

**IN THE INCOME TAX APPELLATE TRIBUNAL, KOLKATA 'D' BENCH,
KOLKATA**

Before **Shri S.S. Viswanethra Ravi, Judicial Member** and
Shri Dr. Arjun Lal Saini, Accountant Member

I.T.A. Nos. 693 & 694/Kol/2016

A.Ys 2011-12 & 2012-13

Assistant Commissioner of Income-tax..... Appellant

Circle-33, Kolkata
10B, Middleton Row
3rd floor
Kolkata-700071.

-Vs-

M/s. Simplex Meinhardt Joint Venture..... Respondent

PAN: AADAS 0500M
Simplex House
27 Shakespeare Sarani
Kolkata-700017.

Appearances by:

Shri Prabal Choudhury, JCIT, Id. Sr. DR for the revenue
Shri Ravi Tulsiyan, FCA, Id.AR for the assessee

Date of hearing: 14-03-2017

Date of pronouncement: 21-04-2017

Shri S.S. Viswanethra Ravi , JM:

These two appeals by the Revenue are against the separate orders dt: 29-01-2016 passed by the Commissioner of Income Tax-(Appeals), 9, Kolkata for the assessment years 2011-12 and 2012-13 respectively.

2. The only issue in this appeal of revenue is to be decided as to whether the CIT-A justified in allowing the claim of deduction of Rs.43,85,379/- (A.Y 2011-12) & Rs.47,79,138/- (A.Y 2012-13) u/s. 80IA of the Act in the facts and circumstances of the case.

3. At the time of hearing before us the Id.AR of the assessee submits that both the issues in hand are covered by the earlier order dt. 18-06-2013 of the Kolkata Tribunal, 'B' Bench, Kolkata in assessee's own case for the A.Y 2007-08 in ITA No. 1684/Kol/2011 and copy of the same is on record, wherein the Tribunal vide its said order directed the Assessing Officer to grant the assessee the benefit of deduction u/s. 80IA of the assessee as claimed.

4. On the other hand before us the Id.DR submits that the appellant Revenue has preferred an appeal before the Hon'ble High Court of Calcutta against such order dt. 18-06-2013 passed by the Tribunal in assessee's own case. The matter is still pending for adjudication. But he did not provide any document or evidence to show that the Hon'ble High Court of Calcutta has admitted such appeal filed by the revenue and no order contrary to the said order dt. 18-06-2013(assessee's own case) has been produced by the Id.DR on which the appeal of the revenue is still pending before the Hon'ble High Court of Calcutta for disposal.

5. Taking into consideration the submissions of the Id.AR of the assessee, we proceed to hear the appeal and dispose off the same on merits on the basis of material as available on record.

ITA No.693/Kol/2016 A.Y 2011-12(by the assessee)

6. The brief facts of the case are that the assessee is a AOP [Joint Venture] stood successful in getting the bid for detailed survey, drawing, design and execution of sewerage project on turn-key basis for Zones-II,III,IV and V project of Municipal Corporation at Jabalpur. The assessee JV was awarded the said project work by the Municipal Commissioner, Jabalpur. Accordingly, the assessee entered into an agreement vide dt. 24-09-2007 with the two members 1) M/s. Simplex Infrastructue Ltd and 2) M/s. Meinhardt (Singapore) Pte. Ltd) for terms and conditions. However, the assessee AOP filed its return of income for the A.Y under consideration electronically on 30-09-2011

declaring total income of Rs.46,740/-. Under scrutiny, notices u/s. 143(2) and 142(1) of the Act were issued. In response to which, the Id.AR of the assessee appeared time to time and filed various details and supporting evidences in support of the return as filed. The AO found that the assessee has claimed deduction u/s. 80IA being identical amount of net profit for development of infrastructure facility. The AO was of the view that the assessee JV (Joint Venture) received contractual amount of Rs.15,04,45,674/- for the work done and derived net profit of Rs.43,85,379/-. In the audit report as well as in the return of income the assessee JV claimed the same as deduction u/s. 80IA(4) of the Act. The AO further found that the assessee raised RA bills in accordance with the measurement and held that it is a work contract within the meaning of Explanation to section 80IA, which was substituted by the Finance Act 2009 and came into force w.e.f 1-4-2000 retrospectively. However, 'the AO considering the status of assessee as a 'works contractor' the claim of deduction u/s. 80IA of the Act was disallowed and added the same to the total income of the assessee.

