

IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

**Before: Shri Waseem Ahmed, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member**

**ITA No. 126/Rjt/2015
Assessment Year 2008-09**

Backbone Enterprise Ltd. M-43, Gujarat Housing Board, Kalawad Road, Rajkot PAN: AABCB9255E (Appellant)	Vs	The Deputy Commissioner of Income- Tax, Central Circle-2, Rajkot (Respondent)
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**ITA No. 147/Rjt/2015
Assessment Year 2008-09**

The Assistant Commissioner of Income- Tax, Central Circle-2, Rajkot (Appellant)	Vs	Backbone Enterprise Ltd. M-43, Gujarat Housing Board, Kalawad Road, Rajkot PAN: AABCB9255E (Respondent)
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**Assessee by: Shri D.M. Rindani, A.R.
Revenue by: Shri Aarsi Prasad, CIT-D.R.**

Date of hearing : 06-07-2022
Date of pronouncement : 28-09-2022

आदेश/ORDER

PER BENCH:-

These are the two appeals filed by the assessee and the revenue against the order of the Id. Commissioner of Income Tax (Appeals)-11, Ahmedabad in Appeal no. CIT(A)-11/462-R/CC.2/2014-15 vide order dated 16/01/2015 passed for the assessment year 2008-09.

2. **The Department has taken the following grounds of appeal**

“1. On the fact and circumstance of the case, the Ld. CIT(A) has erred in allowing deduction u/s 80IA(4) of the Act in respect of project No. 14,16 to 19,22 and 33 by treating the assessee as a "Developer" of infrastructure projects instead of "Work Contractor" as treated by the A.O.

On the facts and in the circumstances of the case and in law, the CIT(A) ought to have upheld the order of the A.O. to the above extent.

It is, therefore, prayed that the order of the CIT(A) be set and that of the A.O. be restored to the above extent.”

3. **The assessee has taken the following grounds of appeal**

“1. The learned Commissioner of Income Tax (Appeals) - 11, Ahmedabad erred in upholding the validity of order passed u/s 153A r.w.s. 143(3) of the Act.

2. The learned Commissioner of Income Tax (Appeals) - 11, Ahmedabad erred in confirming the action of the assessing officer in disallowing the claim of deduction of Rs. 3,70,61,909/- u/s 80IA(4) in

respect of following infrastructure projects undertaken by the appellant:

<i>Sr. No. of Project referred by CIT (Appeals)</i>	<i>Name of the Project</i>	<i>Amt. of deduction claimed u/s 80IA (in Rs.)</i>
1	MORBI MALIYA RURAL P-2 ROAD	406,454
2	KKS RJT1 - A ROAD	563,830
3	MORBI MALIYA KP / RAJ /P-2 ROAD	800,528
4	MORBI - TANKARA KP / RAJ / P-3 ROAD	202,943
5	NABARD/RAJ/P-4 WMT ROAD	545,654
12	GKA KM42 TO 248 NH-8 NHAI ROAD	34,542,500
	<i>Total</i>	<i>3,70,61,909</i>

3. *The learned Commissioner of Income Tax (Appeals) - 11, Ahmedabad erred in holding that appellant was not a developer of infrastructure facility in respect of projects specified by him and listed in ground No. 2 above.*

The appellant craves leave to add, amend, alter and withdraw any ground of appeal anytime up to the hearing of this appeal.”

We shall first take up the Department's appeal.

4. The brief facts of the case are that the assessee company is a government contractor doing mainly government work on contractual basis. The assessee claimed deduction under section 80-IA(4) of the Act in respect of contracts carried out with Government and Semi-Government Bodies. During the course of assessment, the AO denied the claim of 80-IA(4) of the Act to the assessee on ground that the assessee is "contractor" and is not a "developer" within the meaning of 80-IA(1) of the Act and hence is not eligible for deduction respect of receipts from contracts carried out with Government and Semi-Government Bodies. The AO held that the assessee had carried out "works contract" in respect of each of the projects for which it had claimed deduction under section 80-IA(4) of the Act. The assessee has not been able to establish as to how it made investment in the project in addition to the fact that he has acted purely as a "works contractor". Accordingly, the AO denied deduction under section 80-IA(4) of the Act in respect of all the projects carried out by the assessee during the year under consideration. While denying the claim of the assessee, the AO made the following observations:

