Officer as under :

2. The sole grievance of the assessee in the present appeal is with regard to the disallowance of deduction claimed u/s 80IA (4) of the Act. Briefly the facts of this issue are the assessee is a joint venture formed by three companies viz., Navayuga Engineering Company, Nagrjuna Construction Company and Maytas. The assessee entered into a contract with the Government of Andhra Pradesh Irrigation and CAD Department represented by the Superintending Engineer, Pebbair. The contract is for the execution of the works known as "BLIP-Lift-II at Thirumalayapally & Mothakota (Village) of Kothakota Mandal, Mahaboobnagar District, Andhra Pradesh on EPC basis". The assessee filed its return of income for the impugned assessment year on 31-10-2006 declaring 'nil' income after claiming deduction of Rs.2,85,67,175/- u/s 80IA (4). In course of scrutiny assessment proceedings, the Assessing Officer raised query with regard to the claim of deduction u/s 80IA (4) of the Act. In response to the query, the assessee submitted its explanation before the Assessing Officer. The Assessing Officer however did not accept the explanation submitted by the assessee on the following reasons:-

i) Section 80IA (4) applies to a developer and the assessee is not a developer and only a contractor.

ii) The assessee is not the owner of the infrastructure facility and has executed the work on EPC (Erection, Procurement and Construction) basis.

2. The sole grievance of the assessee in the present appeal is with regard to the disallowance of deduction claimed u/s 80IA (4) of the Act. Briefly the facts of this issue are the assessee is a joint venture formed by three companies viz., Navayuga Engineering Company, Nagrjuna Construction Company and Maytas. The assessee entered into a contract with the Government of Andhra Pradesh Irrigation and CAD Department represented by the Superintending Engineer, Pebbair. The contract is for the execution of the works known as "BLIP-Lift-II at Thirumalayapally & Mothakota (Village) of Kothakota Mandal, Mahaboobnagar District, Andhra Pradesh on EPC basis". The assessee filed its return of income for the impugned assessment year on 31-10-2006 declaring 'nil' income after claiming deduction of Rs.2,85,67,175/- u/s 80IA (4). In course of scrutiny assessment proceedings, the Assessing Officer raised query with regard to the claim of deduction u/s 80IA (4) of the Act. In response to the query, the assessee submitted its explanation before the Assessing Officer. The Assessing Officer however did not accept the explanation submitted by the assessee on the following reasons:-

i) Section 80IA (4) applies to a developer and the assessee is not a developer and only a contractor.

ii) The assessee is not the owner of the infrastructure facility and has executed the work on EPC (Erection, Procurement and Construction) basis.

4. The learned AR submitted before us that different benches of Tribunal including the Hyderabad Bench in a number of cases upheld that the contractor can be a developer depending upon the terms and conditions of the contract and related work covered by a contract. The learned AR referring to the scope and nature of work and different clauses of contract submitted that the assessee has not executed the work merely as a contractor but has executed it on a turn-key basis. The learned AR submitted that as per the scope and nature of the work, the assessee had taken full responsibility for designing and engineering and execution of civil, electrical and mechanical works including the supply, transportation, storage and installation, testing and commissioning of hydro mechanical and electro mechanical equipment including operation and maintenance of the project for a period of three years from the date of successful commissioning of the project. The learned AR further submitted that the assessee joint venture has made huge financial investments for executing the project and also employed technical personnel for executing the work. The technological risks undertaken in the design and drawing of various types of machinery to the satisfaction of the Government executing the infrastructure related work indeed are huge. It was further submitted that the assessee is responsible for certain works which requires application of technical expertise such as detailed design of the entire plant, providing engineering drawings, data, bill of materials etc., complete manufacture of all the equipment required for plant including their shop testing, supply includes packing and transportation from the manufacturer's works to the project site including customs' clearance of imported components, if any and storage, preservation and conservation of all the equipment at the site erection, testing and commissioning of all units and handing over to irrigation authorities in

complete shape. The learned AR relying upon a decision of Income-tax Appellate Tribunal, Hyderabad Bench in case of M/s Sushee Hi-tech Constructions Pvt. Ltd V/s. DCIT (ITA Nos. 269 and 1165/Hyd/2009 and ITA No. 1171/Hyd/2010 dated 16th March, 2012 submitted that the assessee is not required to be the owner of the infrastructure facility for availing deduction u/s 80IA (4) of the Act. Relying upon the same decision, it was further submitted that the assessee has to fulfill any one of three conditions i.e., (i) developing (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility could be entitled to claim deduction 80IA(4). The learned AR vehemently contented that the assessee in fact is involved in all stages of development like designing, execution of all civil works like canal manufacture, testing at manufacture works etc. It is entitled to claim deduction u/s 80IA (4) of the Act. The learned AR also relied upon the following decisions in support of his contentions:-

i) Income-tax Appellate Tribunal, Hyderabad Bench "B" in the case of GVPR Engineers Limited V/s. ACIT and vice versa in ITA Nos. 347/Hyd/2008 and 17 other appeals dated 29-2-2012.
ii) Order of Income-tax Appellate Tribunal Chennai B- Bench in ACIT V/s. Chett5inad Lignite Transport Services (P) Ltd./ in ITA Nos. 1312 and 1313/Hyd/2011 for the assessment years 2007-08 and 2008-09 dated 18-11-2011.
iii) order of Income-tax Appellate Tribunal Chennai Bench "C" in ACIT V/s. RR Constructions in ITA No.2061/Mad/2010 for the assessment year 2007-08 dated 3-10-2011.
iv) Order of Jaipur A Bench of Income-tax Appellate Tribunal in Om Metals Infra Projects Limited V/s. CIT in ITA Nos. 722

complete shape. The learned AR relying upon a decision of Income-tax Appellate Tribunal, Hyderabad Bench in case of M/s Sushee Hi-tech Constructions Pvt. Ltd V/s. DCIT (ITA Nos. 269 and 1165/Hyd/2009 and ITA No. 1171/Hyd/2010 dated 16th March, 2012 submitted that the assessee is not required to be the owner of the infrastructure facility for availing deduction u/s 80IA (4) of the Act. Relying upon the same decision, it was further submitted that the assessee has to fulfill any one of three conditions i.e., (i) developing (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility could be entitled to claim deduction 80IA(4). The learned AR vehemently contented that the assessee in fact is involved in all stages of development like designing, execution of all civil works like canal manufacture, testing at manufacture works etc. It is entitled to claim deduction u/s 80IA (4) of the Act. The learned AR also relied upon the following decisions in support of his contentions:-

i) Income-tax Appellate Tribunal, Hyderabad Bench "B" in the case of GVPR Engineers Limited V/s. ACIT and vice versa in ITA Nos. 347/Hyd/2008 and 17 other appeals dated 29-2-2012.

ii) Order of Income-tax Appellate Tribunal Chennai B- Bench in ACIT V/s. Chett5inad Lignite Transport Services (P) Ltd./ in ITA Nos. 1312 and 1313/Hyd/2011 for the assessment years 2007-08 and 2008-09 dated 18-11-2011.

iii) order of Income-tax Appellate Tribunal Chennai Bench "C" in ACIT V/s. RR Constructions in ITA No.2061/Mad/2010 for the assessment year 2007-08 dated 3-10-2011.

iv) Order of Jaipur A Bench of Income-tax Appellate Tribunal in Om Metals Infra Projects Limited V/s. CIT in ITA Nos. 722

and 723/JP/2008 for the assessment years 2003-04 and 2004-05 dated 31-12-2008.

v) Order of ACIT V/s. Bharat Udyog Ltd. (123 TTJ 689)

vi) Order of Income-tax Appellate Tribunal Mumbai "F" Bench in Patel Engg. Ltd. V/s. DCIT in ITA Nos. 1221/Mum/2004 for the assessment year 2000-01 dated 22nd June, 2004 (94 ITD 411).