7. The assessee challenged the same before the CIT-A. The CIT-A after considering the submissions of assessee held that the assessee was not a works contractor as treated by the AO. The CIT-A was of the view that the assessee was a developer and as such Explanation to section 80IA(13) of the Act does not apply to the assessee. Therefore, the following the earlier order of the Kolkata Tribunal in assessee's own case for the AY 2008-09 and earlier order of the CIT-A XIX for the AY 2009-10 allowed the deduction u/s. 80IA. He directed the AO to allow deduction u/s. 80IA.

8. Heard rival submissions and perused the material available on record. We find that the only question is to be decided by us for allowance of deduction u/s. 80IA of the Act as to whether the assessee is a developer or a works contractor. The AO found that the assessee raised RA bills in accordance with measurement of works executed and thereby he held that the

assessee is not a developer and is a works contractor. We find that the assessee stood successful in getting the bid for detailed survey, drawing, design and execution of sewerage project on turn-key basis for Zones-II,III,IV and V project at Jabalpur. The assessee JV was awarded the said project work by the Municipal Commissioner, Jabalpur. Thereby the assessee is a developer for the reason that the assessee involved in preparation survey, drawing, design and execution of sewerage project work. We find that the assessee made investments and development of infrastructure to support the various contract works. The assessee is also responsible in all respects for the procurement of labours, machinery, equipments, goods, materials for the said project work. The assessee is also responsible for the payment and supply of labour, water and electric charges usage for the project. The assessee is responsible for making the payments of labours and for supply of various items related to the said project. We also find that the Bombay High Court in the case of CIT Vs. ABG Heavy Industries Limited reported in 322 ITR 323 clarify that in order to avail of a deduction, the assessee could (i) develop or (ii) operate and maintain or (iii) develop, operate and maintain the facility. Therefore, the fulfillment of these three activities/ conditions by the assessee would become eligible for claim of deduction. On perusal of the terms and conditions in the agreement, it is clear that the assessee was not a works contractor and was a developer and hence Explanation to section 80IA(13) does not apply. Now we refer to the order of the Co-ordinate Bench in the case of M/s.Simplex Som Datt Builders JV in ITA No.1684/Kol/2011 for A.Y 2007-08 considered the order of ITAT Hyderabad Tribunal in the case of M/s. GVPR Engineers Ltd Vs. ACIT. Relevant portion of which is reproduced herein below:-

"the co-ordinate bench ITAT, Hyderabad 'B' Bench, Hyderabad in the case of M/s. GVPR Engineers Ltd & Ors in ITA Nos. 347/Hyd/2008 & 17 Others dated 29.02.2012, wherein in paras 26-29, it has been held as under:-

26. We have considered the elaborate submissions made by both the parties and also perused the materials available on record. We have also gone through all the case laws cited by both the parties. We find that the provisions of Section 80IA (4) of the Act when introduced afresh by the Finance Act, 1999, the provisions under section 80IA (4A) of the Act were deleted from the Act. The deduction available for any enterprise

earlier under section 801A (4A) are also made available under Section 801A (4) itself. Further, the very fact that the legislature mentioned the words (i) "developing" or (ii) "operating and maintaining" or (iii) "developing, operating and maintaining" clearly indicates that any enterprise which carried on any of these three activities would become eligible for deduction. Therefore, there is no ambiguity in the income-Tax Act. We find that where an assessee incurred expenditure for purchase of materials himself and executes the development work i.e., carries out the civil construction work, he will be eligible for tax benefit under section 80 IA of the Act. In contrast to this, a assessee, who enters into a contract with another person including Government or an undertaking or enterprise referred to in Section 80 IA of the Act, for executing works contract, will not be eligible for the tax benefit under section 80 IA of the Act. We find that the word "owned" in sub-clause (a) of clause (1) of sub section (4) of Section 801A of the Act refer to the enterprise. By reading of the section, it is clear that the enterprises carrying on development of infrastructure development should be owned by the company and not that the infrastructure facility should be owned by a company. The provisions are made applicable to the person to whom such enterprise belongs to is explained in sub-clause (a). Therefore, the word "ownership" is attributable only to the enterprise, carrying on the business which would mean that only companies are eligible for deduction under section 801A (4) and not any other person like individual, HUF, Firm etc.