"8. The claim of the assessee for deduction under section 80IA(4) of the Act has been considered in view of the facts and circumstances of the case as discussed above and the provisions of Act as applicable for the year under consideration. There is no ambiguity about the fact that the deduction under section 80IA(4) is available to a developer of the infrastructural facilities as provided within the meaning of the said section and not the contractors who simply executes work as per work contract received from either Central Govt. or State Govt. or any other agency. On this issue it would be pertinent to refer to the

decision in the case of Asstt. CIT v. Indwel Linings (P.) Ltd. [2009] 122 TTJ (Chennai) 137 where in it was held that Where assessee took contract work of cement lining for water supply project of Gujarat Water Supply and Sewerage Board (Gujarat Government undertaking), it being a contractor and not developer, was not entitled to deduction under section 80IA, In this case the Hon. IT AT had discussed the distinction between a "Contractor ' and ' developer' which is extremely relevant in deciding the issue in the present case. The Hon. Tribunal observed that 'Contractor ' and ' developer' are two different terms. As per the Oxford Advanced Learner's Dictionary, 'developer' is a person or company that designs and creates new projects, whereas 'contractor' is a person or company that has a contract to do work or provides services or goods to another. The benefit of section 80-IA is available only to the developer. It is the condition precedent for the availability of the benefit of this section that the undertaking or enterprise must derive its income from carrying on the business of developing any infrastructure facility. The prescription of section 80-IA shall not apply to a person who executes work contracts entered into with an undertaking or enterprise. Thus, in a case where a person who makes investment and himself executes development works and carries out civil works, will be eligible for tax benefit under section 80-IA. In contrast to this, a person who enters into a contract with another person for executing works contract will not be eligible for the tax benefit under section 80-IA.

9. Hence, it is evident that the Explanation, below sub section (13) of section 80IA, as inserted by the Finance Act, 2009 with retrospective effect from 01.04.2000, has only clarified it that the deduction is not available to 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 an enterprise referred to in sub-section (1). The argument as to whether a contractor is a 'developer' within the meaning of the above provision of the Act has only been put to rest by providing an explicit clarification which leaves no scope for any ambiguity as regard the issue that the 'contractors' are not 'developers' within the meaning of sub-section (1) of section 80IA and hence, they are not eligible for deduction in respect of their business income from executing work orders as per

contract with either Central Govt. or State Govt. or any other agency. The explanation does not in any manner provide for restricting or altering the meaning of the said provision. **Rather, the position which was earlier apparent on a careful look of the provisions of sub-section (4) has now been made available even at the cursory look through the Explanation by clarifying the hitherto intention of the legislature that no person executing the works contract shall be eligible for deduction u/s. 80IA, even if it is an enterprise or undertaking as referred to in sub-section (1).** The language of this Explanation makes it crystal clear that the benefit under sub-section (4) cannot be provided to a business referred to in sub-section (4) which is in the nature of works contract awarded by any person including the Central or State Government and executed by the undertaking or enterprise referred to in subsection (1). From the memorandum explaining the rationale behind the substitution of Explanation it can be easily seen that the legislature clarified its intention beyond any doubt that the deduction cannot be allowed in relation to a business which is in the nature of works contract.

10. In view of the above discussion, there is no reason to ignore the unambiguous language of the Explanation, which is simple and plain, denying the benefit of deduction to the business which is in the nature of a works contract. There is no need to arbitrarily presume any doubt in the language of section, which does not, in fact, exist, and then proceed to finding out ways and means of granting the benefit to the assessee, which the legislature did not intend. Here in would only be pertinent to refer to the decision of Hon. Supreme Court in the case of Padmasundara Rao(Deed.) vs. State of Tamil Nadu (2002) 255 ITR 147 where in it was pointed out by the Apex Court that the plain language to the statute is best understood as the declaration of the intention of the Legislature, The court can not seek to supply omissions as such an attempt would tantamount to power to legislate, which it does not have. The plain inference can not be dismissed on the ground that it would be unreasonable or that the language is contrary to the obvious intention of the legislature. Where as in the present case even the language of the provisions harmoniously goes with the obvious intention of the legislature.

11. It is clear from the above that the assessee had executed works contract in respect of each of the projects for which it has claimed deduction u/s. 80IA(4) of the Act. The assessee has also been unable to establish as to how did it make an investment in the project, part from not being able to prove that it had not executed a works contract as is evident above. In view of the foregoing, I find no merit in the claim of the assessee for a deduction u/s.80IA of the Act. Hence, in consideration of the above discussion and provisions of section 80IA of the Income-tax Act, 1961, as applicable for the year under consideration, it is evident that the assessee is not eligible for deduction out of its business income under the provisions of the said section and hence, the deduction claimed by the assessee in the return of income under section 80IA(4) of the Act is to be disallowed and added back to the total income of the assessee for the assessment year under consideration. Hence, the deduction claimed by the assessee company u/s.80IA(4) amounting to Rs.13,46,89,674/- is hereby disallowed and withdrawn and added back to the taxable income of the assessee company.”