5. The learned Departmental Representative supporting the order of the revenue authorities submitted that the assessee has executed the work mainly as a contractor and hence he is not entitled to avail deduction u/s 80IA(4) of the Act.

6. We have heard rival submissions and perused the material on record. We have also applied our mind to the decisions citied before us. Section 80IA(4) allows deduction to an enterprise carrying on business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility if the following conditions are fulfilled.

a) The enterprise is owned by a company registered in India or by a consortium of companies

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

© It has started or starts operating or maintaining infrastructure on or after 1st of April, 1995.

7. A plain reading of the aforesaid provision makes it clear that the enterprise has to undertake any one of the three activities i.e., developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility. It has to be owned by a company or consortium of companies. The revenue authorities held that the assessee is not entitled to avail exemption u/s 80IA (4) as it has not undertaken all the three activities and it is not the owner of the infrastructure facility. For coming to such conclusion the CIT (A) has also relied upon the decision of Income-tax Appellate Tribunal, Mumbai Special Bench in the case of M/s. B.T. Patil and Sons (supra). The co-ordinate Bench of the Tribunal in the case of Sushee Hi Tech Constructions (supra) after taking into account the decision of the Income-tax Appellate Tribunal, Special Bench in the case of B.T. Patil (supra) and also taking into consideration the subsequent amendment to section 80IA(4) held that an enterprise which undertakes any one of the three activities viz., developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility would become eligible for deduction u/s 80IA(4) of the Act.

8. The co-ordinate bench in the said decision further held that for availing deduction u/s 80IA (4) of the Act the assessee need not be the owner of the infrastructure facility. The only requirement under clause (1) (a) of section 80IA (4) is that the enterprise which is executing the work should be owned by a company. In view of the clear statutory language and the ratio laid down by the co-ordinate bench in case of M/s Sushee Hi Tech Construction Private Limited V/s. DCIT (supra), claim of deduction u/s 80IA (4) cannot be denied on the ground that

the assessee has not carried out all the three activities and it is not an owner of the infrastructure facility. However, it is further evident from the orders of the revenue authorities that the claim of deduction also has been disallowed on the ground that the assessee has not executed the work as a developer but has acted merely as a contractor. In this context, the learned AR has vehemently contended that the assessee has not acted merely as a contractor but was involved in planning, designing, manufacturing and all other ancillary and incidental activities of executing the project as per the terms of the contract. In this context, the learned AR also submitted that the revenue authorities have not examined the contract properly before coming to their conclusion. After going through the orders of the revenue authorities, we find that the Assessing Officer has treated the assessee as a contractor merely because the agreement between the assessee and the government reads as contract agreement and Suptt. Engineer representing the AP Government is mentioned as the employer and the assessee is mentioned as a contractor. The CIT (A) has also endorsed such a view by observing that the assessee is not involved in the planning and development of infrastructure. However, before coming to such a conclusion, the contract has to be read in its entirety for finding out the true nature and scope of the work which in our view has not been done in the present case. The co-ordinate bench in the case of M/s Sushee Hi Tech constructions Private Limited (supra) after considering several other decisions of the Income-tax Appellate Tribunal held in the following manner:-

> **"..........The assessee should not be denied the deduction u/s 80IA of the Act as the contracts involves, development, operating, maintenance, financial involvement and defect correction and liability period, then such contracts cannot be**

> **called as simple works contract. In our opinion the contracts which contain above features to be segregated and on this deduction u/s 80IA has to be granted and the other agreements which are pure works contracts hit by the explanation section 80IA (13), those work are not entitled for deduction u/s 80IA of the Act. The profit from such contracts which involves development, operating, maintenance, financial involvement, and defect correction and liability period is to be computed by assessing officer on pro-rata basis of turnover. The Assessing Officer is directed to examine and grant deduction on eligible turnover as directed above."**

As would appear from the aforesaid observations made by the co-ordinate bench, an assessee is entitled for deduction u/s 80IA (4) of the Act if it develops the infrastructure facility. However, the assessee has to show that it has actually carried on development of the infrastructure facility cumulatively with all the activities of design, development, engineering,. Construction, maintenance, financial involvement, defect correction and such other ancillary and incidental work connected with the development of the project. The assessee has to establish by producing evidence on record that it has developed the project and has not executed the work merely as a contractor. Since these aspects have not been looked into properly, we are inclined to remit the matter back to the Assessing Officer who shall examine the issue afresh after considering the contract documents in its entirity and all other evidences that may be submitted by the assessee. If the assessee is able to establish the fact that it itself has carried out the development of the infrastructure facilities along with design, development, operation and maintenance, financial involvement, defect correction of the contract during the warranty period, then such contract should be considered as a development of infrastructure facility executed by the assessee and claim of deduction u/ 80IA (4) should be allowed. Accordingly, we set aside the order of the CIT (A) and direct the Assessing Officer to decide the issue afresh keeping in view the observations made by us hereinabove. The Assessing Officer shall afford a reasonable opportunity of being heard to the assessee before the final order is passed.

9. In the result, the appeal filed by the assessee i.e. ITA No.517/Hyd/10 is treated as allowed for statistical purposes.

It is in this backdrop that we deal assessee's appeal ITA No.496/Hyd/2018 for Assessment Year 2006-07 as the lead case.

3. Mr. Afzal next took us to the Assessing Officer's consequential second round order dt.28.2.2014 reiterating the impugned section 80IA(4) deduction disallowance of Rs.2,85,67,175 as follows :

----Space left intentionally-------

M/s NEC NCC MAYTAS
A.Y.2006-07 r.w.s

2. For the A.Y.2006-07, assessee filed its return of Income on 31.10.2006 admitting NIL taxable income after claiming deduction u/s 80IA at Rs.2,85,67,175/-. Assessment u/s 143(3) was completed on 28.07.2008, denying the deduction claimed u/s 80IA. Income was accordingly assessed at Rs. 2,85,67,175/-. CIT(A)-Tirupati upheld the assessment vide appellate order dt. 15.01.2010 in ITA No. 353/Tr/ACIT-6(1)/Hyd/CIT(A)/TPT/09-10. On further appeal by assessee, ITAT Á'Bench, Hyderabad, vide its order dt. 08.03.2013, in ITA No. 517/Hyd/10, held that "on consideration of the contract documents and other evidences, if ultimately it is found that the assessee itself has carried out the development of infrastructure facility cumulatively with the activities of drawing, designing, constructing and maintaining with financial involvement and defect correction of contract during the warranty period, then the assessee would be entitled to claim deduction u/s 80IA(4) of the Act". Accordingly, fresh notice u/s 143(2) dt. 02.08.2013 was issued along with show cause letter. In response, assessee submitted the details called for, vide letter filed by it on 14.02.2014.