27. We also find that according to sub-clause (a), clause (i) of sub section (4) of 80-IA the word "it" denotes the enterprise carrying on the business. The word "it" cannot be related to the infrastructure facility, particularly in view of the fact that infrastructure facility includes Rail system, Highway project, Water treatment system, Irrigation project, a Port, an Airport or an Inland port which cannot be owned by any one. Even otherwise, the word "it" is used to denote an enterprise. Therefore, there is no requirement that the assessee should have been the owner of the infrastructure facility.

28. The next question is to be answered is whether the assessee is a developer or mere works contractor. The Revenue relied on the amendments brought in by the Finance Act 2007 and 2009 to mention that the activity undertaken by the assessee is akin to works contract and he is not eligible for deduction under section 801A (4) of the Act. Whether the assessee is a developer or works contractor is purely depends on the nature of the work undertaken by the assessee. Each of the work undertaken has to be analyzed and a conclusion has to be drawn about the nature of the work undertaken by the assessee. The agreement entered into with the Government or the Government body may be a mere works contract or for development of infrastructure. It is to be seen from the agreements entered into by the assessee with the Government. We find that the Government handed over the possession of the premises of projects to the assessee for the development of infrastructure facility. It is the assessee's responsibility to do all acts till the possession of property is handed over to the Government. The first phase is to take over the existing premises of the projects and thereafter developing the same into infrastructure facility. Secondly, the assessee shall facilitate the people to use the available existing facility even while the process of development is in progress. Any loss to the public caused in the process would be the responsibility of the assessee. The assessee has to develop the infrastructure facility. In the process, all the works are to be executed by the assessee. It may be laying of a drainage system; may be construction of a project; provision of way for the cattle and bullock carts in the village; provision for traffic without any hindrance, the assessee's duty is to develop infrastructure whether it involves construction of a particular item as agreed to in the agreement or not. The agreement is not for a specific work, it is for development of facility as a whole. The assessee is not entrusted with any specific work to be done by the assessee. The material required is to be brought in by the assessee by sticking to the quality and quantity irrespective of the cost of such material. The Government does not provide any material to the assessee. It provides the works in packages and not as a works contract. The assessee utilizes its funds, its expertise, its employees and takes the responsibility of developing the infrastructure facility. The losses suffered either by the Govt. or the people in the process of such development would be that of the assessee. The assessee hands over the developed infrastructure facility to the Government on completion of the development. Thereafter, the assessee has to undertake maintenance of the said infrastructure for a period of 12 to 24 months. During this period, if any damages are occurred it shall be the responsibility of the assessee. Further, during this period, the entire infrastructure shall have to be maintained by the assessee alone without hindrance to the regular

traffic. Therefore, it is clear that from an un-developed area, infrastructure is developed and handed over to the Government and as explained by the CBDT vide its Circular dated 18-05-2010, such activity is eligible for deduction under section 80IA (4) of the Act. This cannot be considered as a mere works contract but has to be considered as a development of infrastructure facility. Therefore, the assessee is a developer and not a works contractor as presumed by the Revenue. The circular issued by the Board, relied on by learned counsel for the assessee, clearly indicate that the assessee is eligible for deduction under section 80IA (4) of the Act. The department is not correct in holding that the assessee is a mere contractor of the work and not a developer.

29. We also find that as per the provisions of the section 80IA of the Act, a person being a company has to enter into an agreement with the Government or Government undertakings. Such an agreement is a contract and for the purpose of the agreement a person may be called as a contractor as he entered into a contract. But the word "contractor" is used .to denote a person entering into an agreement for undertaking the development of infrastructure facility. Every agreement entered into is a contract. The word "contractor" is used to denote the person who enters into such contract. Even a person who enters into a contract for development of infrastructure facility is a contractor. Therefore, the contractor and the developer cannot be viewed differently. Every contractor may not be a developer but every developer developing infrastructure facility on behalf of the Government is a contractor."