5. In appeal, Ld. CIT(Appeals) discussed facts of each of the individual projects carried out by the assessee on merits, and based on the analysis of each of the projects, gave part relief to the assessee. The Department and the assessee are in appeal of before us against the relief provided by Ld. CIT(Appeals) in respect of some of the projects. Ld. Counsel for the assessee submitted that the assessee has built/developed complete infrastructure and had undertaken complete responsibility for the same as well and accordingly Ld. CIT(A) erred in facts and in law in holding that for certain projects the assessee is not eligible for deduction u/s 80-IA(4) of the Act in respect for certain projects. He placed reliance on the following various favourable Rulings and submitted that the case of the assessee is covered by the same:-

<i>Sr. No.</i>	<i>Particulars</i>
1.	<i>Patel Infrastructure Pvt. Ltd. (Rajkot Tribunal) dated 30-07-2020 (2020) 59 CCH 0266</i>
2.	<i>M/s Katira Construction Ltd. (Rajkot Tribunal) dated 30-07-2020 (2020) 59 CCH 0264</i>
3.	<i>M/s Ketan Construction (Rajkot Tribunal) in ITA Nos. 219,220,221,222/Rjt/2015, 199,200,201,202/Rjt/015 dated 03-06-2020</i>
4.	<i>M/s KCL - BEL Tarmat (JV) (Rajkot Tribunal) in ITA No. 192, 193/Rjt/2011, 214/Rjt/2011 and 485/Rjt/2014 dated 03-12-2018</i>
5.	<i>Welspun Projects Ltd. (Ahmedabad Tribunal) dated 08-10-2018 (2018) 54 CCH 0070</i>
6.	<i>M/s BBEL STPL (JV) (Rajkot Tribunal) in ITA No. 507/Rjt/2012 dated 28.-10-2016 - A.Y. 2009-10</i>
7.	<i>TARMAT - BEL (JV) (Rajkot Tribunal) in ITA No. 1111/RJT/2010 dated 23-09-2010- A.Y. 2007-08</i>
8.	<i>TRG Industries Pvt. Ltd. (2017) 155 DTR 0109 (J & K HC)</i>
9.	<i>M/s. Simplex Infrastructure (2017) 49 CCH 0088 (Kolkata Tribunal)</i>
10.	<i>VRM India Ltd. (Delhi HC) ITA nos. 2069 of 2010, 318 & 320 of 2014 dated 18-03-2015</i>
11.	<i>Sugam Construction Pvt. Ltd. Vs. I.T.O. (2012) 34 CCH 0383 (Ahmedabad Tribunal)</i>
12.	<i>GVPR Engineers Ltd. & Others, Hyderabad (2012) 32 CCH 0296 (Hyderabad Tribunal)</i>
13.	<i>Laxmi Civil Engg. P. Ltd. (Pune Tribunal) in ITA Nos. 766/PN/09, 254/PN/08, 431/PN/07 & 435/PN/07</i>

14.	<i>Gayatri Projects Ltd. (Hyderabad Tribunal) in ITA Nos. 211/Hyd/2008, 711 & 712/Hyd/2010</i>
15.	<i>Koya & Co. Construction (P.) Ltd. (Hyderabad Tribunal) (2012) 32 CCH 0043</i>
16.	<i>Pratibha Industries Ltd. (Mumbai Tribunal) in ITA Nos. 2197 to 2199/Mum/2008 dated 19-12-2012</i>
17.	<i>Katira Construction Ltd. (2013) 31 taxmann.com 250 (Gujarat HC)</i>
18.	<i>KMC Constructions Ltd. (2012) 32 CCH 0297 (Hyderabad Tribunal)</i>
19.	<i>Vijay Infrastructure Ltd. (2018) 402 ITR 0363 (Allahabad HC)</i>
20.	<i>The Supdt. Engineer vs ITO (2013) 36 CCH 0568 (Chandigarh Tribunal)</i>
21.	<i>Circular no. 4 of 2010 dated 18-05-2010 (widening of an existing roads)</i>
22.	<i>Rohan & Rajdeep Infrastructure (2013) 157 TTJ 333 (Pune Tribunal)</i>
23.	<i>Shristi Infrastructure Development Corporation Ltd. (2008) 28 CCH 0449 (Delhi Tribunal)</i>
24.	<i>Rajkamal Builders Infrastructure P. Ltd. in ITA Nos. 118/A/2009 and others dated 13-05-2022 (Ahmedabad Tribunal)</i>
25.	<i>TRG Industries (P.) Ltd. (2013) 35 taxmann.com 253 (Amritsar Tribunal)</i>