3. Arguments made by assessee are summarized as under :

a. The scope of work in connection with the infrastructural facility includes 'design and execution'. Title of tender document shows that it is for design and development. Design of all civil works, design of all electro-mechanical works have to be drawn by assessee.
b. Contract is an EPC contract on turn-key basis.
c. Assessee is liable for all risk factors.
d. Assessee is eligible for deduction as per CBDT Circular dt. 18.05.2010.

4. Assessee's contentions are considered and discussed below.

5. During the year under consideration, the company has carried out execution of contract work of Lift II - stage 1 and 2 pumping stations of Bhima Lift Irrigation scheme at Thirumalayapally & Kothakota village of Kothakota mandal, Mahaboobnagar district, Andhra Pradesh. The work was allotted by the Project administrator & Superintending Engineer, BLIP Circle, Pebbair, Mahaboobnagar district. To evaluate the eligibility u/s 80 IA (4), the agreement entered by the

assessee with the PA & SE, BLIP Circle, Mahaboobnagar District, is examined, leading to the following analysis.

a. The agreement is titled as 'contract agreement'.
b. The authority that awarded the contract is termed as 'Employer' and the recipient of the contract is termed as 'Contractor'.
c. In the letter submitted by the assessee to the PA & SE, BLIP Circle, furnishing the price schedule, it was referred to as 'work'.
d. The 'work' was awarded to the assessee on the basis of successful 'bidding' of 'tender'.
e. Bidding for tender work was done by many companies including the assessee.
f. The agreement refers to the assessee as merely a contractor executing the works awarded to it, but not as a developer.

6. From the above, it is clear that the nature of work done by assessee is in the nature of 'works contract', but not development. At this point, it would not be out of place to dwell upon the eligibility for deduction vis-à-vis legislative intention behind the Section.

7.1 The Budget Speech for 1995-96 which was delivered by Sri Manmohan Singh, then Minister of Finance, on 15th March, 1995, has set the tone for private sector participation in accelerated development of infrastructure in India, which was, hitherto, in the domain of the public sector only. The relevant point is extracted as under :

> "56. *Inadequate infrastructure is a key constraint to our economic progress. In order to promote expansion of quality infrastructure, I propose to allow a five-year tax holiday for any enterprise which builds, maintains and operates infrastructure facilities in the area of highways, expressways and new bridges, airports, ports and rapid mass transport systems. This tax holiday will be available to enterprises which commence operation after 1st April 1995.*"

7.2 The need for drawing private sector in development and operation of infrastructure facilities in a comprehensive fashion was necessitated by the huge capital investment that these projects demand; and realization that government's funds and expertise would alone not suffice. The need was felt to offer incentives to offset the long gestation period and a certain amount of risk associated with such capital intensive projects. For this purpose, the concepts of BOT(Build – Operate – Transfer), BOOT (Build – Own – Operate – Transfer) and BOLT (Build – Own – Lease – Transfer) have been adopted from the United Nations Industrial Development Organization (UNIDO), which is primarily concerned with the development of infrastructure facility in the third world countries for boosting their economic development. As a part of the incentive package, a concession in the form of deduction in incometax was envisaged.

7.3 It is important to appreciate the transformation that is intended to infrastructure development scenario in India as an offshoot of 80IA deduction. Previously, public infrastructure facilities were developed by the 'Public Works Departments (PWD)' or specially designated bodies carved out for this purpose. In turn, the PWD used to sub-contract the works to private participants. **To that extent, private participation was in existence even before this deduction**. The difference that this deduction sought to bring is that the private sector was given impetus not to relegate itself to mere sub-contract work, but to take up infrastructure projects **in toto**, right from mobilization of funds to EPC (Engineering, Procurement and Construction) and thereafter operating and maintaining the facility, in the process levying a user charge like toll tax and getting back its investment with a decent return, all on its own. The private sector was essentially required to take up combined roles of fund-raiser, builder and operator. The incentives are necessarily in recognition of this larger and comprehensive role of the private sector.

7.4 The deduction was therefore, never intended to be allowed to companies who simply build the whole or part of the facility with the resources provided by the government. **It was never the intention to block the government funds in infrastructure project and still grant deduction u/s 80IA.** The concept of 80IA

M/s NEC NCC MAYTAS JV
A.Y.2006-07 r.w.s 254

was based on a mix of 'builder cum operator' who could develop the infrastructure facility and later recover its cost by operating the same. The concession is essentially granted in recognition of the intensive capital investment made by the private company so as to enable it to recover the costs and make profit for a limited period, before transferring the facility to the government.

7.5 From the above, it can be seen that the assessee does not qualify for deduction. The reasons are elaborated as under :

a. **Nomenclature used in work order** :

The agreement is termed as 'contract agreement'. In the definition clause, the nomenclature adopted shows that assessee is termed as 'hereinafter called the "contractor"'. This shows that the assessee is only executing the works in the status of a contractor.

b. **Nature of agreement :**

The agreement is termed as 'contract agreement' but not development agreement. The authority awarding the contract, have called for tenders and awarded the tenders on the basis of highest bid amount / negotiation. Accordingly, the work order has been issued to the assessee.

c. **Nature of work is 'execution', but not development :**

The work order mentions the specifications of the work to be completed, the contract amount, the stipulated time for completion of works and other miscellaneous conditions. The vocabulary and terminology of the above agreements clearly indicate that the assessee is only a Contractor who is awarded a work to be executed for a certain price, as per the specifications and designs mandated by the Employer. The assessee is required to merely 'execute' the work, within the stipulated period, subject to the specifications.

The Oxford Dictionary gives the meaning for the word 'execute' as to carry out a work or an order. The work carried out by the assessee clearly

falls under this meaning. In view of the above, the assessee is to be treated as merely a works contractor.

The specifications are generated by the government authority and the assessee is required to merely execute the work as a contractor. It is to be noted this is akin to the works previously granted by the PWD, but not in the form of a comprehensive BOT or BOOT model.

d. Nature of risks borne :

Risk can be explained as exposure to the possibility of loss, injury, or other adverse or unwelcome circumstance; a chance or situation involving such a possibility. Entrepreneur is besotted with plethora of risks in the business environment.

In general parlance, business risks can be classified by the influence of two major risks: internal risks (risks arising from the events taking place within the organization) and external risks (risks arising from the events taking place outside the organization).

Internal risks arise from factors (endogenous variables, which can be controlled) such as human factors (talent management, strikes), technological factors (emerging technologies), physical factors (failure of machines, fire or theft), operational factors (access to credit, cost cutting, advertisement). External risks arise from factors (exogenous variables, which cannot be controlled) such as economic factors (market risks, pricing pressure), natural factors (floods, earthquakes), political factors (compliance and regulations of government).