9. The Co-ordinate Bench of this Tribunal in assessee's own case vide order dt.18-06-2013 supra considered the order in the case of ARSS Infrastructure Projects Ltd Vs. ACIT, Cir-2(1), Bhubaneswar in ITA Nos. 142,143/CTK/2010 & 483, 484/CTK/2011 dt. 13-06-2013 observed that when an assessee is doing contract work according to the requirement and specification of the customer and the same has been done by using materials purchased from third parties other than the customers and held that though the assessee is doing a works contract the same would not fall within the meaning of the word 'works contract' for the purpose of the Act due to the exclusion provided in the meaning of 'work ' in section 194C of the Act. Relevant findings of the order dt. 18-06-2013 are reproduced herein below for better understanding:-

11. We have considered the rival submissions. Admittedly, a perusal of the agreement entered into between the assessee and the Govt of Andhra Pradesh Irrigation & CAD Department shows that the assessee has taken EPC/Turnkey contract of the flood flow canal project from SRSP. The name of the contract has been extracted earlier in this order. The scope of the work is also extracted above. Admittedly, the assessee has taken a turnkey contract from the Irrigation Department, Govt. of Andhra Pradesh. The turnkey contract is in respect of the irrigation project. Irrigation project is an infrastructure facility within the scope of Explanation to section 80IA(4) of the Act. The provisions of section 80IA(4) is to be controlled by the Explanation to section 80IA, which has been substituted by the Finance (No.2) Act, 2009 with retrospective effect from 1-4-2-2000. This Explanation is found after sub-section (13) of section 80IA. The said Explanation attempts to control the provisions of sub-section 4. More so, it says that nothing contained in section 80IA would apply in relation to the business referred to sub-section (4), which is in the nature of works contract. A works contract is not defined in section 80IA. Now, what would come into

consideration is whether the substituted Explanation after sub-clause (13) changed the nature of the meaning of 'infrastructure facility' provided in the Explanation to section 80IA(4). Admittedly, the Explanation to section 80IA(4) gives the meaning the term 'infrastructure facility'. The substituted explanation after sub-clause (13) brings in the nature of work as a works contract. The provisions of section 194C, which deals with TDS in respect of payment to contractors for carrying out any work in the Explanation thereto as explained the term 'work' to be an inclusive definition, but has provided an exclusion to be 'does not include manufacturing or supplying of a product according to requirement or specification of the customer by using materials purchased from a person, other than such customer'. Thus, with this in mind, a perusal of the turnkey contract agreement entered into by the assessee with the Irrigation Department, Govt of A.P. clearly shows that the construction of all the structures of the whole canal system is to be as per approved design, drawings, specifications of the department etc. The survey is to be done as per investigation and designing criteria of the Irrigation Department. This is also as per article 11.1 of the agreement. The assessee is to procure the materials independently and those materials are to conform to the specifications provided. The assessee is also to make its arrangements for storage of the materials. This is as per article 107 of the agreement. Thus, admittedly the work done by the assessee falls in the exclusion provided to the meaning of the work given in the Explanation to section 194C of the Act. Once it falls outside the meaning of term 'work' for the purpose of section 194C, the question that arises is can it be said that the assessee is doing the work contract as provided in the substituted Explanation in section 80IA after sub-clause (13)?, The answer would be emphatic no.

12. This is because the assessee is doing the activity of development of an infrastructure facility as provided under section 80IA(4). The project is a Turnkey project and it cannot form nor have a character of a works contract. Works contract would be applicable to the repairs and maintenance of an existing project. Works contract cannot be in relation to the development of a new project. One of the arguments raised by the learned Sr.DR that the intention of the substitution of the Explanation after sub-clause (13) of section 80IA was to deny, the benefit of deduction u/s. 80IA(4) in respect of works contract, but to provide the deduction to such undertakings, which is doing the business of building, operating and Transfer (BOT) and building owning, operating and transfer BOOT as also PPP contracts does not hold water in so far as an irrigation project can never function under BOT or BOOT or PPP. In the circumstances, we are of the view that the assessee's claim is not hit by the substituted Explanation as provided after sub-clause(13) of section 80IA. Here, we may mention that this view finds support from the decision of the co-ordinate of the tribunal, [ITAT, Hyderabad Bench, Hyderabad in the case of GVPR Engineers Ltd & Ors (refer to supra). We may mention here that our view also finds support from the decision of the co-ordinate bench of this tribunal, ITAT Cuttack Bench, Cuttack in the case of ARSS Infrastructure Projects Ltd Vs. ACIT, Circle-2 (1), Bhubaneswar in ITA Nos. 142, 143/CTK/2010 & 483,484/CTK/2011 dated 13-06-2013, wherein one of us was a party and in which case it has been held as under :-