The Ld. Departmental Representative submitted that Ld. CIT(A) has erred in facts and in law in allowing relief to the assessee since post amendment all works contracts have been excluded from within the scope of eligibility of deduction u/s 80-IA(4) of the Act. The assessee is a works contractor and

hence not eligible to claim deduction u/s 80-IA(4) of the Act. We have heard the rival contentions and perused the material on record. Therefore, in order to decide the Department's appeal, we shall be discussing the observations made by Ld. CIT(Appeals) in respect of each of the projects and thereafter decide, whether in the applicable set of facts, the assessee is eligible for deduction under section 80-IA(4) of the Act.

5.1 However, before we analyse the order of Ld. CIT(Appeals) in respect of each individual projects, it would be useful to go through the relevant statutory provisions and law on the subject in light of various judicial precedents to have a better understanding of the precise scope of the deduction u/s 80-IA(4) . The relevant extracts of the section are reproduced below.

Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.

80-IA.

4) This section applies to—

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

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

(b) it has entered into an agreement with the Central Government or a State Government or a 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;

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

The above provision has been further clarified by way of explanation under sub-section (13) of section 80-IA(4) of the Act, with retrospective effect from 01-04-2000, which reads as under:

Explanation.—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 to in sub-section (1)

The Memorandum to the Finance Bill 2009 explaining the above provision reads as under

Further, with a view to preventing the misuse of the tax holiday under section 80-IA of the Income-tax Act, it is proposed to amend the Explanation to the said section to clarify that nothing contained in the said section shall

apply in relation to a business referred to in sub-section (4) of the said section **which is in the nature of a works contract awarded by any person** (including the Central or State Government) and executed by an undertaking or enterprise referred to in sub-section (1) thereof. This amendment will take effect retrospectively from 1st April, 2000 and will, accordingly, apply in relation to assessment year 2000-2001 and subsequent years.

Further, the Memorandum to the Finance Bill 2007 is also reproduced below to throw useful light on the intent behind introducing the above provisions (effective from 01-04-2000):

Clarification regarding developer with reference to infrastructure facility, industrial park, etc. for the purposes of section 80-IA

Section 80-IA, inter-alia, 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 executes 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.

5.2 A reading of the various Statutory provisions read with the Memorandum brings out the following salient features of claim of deduction under section 80-IA(4) of the Act:

5.3 **Firstly**, purpose of introduction of beneficial provisions under section 80-IA(4) of the Act is for encouraging private sector participation. **Secondly**, only investment in development of the infrastructure sector is eligible for deduction under section 80-IA(4) of the Act and benefit is not available for the persons who merely “executes” the “civil construction work” or “any other works contract”. **Thirdly**, where a person makes the investment and himself executes the development work i.e., carries out the civil construction work, he will be eligible for tax benefit under section 80-IA(4) of the Act. **Fourth**, the Income Tax Act does not define what would constitute as “works contract/works contractor” (as opposed to section 194C of the Act, where the word “contractor” finds a specific definition). However, from the language of the Statute read with the Memorandum the Finance Bill, benefit is sought to be denied only to persons who merely

“executive” works contract, but in cases where a person makes the investment and himself executes the development work i.e., carries out the civil construction work, benefit under section 80-IA(4) of the Act would be available. **Fifth**, apparently there is no conflict between the term “works contractor” and “developer” and in case a person/assessee carries out activity the nature of “civil construction” work by making the investment and himself executing the development work, then such person would be eligible for benefit under section 80-IA(4) of the Act. Notably, the ITAT Calcutta in the case of DCIT v. Simplex infrastructure Ltd (2017) 49 CCH 88, held that the term "contractor" is not essentially contradictory to the term "developer". On the other hand, rather s. 80- IA(4) itself provides that assessee should develop the infrastructure facility as per agreement with the Central Government, State Government or a local authority. So, entering into a lawful agreement and thereby becoming a “contractor” should, in no way, be a bar to the one being a “developer”.