The nature of various business risks and the assessee's exposure to them are examined :

i. Strategic risk : Entrepreneur scouts the business environment for business opportunities and embarks upon business

A.Y.2006-07 r.w.s 254

adventure, depending upon his proven capabilities and potentialities. Uncertainty with regard to all of the internal and external risks sampled above, renders the goalposts hazy and brings in a strategic risk to be alleviated through prudent planning. In this case, there is no uncertainty whatsoever. The project is offered in a basket of predesigned specifications, and the goalpost is clear – to execute the project according to laid down specifications, commission the project, render basic maintenance. There is no element of strategic risk whatsoever.

ii. Operational risk : It consists of two dimensions :

a. Process management factors like nature of technology to be utilized, production and engineering aspects impart a dimension of operational risk. The business is concerned with technology decisions, as to what technology should be sourced and erected in his production shopfloor and administrative process/establishment, its maintenance and periodic updation and tuning to the changing needs of the business, without falling prey to obsolescence. While many corporations have had to bear the brunt of technological mismatch and obsolescence, there is no such risk in this case. The assessee's operations are specific to a work order with set specifications, including technological and engineering parameters, thus insulating from operating risk of this dimension.

b. Another dimension of operational risk can be viewed from the Basel II framework on operational risks, which lists factors such as internal frauds, external frauds, employee practices, damage to business assets, business disruptions and system failures, execution, delivery and process management. These are risks endemic to any

business in general and do not warrant specific support from the government in the form a tax holiday.

iii. Market risk : Market risk encompasses the milieu of buyers and sellers interacting to buy and sell goods and services, changes in supply and demand, competitive structures, marketing research for target market study, market segmentation and product positioning, buying behavior, selling and distribution management, retail and wholesale logistics, advertisement, brand management, media relations etc. These issues *per se* do not make a case for tax holiday because they are borne by all businessmen and not those in infrastructure field alone. But it is interesting to note that instead of bearing such risks, the assessee in his line of business, enjoys an advantage, because it is not being bothered by any of these issues as the assessee is only concerned with a singular customer, sans any marketing effort. The JV itself is formed by its partners viz., Navayuga Engineering Company Ltd., Nagarjuna construction Company & Maytas, with the express intention of executing the work awarded. Each of them had proven capabilities in the area of operation and have together joined hands and won the project by participating in the bidding. There is no other marketing activity and mere participating in the bidding cannot be termed as a market risk. There is clearly no case for tax holiday on this count.

iv. Finance risk : Finance risk brings within its ambit, investment risk, credit risk, liquidity risk etc. Businessman confronts his investment decisions with optimum leveraging of debt and equity. In the process, he needs to ensure reasonable rate of return for the equity investor and sufficient margins to match timely interest outgo. In this case,

a. There is no initial investment other than the Earnest Money Deposit (EMD), which is sourced by the JV partners.

b. There is neither equity capital nor debt raised from financial institutions. So, investment risk is absent.

c. Mobilization advance is given to the JV in the initial stages, and also periodically from time to time.

d. The assessee has no capital investment in machinery/fixed assets. Even for the capital investment by the partners and for working capitai, sourcing is done through mobilization advance.

e. Further, the assessee is in receipt of bill-to-bill payments from time to time. So, there is no credit risk or liquidity risk.

f. Any amount of financial risk due to external reasons beyond the control of the assessee is further nullified by the presence of cost escalation clause in the agreement.

In view of the above, as the assessee has no financial risk, it has no justification to be compensated by a tax holiday.

v. Human Resource risk : In any business enterprise which runs as a going concern, the realm of HR activities spreads over the domains of recruitment, placement, training, performance appraisal, rewarding, succession planning, labour relations & dispute resolution etc. In the assessee's nature of business of executing a specified works contract, the human resource function commences with engaging labour on wages basis and technicians on consultancy or short term appointment basis, and ends with completion of the contract work. After the completion of project, the entire human resource establishment just winds up except for maintaining a lean structure of office personnel for secretarial and accounting works. In this regard, the assessee's

COPY

human resource management endeavor is less than in conventional businesses and does not form a ground for seeking tax holiday.

e. **Infrastructure facility should begin to operate :**

As per Sec 80IA(2), "..*the deduction can be claimed by an assessee for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or enterprise develops and begins to operate any infrastructure facility*..." The conjunctive word 'and' used between 'develops' and 'begins to operate' shows the legislative intent that the 'operations' are an integral component of the whole, which cannot be delinked.

It can be seen from above that the deduction can be claimed by an enterprise which develops **and** begins to operate any infrastructural facility. It is clear therefore that the deduction is inextricably connected to the commencement of operations of the infrastructural facility. It follows that the deduction is available only on the income generated by the facility subsequent to commencement of its operations, such as toll revenues etc., but the work contract margins realized on mere execution of the contract cannot justify for the deduction claim. In this case, the revenues are singularly from release of running bills from time to time towards work executed as per specifications, but not on account of income derived from operation of such facilities.

f. **Gestation period :**

The short term nature of the work rules out any long drawn gestation period. This makes it evident that the assessee bears no risk at all, which precludes it from any justification for tax concession.

g. **Role in designing :**

One of the parameters that can be employed to judge the difference is whether the assessee is involved in design and execution or merely execution

based on instructions. In this case, the assessee has no role in generating design. The specifications are predetermined by the time the bidding commences and the assessee is required to merely execute the work as per the specifications which form a part of the bid inviting document. Therefore, the assessee has no role in designing. The assessee's role is limited to execution as per instructions.

h. Whether the work executed can be called as an 'infrastructural facility'.

It is seen whether the work undertaken by assessee can qualify to be called as 'irrigation project' in the first instance and thereby, as an infrastructure facility. The term 'irrigation project' has not been defined in the Act. The words 'irrigation' and 'project' have general meanings, but the term 'infrastructural facility' being an 'irrigation project' connotes a comprehensive project with independent existence capable of standalone functionality. The facility has to be conceived in its totality because part of the infrastructure facility has no existence independent of the whole.

In this case, assessee is undertaking execution of a piece of work in 'Bhima Lift Irrigation Scheme'. A table showing division of work into various packages that were awarded to various contractors, are shown in the next two pages. As seen from the table, the Scheme consists of various phases, which were awarded to different contractors.