10. Now coming to the merits of the deduction u/s. 80IA(4) of the Act. A perusal of the provisions of section 80IA(4) of the Act shows that in the explanation 'infrastructure facility' has been specified to mean a road including a toll road, a bridge or a rail system. Admittedly, the assessee is doing the business of development of railway tracks and bridges thereof as also roads. If, we are to accept the contention of the Ld. CIT that the provisions of section 80IA(4) of the Act after the substitution of the explanation to section 80IA of the Act was introduced was only for the purpose of giving the benefit to BUT contracts then, the explanation to section 80IA(4) of the Act becomes otiose. This is as explanation to section 80IA(4) of the Act specifically provides for the road to include a toll road, a bridge or a rail system. BUT contract in respect of the railway system can never exist. Further, a perusal of the provisions of section 80IA of the Act shows that the term 'works contract' is not defined in the said section. However, the terms 'works' and 'contract' is defined in the provisions of section 194C of the Act. If a particular word or term is not defined in the specific section then, one could go to other sections in the said Act where the definition would be available to draw a meaning to the said terms. In the provisions of section 194C of the Act, work has been given an inclusive definition but in the subsequent portion it has excluded the manufacturing or supplying a product according to requirement or specification of a customer by using material purchased from a person other than such customer. As has been specified by the Ld. AR, the assessee is doing contract work but

that work is according to the requirement and specification of the customer and the same has been done by using materials purchase from third parties other than the customers. Thus, though the assessee is doing a works contract the same would not fall within the meaning of the word 'works contract' for the purpose of the Act due to the exclusion provided in the meaning of 'work' in section 194C of the Act. The issue raised by the Ld. CIT that the assessee is not doing the development work but is only doing the contract also does not stand to test as the assessee admittedly is developing the roads and railway lines and the bridges thereof. Development encompasses within itself contract work. The agreement between the assessee and the customer being the government is for the development of the infrastructure facility being roads and rail systems and bridges by participating in the tenders. Under these circumstances, we are of th view that the AO was right in law in granting the assessee the benefit of deduction u/s. 801A(4) of the Act.

10. Respectfully following the above, we are of the view that the CIT-A was justified in directing the AO to allow the deduction u/s. 80IA of the Act as claimed by it. We uphold the impugned order of the CIT-A. Accordingly, the grounds raised by the revenue are dismissed.

11. This appeal filed by the revenue in ITA No.693/Kol/2016 for the AY 2011-12 is dismissed.

ITA No. 694/Kol/2016 A.Y 2012-13 (by the revenue)

12. We find that the facts and circumstances of this case are similar to the facts and circumstances mentioned hereinabove in ITA No. 693/Kol/2016 for the AY 2011-12(by the revenue), wherein we held that the assessee is entitled to claim deduction U/Sec. 80IA of the Act. Following the same view as taken in ITA No. 693/Kol/2016 A.Y 2011-12(by the revenue), this appeal of the revenue in ITA No. 694/Kol/2016 being similar and identical issue is also dismissed. Therefore, the grounds raised in revenue's appeal in ITA No. 694/Kol/2016 for the A.Y 2012-13 is dismissed.

13. In the result, both the above appeals of revenue in ITA Nos. 693 & 694/Kol/2016 for the A.Ys 2011-12 and 2012-2013 are dismissed.

Order pronounced in the open Court on 21 -04-2017

Sd/-

Dr. Arjun Lal Saini
Accountant Member

Date 21 -04-2017

Sd/-

S.S. Viswanethra Ravi
Judicial Member

Copies of the order forwarded to :

(1) The appellant/department: The Asstt. Commissioner of Income Tax, Circle-33, 10B Middleton Row, 3rd floor, Kolkata-71.

(2) The respondent/assessee: M/s. Simplex Meinhardt Joint Venture, Simplex House, 27 Shakespeare Sarani, Kolkata-17.

(3) Commissioner of Income-tax (Appeals)-I, Kolkata

(4) Commissioner of Income Tax, Kolkata

(5) The Departmental Representative

(6) Guard File

**PP/SPS

By order

Assistant Registrar,
Income Tax Appellate Tribunal, Kolkata