5.4 As stated above, the intent of the Statute even post Amendment vide Finance and 2009 is not, in our view, to completely deny benefit of deduction under section 80-IA(4) of the Act to all “works contracts/work-contractors ” because that would amount to defeating the very purpose for which section 80-IA(4) of the Act was introduced viz. to boost industrial modernization through expansion and improvement in infrastructure by encouraging private sector participation by way of investment in development of the infrastructure sector. The memorandum to the Finance Bill 2007 specifically provides that the purpose of the tax benefit has 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”. Therefore, the provisions cannot, in our view, be read in manner that all “works contracts” have been ousted from the scope of benefit under section 80-IA(4) of the Act (because that would be defeating the very purpose for which section 80-IA(4) of the Act was introduced), but the benefit is sought to be denied only to persons who merely “execute” works contract. Therefore, in cases where a person makes the investment and himself executes the development work i.e., carries out the civil construction work, benefit under section 80-IA(4) of the Act would be available. Therefore, a co-joint reading of all the provisions reproduced above, read with the memorandum, points to the fact that the benefit under section 80-IA(4) of the Act continues to be available to works **“contractor/civil contractor”** engaged in “development” of the project by making the investment and himself executing the development work and is only sought to be denied to those class of persons engaged merely in “execution” of works contract/ civil construction work.

5.5 Now, in the absence of any definition of “works contractor” with reference to section 80-IA(4) of the Act, the issue for consideration is what class of cases would fall under the definition of “mere execution” of works contract and hence not eligible for benefits under section 80-IA(4) of the Act which cases would fall under the category of “development activities” done by a civil/ works contractor and hence eligible for benefits under section 80-IA(4) of the Act. The Hyderabad bench of Tribunal in case of **M/s. GVPR Engineers Ltd. Vs. ACIT (2012) 51 SOT 0207 (Hyd) (URO)** held that

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.

5.6 Therefore, in our view, in order to decide whether the project undertaken is in capacity of a “developer” or “work contractor” has to be analysed on its own set of facts for each individual project. Various factors have to be seen whether the contract qualifies as “development contract” or mere “works contract” for example to enumerate a few factors **firstly**, there must come into existence some “new infrastructure facility” to be able to avail the beneficial provisions u/s 80-IA(4) of the Act. Mere repair/ maintenance/ upgradation/ restoration etc. would not be by itself sufficient to avail the benefits of provisions of 80-IA(4) of the Act, irrespective of scale of operations or other attendant conditions imposed on the works contractor. **Second**, how are the funds being mobilised by the contractor i.e. if the government gives any mobilisation advanced to the contractor then what are the conditions attached to granting of this mobilisation advance i.e. whether the contractor is required to give certain security deposit/bank guarantee against the same. In sum and substance, whether any financial risk is being undertaken by the contractors. **Thirdly** whether the agreement is for carrying out any specific work being part of the project or it is for development of the facility as a whole, **Fourthly**, whether the contractor is required to bring his own manpower and material and expertise to the job or whether the materials and designs etc are provided by the Government. Whether the assessee has deployed its own plant and machinery towards

execution of the project or is it a mere supplier of manpower **Fifth**, whether the responsibility of the contractor ends with handing over the project or whether the responsibility in relation to the project continues even post the handing over of the project i.e. whether the contractor is required to undertake the maintenance of the infrastructure for a period of 12 months or more after handing over of the project to the Government, **Sixth**, if during the period of construction any damage is incurred and whether the contractor shall be responsible for the same i.e. whether the assessee has to furnish a security deposit to the Employer and indemnify the employer of any losses/damage caused to any property/life in course of execution of works **Seventh**, whether the contractor was responsible for the correction of defects arising in the works at its own cost and responsibility.

5.6.1 To sum up, (i) first to see any new infrastructural facility has been put in place (and not mere repairs/ restoration/ upgradation/ strengthening etc. is done of the existing facility) (ii) In addition to works contract, the assessee undertakes addition responsibilities and risks attached to the project being undertaken, both financial risk as well as undertaking responsibility towards various other obligations attached towards successful completion and handing over the project including post completion performance guarantee, then he would, in our considered view, be eligible to deduction u/s 80-IA(4) of the Act.

5.7 Now having discussed the legal background, we shall come to the facts of the case in hand.

Department's appeal

6. Now, with the above background in place, we shall first deal with the Department's appeal in which it has challenged the various projects in respect of which relief has been given by the Ld. CIT(Appeals). As stated earlier, Ld. CIT(Appeals) has discussed the facts and merits of each of the projects undertaken by the assessee individually and then decided on the allowability of deduction u/s 80-IA(4) of the Act.