Table

PKG No.	Description	Awarded	Bid Amount Rs. in Crs.
13	Excavation of High level right main canal, distributary system including construction of CM & CD works from Sangambanda BR to feed ayacut of 18400 Acres.	M/s. R.M.M. & BRC (JV)	57.97
14	Excavation of High level left main canal, distributary system including construction of CM & CD works etc. to feed an ayacut of 35,800 Ac. Under Sangambanda BR	M/s. VPR-Cromandal (JV)	68.94

15	Investigation, design, estimation and excavation of canal distributary system including construction of CM & CD works from Yenukunta BR, Waddewata (V), Kottakota (M), Mahabubnagar (D) to feed about 14,000 Acres upto Rangasamudram BR.	M/s. Prathibha-Ch MR (JV)	51.270
16	Excavation of canal distributary system – including constrction of CM & CD works from Ranga Samudram to feed an ayacut of 21,000 Acres	M/s. RNS-GSR & CO (JV)	70.800
17	Investigation, design, estimation and execution for converting the existing Rangasamudram tank, near Sri Rangapuram (V) Pebbair (M), Mahabubnagar district as balancing reservoir under Bhima Lift Irrigation Project (Lift-II)	M/s. ALS-KVR (JV)	41.540
18	Investigation, design, estimation and execution for convesting the existing Shankarasamudram tank, near Knaipally (V) Kothakota (M), Mahabubnagar district as balancing reservoir under Bhima Lift Irrigation Project (Lift-II)	M/s. Sri Avanthi Saivenkata (JV)	42.100
19	Shankara Samudram Balancing Reservoir Right Main canal.	M/s. G.H. Reddy & Associate K.K.R & Co (JV)	36.90
20	(i) Formation of Earth Dam with FRL +352m (ii) Construction of spillway, (iii) Construction of Head Regulator to let out into left and right main canals. Budpur Balancing Reservoir	M/s. KNR-SLEC (JV)	36.98
21	Investigation, Designs and excavation of left main canal, distributary system including construction of CM & CD works from budpur Balancing reservoir, Budpur (V), Atmakur (M), Mahabubnagar (D) to feed about 32,000 Acres	M/s. S.V.E.C. Co.,	60.39
22	Investigation, Designs and excavation of right main canal, distributary system including construction of CM & CD works from budpur Balancing reservoir, Budpur (V), Atmakur (M), Mahabubnagar (D) to feed about 32,000 Acres	M/s. S.V.E.C. Co.,	26.73
27	Investigation, Design, excavation of left main canal, distributary system including construction of CM & CD works from Sankarsamudam Balancing Reservoir	M/s. KNR Const. Ltd. & BPL (JV)	149.40

OC	**LIFT-I :** Design, manufacture, supplying & erection of pumps, motors, electro mechanical works, including tunnel, cistern and pump house etc.	M/s. Patel Engg. Ltd.	383.349
OC	Design and execution of Stage-I and stage-II pumping stations of **LIFT-II** at Thirumalayapalli & Kothakota (M), Mahabubnagar (D) on EPC basis.	M/s. NEC-NCC-MAYTAS (JV)	391.55
	TOTAL		**1417.919**

It can be seen from above that assessee is merely executing a piece of work at at Kothakota Mandal, Mahabubnagar district (Package numbered as 'OC'). Assessee's work is a segment of Bhima Lift Irrigation Scheme, the details of which are represented in table extracted in the previous pages.

As seen from the table, the assessee's work is partial and sectional in nature. It is incapable of becoming operational without reference to the rest of the project, of which it is only a part. It has no independent existence capable of commencement of operations by itself, or to qualify as larger infrastructural facility. Therefore, the work being executed by the assessee cannot be termed as 'infrastructural facility'.

i. Classification in Form 10 CCB :

The assessee claimed in Column 14 of Auditor Report in Form no. 10CCB that with respect to the infrastructure facility, the enterprise is engaged in development, operation and maintenance. The terms "develop, operate and maintain" have a particular connotation. An enterprise is said to operate and maintain a particular facility only if it runs the facility for an extended period of time subsequent to building it. Petty maintenance work during the period of building a facility is incidental to any contract work and does not qualify as operation and maintenance for the purpose of Section 80 IA. It is necessary to own the particular facility for a substantial period of

time, then operate and maintain that facility subsequently and finally transfer back the asset. This part of operation and maintenance envisages a levy of user charge for the asset, like toll tax etc., which the developer will collect for a period of time until his investments are paid back. This provision is intended to draw private investments into the domain of public expenditure and ensure that the investor is paid back within a reasonable period of time.

Further, it is the 'profit' from such operations which is subject matter of deduction u/s 80IA. The fact that an enterprise is entitled to choose any ten out of 15 years shows that the legislature recognized that there may not be any profits in the first few years of development and operation. A simple contractor or builder is not required to wait for operation of infrastructure facility. His role ends with the completion of structure stipulated under the contract. But the role of the developer continues, as he has to recover his investments and costs. In order to recover his costs, the enterprise has to operate it and realize returns from it.

From the above, it is amply clear that the benefit of deduction was meant by the legislature to be extended only to those private enterprises which developed infrastructure facilities in the enhanced role of a developer, but not merely as a 'works contractor'.

j. Non-relevance of Board Circular no. 4/2010 dt. 18.05.2010 :

Assessee referred to Board's Circular no. 4/2010 dt. 18.05.2010 in its support. It is clarified that the said circular is not relevant to the assessee as the Circular answered a specific reference as to whether widening of existing roads constitutes creation of new infrastructure facility. The assessee's contract work is not related to widening of existing roads, and hence the Circular has no bearing in this case.

---

k. Revisiting legislative intention :

In para E above, the legislative intention behind the insertion of 'Section 80IA' in the statute has been discussed. The legislative intention behind insertion of 'Explanation to Section 80 IA' vide Finance Act 2007, with retrospective effect can be seen from the 'MEMORANDUM EXPLAINING THE PROVISIONS IN THE FINANCE BILL 2007', wherein its purpose and ambit has been discussed as under:-

'Clarification regarding developer with reference to infrastructure facility, industrial park etc. for the purposes of Section 80IA interalia, provides for a ten year tax benefit to an enterprise or an undertaking engaged in development of infrastructure facilities, industrial parks and special economic zones.

The tax benefit was introduced for the reason that industrial modernization requires a massive expansion of and qualitative improvement in infrastructure (viz. expressways, highways, airports, ports and rapid urban rail transport systems) which was lacking in our country. The purpose of the tax benefit has all along been for encouraging private sector participation by way of investment in development of the infrastructure sector and not for the persons who merely execute the civil construction work or any other works contract.

Accordingly it is proposed to clarify that the provisions of section 80-IA shall not apply to a person who executes a works contract entered into with the undertaking or enterprise referred to in the said section. Thus in a case where a person makes the investment and himself carries out the development work i.e. carries out the civil construction work, he will be eligible for tax benefit under section 80-IA. In contrast to this a person who enters into a contract with another person [i.e. undertaking or enterprise referred to in section 80-IA] for executing works contract, will not be eligible for the tax benefit under section 80-IA.

This amendment will take retrospective effect from 1st April, 2000 and will accordingly apply in relation to the assessment year 2000-2001 and subsequent years'.

The explanation seeks to clarify that only a certain class of developers who take investment risk and create infrastructure facilities are eligible for the tax benefit, as opposed to work contractors who are not eligible. More

specifically, this explanation seeks to restrict indiscriminate use of the tax benefit by non-deserving enterprises.

8. In view of the above, the assessee company is not 'developing, operating and maintaining' the infrastructure facility, as claimed in the Form 10 CCB, but it is only executing the work for completion of the said infrastructure facility as a contractor. The assessee was merely issued work order by an authority of state government. The assessee company is one among the contractors who successfully bid the piece of work notified by the State Government. The ownership of the asset created rests with the State Government awarding the contracts and the assessee company is merely carrying out work as per designs and specifications provided. The work executed is only partial and sectional and cannot be termed as an independent facility. There is no component of 'design' of the project by the assessee and its activities do not span the comprehensive basket of activities that characterize 'develop, operate and maintain'. The presence of multi-dimensional entrepreneurial risks that would warrant tax fillips, is conspicuous with its absence. Further, with the amendment to Explanation of Section 80IA with retrospective effect in Finance Act 2009, any vestiges of doubt are thoroughly dispensed with, and the ineligibility of the assessee for the said deduction cannot be overemphasized.