Contract No. 6: Sabli Dam work:

7. In this case, Ld. CIT(Appeals) while allowing the relief with the following observations:

*“11.5 The contract at Sr. No. 6 was an agreement entered between the Govt. of Gujarat, Narmada Water Resources, Water Supply Kalpsar Department and **the appellant for construction of earthen dam, in Sabli with spillway masonry, spillway bridge and head regulator. Construction was to be made of the Earthen dam in a length of 4235 mt. having maximum height, construction of remaining Ogee shaped** gated Masonry Spillway in length of 125,00 mt, in river gorge portion, construction of Head Regulator, Channel 3100 mt. on left bank, other ancillary work of relevant items like R.C.C. Spillway Bridge for all the above types of works.*

The work to be performed included all general works, preparatory to the construction of road and all other related works. The work also included work of any kind necessary for the due and satisfactory construction completion and maintenance of the work to the intent and meanings of the drawings and these specification and further drawings and orders that may be issued by the engineer from time to time.

*The scope of work also included compliance by the contractor with all general condition of contract, whether specifically mentioned or not in the various clauses of these specifications, all materials, apparatus, plans, equipment, tools, fuel, watering, strutting, timbering, transport, offices, stores, workshop, staff, labour and provision of proper and sufficient protective work, diversions, temporarily fencing and lighting. **It would also include safety of workers, first-aid equipments, suitable accommodation to staff and workman with adequate sanitary arrangement the effecting and maintenance of all insurance, the payment of all wages, salaries, fees, royalties, duties, or other charges arising out of the erection of the work and the regular clearance of rubbish, reinstatement and cleaning up of the site as may-be required-m-completion of works, safety of the public and protection of the works and adjoining land.***

The contractor should ensure that all actions are taken to built in quality insurance in the planning and execution of the work. The quality insurance should cover all stages of rework, such as setting out, section of materials, section of construction method, selection of equipment and plant, deployment of personnel and supervisory staff, quality control, testing etc. The work of building in quality insurance shall be deemed to be covered in this scope of the work.

*The cost of contract was of 10,20,09,748/- and it was to be completed within a period of 18 months. **The Contractor had to give 12 months free maintenance guarantee period from the certified date of taking over. During this period the contractor was to repair the damaged portion of any portion of the project.***

The terms and conditions of the contract were similar to those as mentioned in the contracts entered by the government or by its agencies for developing any infrastructure facility for public utility. After having regard to the terms and conditions of the agreement for development of the infrastructure facility, the rulings of the courts and position of law on the issue, in my opinion, the assessee acted as a developer because he developed infrastructure facility and handed over the same to the authority concerned with guarantee period for maintenance. Therefore, the assessee was eligible for claim of

deduction u/s. 80IA(4)(i) of the Act. Accordingly, the same is allowed.”

7.1 In addition to the observations made by Ld. CIT(Appeals), we have also perused terms of the contract/agreement and it would be useful to produce some of the terms, which would throw useful light on the additional responsibility of being undertaken by the assessee.

“2.00 CONTRACTOR'S OBLIGATIONS:

The contractor shall be deemed to have carefully examined the works and site conditions, the Specifications. Schedules and Drawings and shall be deemed to have fully acquainted himself regarding the local conditions.

if he shall have any doubt as to the meaning of any portion of these General Conditions, the Special Conditions, the scope of the work, the specifications or any other matter concerning the contract, he shall in good time before submitting his tender set for the particulars thereof, and submit them to the Engineer-in-charge that such doubt may be removed.

The Contractor shall unless in the cases specially provided for, make all payments at his own expenses, undertake to do all things and supply all labour, materials, constructional plant, temporary works, transport. supervision and everything whether of a temporary nature or permanent nature required in and for construction, completion and maintenance of the works and for performing the obligations of the contract for which Narmada Water Resources, Water Supply & Kalpsar Department would have to undertake to do or Narmada Water Resources and Water supply & Kalpsar Department had carried out the construction, completion and maintenance of works.

3.00 GOVERNMENT AUTHORISED TO WITHHOLD PAYMENT DUE TO THE CONTRACTORS

The Government shall have a lien over ail money payable to the Contractor under this contract and also over his Security Deposit withheld or recoveries made under the relevant clauses of this Contract in respect of any Government Tax or taxes or other moneys which may become payable to Government by the Contractor, either alone or jointly with another, under any provisions of the Government Acts or any other statutory enactments in force, in modification or substitutions thereof. Government shall at all times be entitled to deduct the said sum of taxes due from contractors from the moneys, securities or deposits which may become payable or returnable to the Contractor under this contract.

MAINTENANCE:

*Not with standing what has been mentioned in clause 17 and 20 of the printed B-2 form, the contractor for a period from the date of issue of the final certificate under clause 7 of the printed B-2 form till the expiry of twelve calendar months commencing immediately after the plant or works have been considered to be put to commercial use, **shall be liable for the proper maintenance and for replacement of any part of the plant, materials, workmanship or any other reason for which in the judgment of the engineer, the contractor is responsible and for making good any damage arising therefrom.** The Department's decision regarding date of beginning of .commercialize, of the completed work under the contract/depending upon the circumstances and merits of the situation shall be final.*

The maintenance period in respect of plant tor works for which replacement of any part has been made for the above reason, shall be further extended until the expiry of twelve months after the replaced parts have been put into commercial use.

PLAN AND DRAWINGS:

The contractor shall submit the following information to the Engineer-in-charge for approval within the time stipulated against each item below.

- A. general lay-out plan of construction plant and equipment for the execution of work which the contractor proposes to adopt at site, in triplicate, within 14 days from the date of notice to proceed with work.*
- B. Drawings or prints, in triplicate, showing the location of major plants and other facilities which he proposes to put up at the site, including any change in the general layout, at least 14 days prior or the commencement of the respective work.*

CONSTRUCTION PLAN:

The contractor shall provide and install all necessary construction plant and shall use such methods and appliances 'for the performance of all the operations connected with the work entered under the contract as will secure and satisfactory quality of work and rate of progress which will ensure the completion of the work within the time limit specified.'

7.2 In light of the above the above terms of the contract, we are of the considered view that the assessee is not acting as a mere “works contractor” in respect of this project. The assessee has taken the responsibility of complete handholding of the project and also additional maintenance after 12 months post completion of project.

7.3 Accordingly, we are of the view, that Ld. CIT(Appeals) has not erred in facts and in law in holding that the assessee is eligible for claim of deduction under section 80-IA (4) of the Act in respect of project Number 6.

Contract No. 7: Tapi River, Kathor PKG-6 Irrigation:

7.4 In this case, Ld. CIT(Appeals) while allowing the relief with the following observations:

“11.6 The contract at Sr. No. 7 was an agreement entered between the Govt. of Gujarat and the appellant for providing protection and strengthening of existing flood protection earthen embankment on the bank of river Tapti River Kathor PKG-6 Irrigation. The work included restoration, raising and strengthening of existing flood protection earthen embankment on the bank of river Tapi, Rander-Kathor-Amboli falling under the the jurisdiction of Surat Canal Division, Surat in Surat city limit. The tender covered protection of earthen embankment by gabions filled with rubble above layer of geofabric filter and sand-gravel bags as directed by Engineer-in-Charge. The main items executed in the tender were earth work in embankment, Geofabric filter, Compaction of earthwork and Rock fill wire gabion. The work was executed in the length of 1050 mtr. with qty. of earthwork of 77389m³, geo- fabric filter of 32871m², gabions of (1.5x1.0x0.6 mt.) in 32871 nos., Rope Gabion (1.5x1.0x0.6 mtr) and gabion (4.0x1.0x1.0 mtr.) in 263 nos. This work was to be completed according to a time bound programe. The cost of the contract was of Rs.10,88,54,285/- The project was to be completed within a period of 15 months and maintenance period was for a period of 12 months after completion of the project.

The terms and conditions of the contract were similar to those as mentioned in the contracts entered by the government or by its agencies for developing any infrastructure facility for public utility. After having regard to the terms and conditions of the agreement for of the infrastructure facility, the rulings of the courts and position of law on the issue, in my opinion, the assessee acted as a developer because he developed infrastructure facility and handed over the same to the authority concerned with guarantee period for maintenance. Therefore, the assessee was eligible for claim of deduction u/s. 80IA(4) (i) of the Act. Accordingly, the same is allowed.

7.5 From the reading of the contention of the Ld. CIT(Appeals) order, the work included primarily restoration, raising and strengthening of existing flood protection earthen embankment on the bank of river Tapi. The tender

covered protection of earthen embankment by gabions filled with the rubble above layer of geo-fabric filter and sand gravel bags as directed by engineer-in charge. From the terms of the contract, primarily the work seems to involve restoration/upgradation/strengthening/maintenance of “existing” flood protection earthen embankment on the bank of river Tapi. The scope of work, in our view does not involve “development” of an infrastructure facility, as envisaged within the meaning of section 80-IA (4) of the Act. The work primarily has upgraded/strengthened the existing projects, but no development of infrastructural facility, in our view has taken place. Although, the assessee has undertaken responsibility of maintenance of the safer. 12 months after completion of the project, however, looking into the totality of facts, we are of the considered view that the assessee is not eligible for deduction under section 80-IA (4) of the Act. The ITAT Bangalore in the case of **GMR Tambaram Tindivanam Expressways Ltd v DCIT in I.T.A Nos.545 & 546/Bang/2018**, held that a clear distinction can be made between widening an existing road by constructing additional lanes as part of the highway project vis-à-vis improving, maintaining and refurbishing an existing road. For a specific patch of road, as the taxpayer was only operating and maintaining an already existing four lane road by strengthening it, no new infrastructure facility came into existence. Laying a service road and laying a main line were two different activities and laying a service road could not be termed as a new infrastructure facility, to claim deduction under section 80-IA of the Act.