9. **Clinching reason specific to this case :**

9.1 In the present case, assessee i.e., the JV entered into an agreement dt. 04.11.2004 with its constituent members i.e., Navayuga Engineering Company Ltd., Nagarjuna construction Company & Maytas (referred to, in agreement, as parties). According to terms of agreement,

a. The scope of work of the individual parties of the Joint Venture for execution of the 'work' shall be distributed as under, including price escalation, additional items, claims etc :

Navayuga	:	50 %
NCC	:	25 %
Maytas	:	25 %

b. The JV shall retain 4 % of the gross value of the IPCs(less TDS) which shall be apportioned to the members in the ratios mentioned in the main agreement.

9.2 Following observations are drawn from the above facts:

a. The entire work (100 %) has been awarded by JV to the three parties on back to back basis.
b. There is no component of any part of work undertaken by JV on its own, at all.
c. JV has a risk free rate of 4 % margin on the work bills.
d. In various appellate orders passed by the jurisdictional Tribunal, it was held that main parameters that assessee would require to have undertaken, to qualify for the deduction would be activities of design, development, operation, maintenance, financial involvement, defect correction. In the case of Maytas NCC for the AY 2006-07, the ITAT categorically stated in para no. 7 of its order dt. 31.12.2012 in ITA No. 1040/Hyd/2009 that *"in the event that assessee itself carried on the development of infrastructure facilities/contract along with design, development, operation, maintenance, financial involvement, defect correction of the contract during the warranty period, then such contract to be considered as a development of infrastructure facility executed by the assessee and thereby eligible for deduction u/s 80IA of the Act."*
e. From the back-to-back nature of the works contract, it is very clear that JV **has not carried on** the above activities.

9.3 In such a factual context, JV cannot be treated as an enterprise which is carrying the work of 'develop, operate and maintain the infrastructure facility' as was claimed in Form 10CCB.

As the assessee failed to satisfy the conditions laid down for Section 80 IA (4), the deduction claimed of **Rs. 2,85,67,175/-** is disallowed and added back to the income chargeable to tax.

The CIT(Appeals) admittedly confirmed the Assessing Officer's action. This is what leaves the assessee's aggrieved. Mr. Afzal vehemently submitted during the course of hearing that both the lower authorities' have erred in law and on facts in disallowing assessee's 80IA(4) deduction claim despite the fact that it has developed the impugned infrastructure facilities. He has further filed a detailed written synopsis summarizing assessee's arguments as under :

" 1. The assessee herein is a Joint Venture Maytas NCC JV. The Joint Venture is a Consortium of Maytas Infra Ltd. (Presently known as IL & FS ECC Limited) and Nagarjuna Construction Company Limited (Presently

known as NCC LIMITED) and engaged in development of irrigation projects which are defined as infrastructure facilities. During the financial year 2005-06, the assessee undertook 6 different infrastructure facilities being irrigation projects. The details of the projects eligible for deduction u/s 801A are mentioned at page 18 of the paper book.

2. The assessee submits that it is a consortium of companies. It enters into agreements with State Government; the State Government allotted the work of development of irrigation projects and the income thereon is eligible for deduction u/s 801A (4) of the I.T.Act. Accordingly, the assessee filed the return of income admitting NIL income.

3. The assessment was originally completed u/s 143(3) of the I.T.Act on 18.11.2008 denying the deduction claimed u/s 80IA of the Act. The learned Commissioner of Income Tax (Appeals) vide order dated 15.06.2009 dismissed the appeal filed. On further appeal filed before the Hon'ble Income Tax Appellate Tribunal, the Hon'ble ITAT vide order in ITA No.1040/Hyd/2009 dated 31.10.2012 set aside the issue to the filed of the Assessing Officer. The directions are at para 7, page 9 of the order of the Hon'ble ITAT.

4. The Assessing Officer completed the reassessment u/s 143(3) rws 2S4 of the LT.Act on 26.03.2014 and rejected the claim for deduction u/s 80IA of the Act. The Assessing Officer in the assessment order mentioned that -

a) the entire project is not executed by the assessee and only part of the project was undertaken;

b) the infrastructure facility was not operated by the assessee and the assessee did not commence the operating and maintenance and, therefore, failed to justify the crucial condition.

c) The Assessing Officer is of the view that the infrastructure facility should be owned for a substantial period with a condition that the assessee should be eligible to operate and maintain.

d) As the intent of the government is not to grant deduction u/s 80IA and also block its funds in developmental activities, the Assessing Officer rejected the claim for deduction u/s 80IA of the Act.

5. Before the learned CIT (A), a detailed submission was made a copy of which is available at page No. 18 & 19 of the paper book. The learned CIT (A) observed as under:

6. At paras 7.0 and 7.1, the learned CIT (A) held that for being eligible for deduction u/s 80IA, it is enough if any of the three conditions i.e. developing or operating and maintaining or developing, operating and maintaining is fulfilled.

7. At para 7.2, the learned CIT (A) referred to the decision of the Hon'ble ITAT, Mumbai bench in the case of Patel Engg. Co. vs. DCIT reported in 94 lTD 411 and held that it is enough if the appellant develops infrastructure facility for becoming entitled for deduction u/s 80IA of the Act.

8. At para 7.4 the learned CIT (A) refers to the decision of the Hon'ble High Court of Bombay in the case of ABG Heavy Industries and held that though the assessee develops only part of the infrastructure facility, it does not bar the assessee from claiming deduction u/s 80IA.

9. At para 7.6, the learned CIT(A), refers to the order of the CIT (A)-4, Hyderabad and held that the works executed by the assessee are not simple works contracts but they are the development of infrastructure facility. The learned CIT (A) also extracted the relevant portion of the order of the CIT (A)-4, Hyderabad.

10. Against the said decision, the Department is in appeal before the Hon'ble Income Tax Appellate Tribunal."

5. Mr. Afzal also took pains to place on record the assessee's twin sheets containing architectural design of stages I and II of Bhima Lift Irrigation Project containing "design and execution of all civil works like canal approach to the tunnel, tunnel, surge pool pump house, delivery mains, etc." His case in light of the assessee's stand adopted throughout and in view of the detailed voluminous Paper Books comprising of agreement clauses to this effect is that it is in fact the assessee who has developed the relevant infrastructure facility defined in section 80IA(4) Explanation (c) of the Act and therefore, we ought to adopt liberal construction only so as to reverse the learned lower authorities' action

making the impugned disallowance. He has also filed a case law paper book running into 93 pages to be precise containing the following judicial precedents :

1. [2005] 94 lTD 411 (Mumbai) Hon'ble IT AT Mumbai Bench "F" in the case of Patel Engg Ltd Vs Dy Commissioner of Income-Tax .
2. Hon'ble ITAT Mumbai Bench-F order in the case of ACIT Vs Bharat Udyog Ltd.
3. [2010] 322 ITR 323 (Bombay) Hon'ble High Court of Bombay in the case of 10 -15 CIT, Central-II Vs ABG Heavy Industries Ltd.
4. Hon'ble ITAT Hyderabad Bench-"A" in the case of Koya & Co Constructions 16-22 (P.) Ltd Vs ACIT.
5. Hon'ble ITAT Ahmedabad Bench-D in the case of Sugam Constructions Pvt Ltd Vs ITO.
6. Hon'ble ITAT Pune Bench-B in the case of B. T. Patil & Sons Belgaum Constructions (P.) Ltd Vs ACIT.
7. Hon'ble ITAT Mumbai Bench-C in the case of ACIT Vs Pratibha Industries Ltd.
8. [2016] 76 Taxmann.com 105 (
Jammu & Kashmir) Hon'ble High Court of Jammu & Kashmir in the case of CIT Vs TRG Industries Pvt Ltd .
9. [2019] 107 Taxmann 362 (Madras) Hon'ble High Court of Madras CIT Vs Chettinad Lignite Transport Services Pvt Ltd
10. Hon'ble ITAT Hyderabad Bench-B in the case of Sushee Hi Tech Constructions Pvt Ltd Vs DCIT.
11. Hon'ble ITAT Rajkot in the case of Katira Constructions Ltd Vs ACIT.
12. Hon'ble ITAT Jaipur Bench-A in the case of Mis am Metals Infraprojects Ltd. Vs CIT-I, Jaipur.

6. Ld. CIT-DR Mr. VYST Sai represents the Revenue in the instant batch of cases. He has strongly supported both the lower authorities making the impugned section 80IA (4) disallowance as per the following written synopsis :

> *" The following synopsis of arguments made during hearing before the Hon'ble ITAT on 15.02.2021 is filed as directed by the Hon'ble ITAT on the date of hearing.*
>
> *1. It is submitted that this is a second round of litigation before the Hon'ble ITAT. In the first round, he Hon'ble ITAT, while setting aside the order of the CIT(A) , and*

directing the AO to decide the issue afresh, has directed that the assessee has to show that it has actually carried on development of the infrastructure facility cumulatively with all the activities of design, development, engineering, construction, maintenance, financial involvement, defect correction and such other ancillary and incidental work connected with the development of the project in relation to claim of deduction u/s. 80IA(4) of the Income Tax Act. The Hon'ble Bench has also directed examination of the issue that the assessee developed the project and not executed the work merely as a contractor.

2. It is submitted that neither before AO nor before the CIT(A), the assessee could establish that it has developed the project both in terms of entrepreneurial risk and financial involvement. Firstly, the assessee is a mere JV with no assets and no wherewithal to execute the project. As can be clearly seen from the JV Agreement, the work was distributed among the partners of JV who executed the work and are separately filing returns and are separately being assessed. When the assessee has not executed any work of the project and when the directions of the Hon'ble ITAT vide its order dated 8.3.2013 have been duly followed by the AO, there is no ground for the assessee to raise the issue again in the second round of litigation.

3. Secondly, the Hon'ble ITAT directed that it should be examined that whether the assessee has actually carried on development of the infrastructure facility cumulatively with all the activities of design, development, engineering, construction, maintenance, financial involvement, defect correction and such other ancillary and incidental work connected with the development of the project. The Hon'ble ITAT specifically mentioned that financial involvement of the assessee is also required for becoming eligible for claiming the said deduction vi] s 80IA. In this connection, it is clearly evident from the Paper Book (Vol.II-Pt-I) filed by the assessee that the assessee was paid mobilisation advance and monthly lump sum payments which are adjusted periodically against work done. It is further submitted that even for supply of electro mechanical and other equipment, payments are made on receipts of goods(70%) and installation (20%). These details are available at Clauses 3.15.1 to 3.15.6

> *(at pages 1-73 to 1-78) of the contract agreement of the assessee with the Government with respect to Bheema Lift Irrigation Project. From the detailed reading of the above said clauses, it is seen that the assessee is not the developer but the Government is the developer. The Government has assigned contract work to the assessee, made advance payments as well as monthly lumpsum payments. There is no financial involvement or entrepreneurial risk borne by the assessee.*
>
> *4. It is submitted that the letter and spirit of Section 80IA in general as well as Explanation to Sec.80IA introduced by Finance Act,2009 (w.e.f.1.4.2000) in specific, has been dealt in detail by the Hon'ble Gujarat High Court in the case of Katira Construction Ltd [352 ITR 513]. When there is no entrepreneurial risk and financial involvement, the entire project is developed by the Government and the assessee is merely a works contractor, the assessee is not be eligible to claim deduction ix] s 80IA (Specific reference is made to paras-27 to 36 of the above referred decision)*
>
> *5. Regarding the words "including Central Govt" in the Explanation which were added by the Finance Act,2009(w.e.f. 1.4.2000), it is submitted that the same are only clarificatory and the key factors of 'Entrepreneurial Risk' and 'Financial involvement' are mandatory even before the inclusion of said words in Sec. 80IA as well as Explanation to Sec.80IA of the Income Tax Act.*
>
> *6. In summary, it is humbly submitted that on both the aspects of executing of the work and entrepreneurial risk and financial involvement, the claim of the assessee falls flat and appeals filed by assessee may kindly be dismissed."*

7. Mr. Afzal has strongly reiterated the assessee's stand claiming itself as developer of the lift irrigation project in question.

8. We have heard the foregoing rival submissions qua the instant issue of section 80IA deduction. The assessee has admittedly claimed the same taking itself as the developer by court that a corresponding commercial project firm of "infrastructural facility" as per section 80IA(4) Expln.(c) covering "a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system" only.

Our attention has been invited to the corresponding project's architectural design (supra). The assessee has thereafter pleaded that it has undertaken the business risk not only in the development of the said lift channel forming part of the irrigation project which has turned barren uneven tracks of land to a canal but also it had deployed all of the corresponding plant and machinery, labour force followed by retention money's project thereby satisfying all the conditions of development of infrastructure facility.

All these assessee's arguments fail to evoke our concurrence for the reasons given hereunder.

9.1 The assessee's first and foremost plea that we ought to adopt liberal interpretation while considering section 80IA(4) claim in the light of relevant facts in the instant case deserves to reject. Suffice to say, such a course of liberal interpretation is no more available while dealing with the Income Tax Act's provisions as per honourable apex court's recent constitutional bench's decision in Commissioner of Customs (Import) Vs. Dilip Kumar and Co. (2018) 9 SCC 1 settling the law that a fiscal statute as well as an exemption clause incorporated therein ought to be construed in stricter parlance only. Their lordships make it clear that benefit of doubt in case of taxing provision goes to the tax payer and vice versa in an instance of an exemption provision. The assessee's first argument is rejected therefore.

10. We next examine the merits of the assessee's claim in light of section 80IA(4) r.w. Explanation (c) thereof. This is for the reason that the legislature has reintroduced the Explanation; formerly inserted by the Finance Act, 2007 w.e.f. 1.4.2007 that "For the removal of doubts, it is hereby declared that nothing contained in this section shall apply to a person who executes a works contract entered into with the undertaking or enterprise as the case may be," followed by its substitution by the Finance Act, 2009 w.e.f. 1.4.2000 that "for the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person (including the central or state government) and executed by the undertaking or enterprise referred in sub-section (1)."

11. Learned CIT-DR at this stage quoted ***Katira Constructions Limited Vs. Union of India and Others*** *(2013) 352 ITR 513 (Guj) upholding vires of the latter explanation that the same is purely explanatory in nature than*

amending the existing provision and therefore, the question of it being levying any tax with retrospective effect would not rise. It is thus explicitly clear that their lordships have held this latter explanation in the nature of a plain and simple one; neither adding nor subtracting anything to the earlier explanation, inserted vide Finance Acts, 2009 and 2007; respectively.

Learned CIT-DR further sought to pin point the fact that the latter explanation inserted vide Finance Act, 2009 w.e.f. ;1.4.2000 has rather covered a work contract as not entitled for the impugned deduction despite the fact that the concerned assessee satisfied all other conditions in sub-section (4) of section 80IA of the Act. We find force in Revenue's instant argument as the Finance Act, 2009 substitutes the earlier explanation that the same would not cover a works contract for the purpose of providing deduction qua industrial undertaking or enterprise engaged in infrastructure development, etc.

12. There is yet another equally important aspect which requires our apt adjudication at this stage i.e. of the clinching legislative expression in the latter explanation "nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person (including the central or the state government)". We note that honourable apex court yet another larger bench decision in ***Kartar Singh Bhadana Vs. Hari Singh Nalwa & Ors*** *Civil Appeal No.6931 of 2000 decided on 27.03.2001 had an occasion to deal with the expression "works" used in section 9-A of the Representation of People Act, 1951. Hon'ble court therein went by the shorter Oxford English Dictionary's meaning that "work means a structure or apparatus of some kind; an architectural or engineering structure, a building edifice. When it was used in the plural, that is, as works, it meant architectural or engineering operations, a fortified building, a defensive structure, fortification or any of the several parts of such structures". Their lordships also took note of honourable jurisdictional high court's judgment in* ***B. Laxmikantha Rao Vs. D Chinna Mallaiah*** *AIR 1979 AP 132 whilst adopting the dictionary meaning of "work" in foregoing terms. We further quote* ***Raghunath Rai Baraza Vs. PNB*** *(2007) 135 Company cases 163 (SC) that it is the cardinal rule of interpretation that words used by the legislature are to be understood in their natural, ordinary or popular sense or constructed as per their grammatical meaning unless such a construction*

lead to some absurdity or there is something in the context or in the object of the statute to the contrary.

13. We go by the foregoing observations of their lordships and observe that the stages I & II of the Bhima Lift Irrigation project undertaken by the assessee containing " all the civil works like canal approach to the tunnel, tunnel, surge pool pump house, delivery mains manufacturing, testing, inspection, packing, supply, erection and commissioning of electro mechanical and hydro mechanical equipment" indeed formed an architectural as well as engineering structure and therefore, amounts to an execution of a "works contract awarded by the state government" through its irrigation development only and covered u/s. 80IA Explanation incorporated in the Act by the Finance Act, 2009 w.e.f. 1.4.2000.

Learned CIT-DR at this stage invited our attention to page 18 in assessee's Paper Book II Part 1 that it had purely executed "works contract" only in view of the fact that the irrigation department had issued it mobilization advances on multiple occasions from time to time. He next took us to agreement clause 3.15 containing "contract price and payment" making it evident that the assessee had to be paid on "fixed lump sum monthly basis" only. And further that the assessee was entitled to get "fixed lump sum monthly instalment payments provided value of the work executed is more than or equal to the fixed lump sum monthly instalment as indicated in the agreement." The said agreement stipulated advance payments to the assessee qua supply of goods at the site. All these facts sufficiently indicate that the assessee, assuming that not accepting that it is the developer u/s. 80IA(4) of the Act, executed a works contract only under Explanation to section 80IA of the Act and therefore, not entitled for the impugned deduction.

14. The assessee next made a very strong endeavour to place reliance on a catena of case law (supra) including CIT Vs. ABG Heavy Industries Limited (2010) 322ITR 323 (Bom). We find that neither of these decisions deals with the interplay between the section 80IA(4) Vs. 80IA Explanation involving execution of works contract as is the factual position before us. The said case law distinguished, therefore.

15. Mr. Afzal's last argument seeks to buttress the point that such a strict interpretation employed in dealing with an instance of development of an infrastructure project would tantamount to closing the deduction chapter

altogether and more particularly, when this assessee has borne all risks and responsibilities of the lift irrigation project by paying reduction money and performance guarantee(s) as well. We hold that this last argument also fails to cut any ice since the assessee has merely performed a works contract and its retention money or the so called performance guarantee only gave an assurance to the irrigation development that it had carried out the corresponding construction etc. as per the specified design norms than involving any business risk. We accordingly hold the view of our independent appreciation of facts as well as assessment findings that the assessee is a contractor having executed works contract only.

16. We also deem it appropriate to quote Adam Smith's 'The Wealth of Nations' (published in 1776 and called as the founding work on modern economics) that " It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest."

17. Nevertheless, the same connotation applies in the facts of the instant case. It is clear that the assesseehas first of all been paid mobilization advances by the state government's department on periodic basis, and, then only it executed the corresponding lift irrigation project works contract followed by its yet another claim of section 80IA of the Act deduction (supra). We are afraid that such a liberal interpretation would amount to going against the stricter interpretation principle in view of honourable apex court decision (supra). We accordingly conclude both the learned lower authorities have rightly disallowed assessee's 80IA deduction claim involving varying sum(s) (supra) in their respective orders. The same stands confirmed. These assessee's appeals are dismissed therefore.

18. No other argument has been raised before us.

19. These assessee's appeals are dismissed."

We adopt the foregoing detailed reasoning *mutatis mutandis* to hold that the assessee's all three civil projects in question are in the nature of works contracts only with the state government's departments which duly stand covered under the statutory Explanation(s) inserted in Sec.80-IA vide Finance

Act, 2009 with retrospective effect from 01-04-2000. We therefore accept the Revenue's corresponding substantive grounds to this effect on merits. All of its remaining grounds (supra) stand rendered academic therefore. All these Revenue's four appeals ITA Nos.186 to 189/Hyd/2018 are partly accepted since involving identical question of law and on facts.

9. These Revenue's four appeals are partly allowed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open court on 28th February, 2022

Sd/-	Sd/-
(LAXMI PRASAD SAHU)	**(S.S.GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad,
Dated: 28-02-2022

TNMM

Copy to :

1.Deputy Commissioner of Income Tax, Central Circle-2(1), Hyderabad.

2.M/s.Indu Projects Limited, No.1009, Indu Fortune Fields, 13th Phase, KPHB Colony, Hyderabad.

3.CIT(A)-12, Hyderabad.

4.Pr.CIT-(Central), Hyderabad.

5.D.R. ITAT, Hyderabad.

6.Guard File.