7.6 Accordingly, we are of the view that Ld. CIT(Appeals) has erred in facts and in law in holding that the assessee is eligible for claim of deduction

under section 80-IA (4) of the Act in respect of contract number 7 as mentioned above. Accordingly, we are of the view that the assessee is not eligible for claim of deduction under section 80-IA (4) of the Act in respect of contract number 7.

Contract number 8 Tapi River, Kathor PKG-3 Irrigation:

7.7 From a perusal of the contention of the order passed by Ld. CIT(Appeals), the scope and contents of contract number 8 and contract number 7 mentioned above are similar. Accordingly, observations in respect of contract number 7 would apply to contract number 8 as well. Accordingly, Accordingly, we are of the view that Ld. CIT(Appeals) has erred in facts and in law in holding that the assessee is eligible for claim of deduction under section 80-IA (4) of the Act in respect of contract number 7 as mentioned above.

7.8 Accordingly, we are of the view that the assessee is not eligible for claim of deduction under section 80-IA (4) of the Act in respect of contract number 8.

Contract number 9: Bharuch 4, Lane Road:

7.9 In this case, Ld. CIT(Appeals) while allowing the relief with the following observations:

“11.8 The contract at Sr. No. 9 was between Gujarat State Road Development ion Ltd. and the appellant for construction of additional 2-Lane of Bharuch- Dahej Road to make Bharuch-Dahej (SH-6) as Lane Road. The terms and conditions of the agreement included complete work including all ancillary works on turnkey basis and the project was handed over to the state agency after its execution with warranty period of twelve months from the date of its completion.

The cost of the contract was of Rs. 103,08,38,493/-. The project was to be completed within a period of 15 months and maintenance period was for a period of 12months after completion of the project.

The terms and conditions of the contract were similar to those as mentioned in the contracts entered by the government or by its agencies for developing any infrastructure facility for public utility. After having regard to the terms and conditions of the agreement for development of the infrastructure facility, the rulings of the courts and position of law on the issue, in my opinion, the assessee acted as a developer because he developed infrastructure facility and handed over the same to the authority concerned with guarantee period for maintenance. Therefore, the assessee is eligible for claim of deduction u/s.80IA(4)(i) of the Act. Accordingly, the same is allowed.”

7.10 In this case, it may be useful to refer to CIRCULAR NO. 4/2010 [F.NO. 178/14/2010-IT(A-I)], DATED 18-5-2010, wherein Board considered the issue as to whether widening of existing roads constitutes creation of new infrastructure facility for the purpose of section 80-IA(4)(i) of the Income-tax Act, 1961. Vide the above Circular, CBDT clarified that widening of an existing Road by constructing additional lanes as a part of a highway project by an undertaking would be regarded as a new infrastructure facility for the purpose of section 80-IA(4)(i). However, simply relaying of an existing Road would not be classifiable as a new infrastructure facility for this purpose.

7.11 Accordingly, in view of the above circular and in light of the observations made by Id. CIT(A), we are of the view that Ld. CIT(Appeals) has not erred in facts and in law in holding that the assessee is eligible for claim of deduction under section 80-IA (4) of the Act in respect of contract number 9 as mentioned above.

7.12 Accordingly, we are of the view that the assessee is eligible for claim of deduction under section 80-IA (4) of the Act in respect of contract number 9.

CONTRACT NUMBER 10: GIDC CHEMICAL ZONE DAHEJ ROAD

7.13 In this case, Ld. CIT(Appeals) while allowing the relief with the following observations:

*“11.9 The contract at Sr. No. 10 was between the Gujarat State Road Development Corporation Ltd. **and the appellant for construction of roads in GIDC Chemical Zone Dahej. The contract was for construction of roads including SWD, Street light, providing water supply distribution network system and providing treated effluent collection network system for chemical zone at Dahej.** It was construction of four lane asphalt road in chemical sector at Dahej in a length of about 3250 mtrs, with provision of a center verge 1 mtr. wide for dividing the traffic moving in opposite directions, pucca sides shoulders of 1.5 mtrs. width were to be constructed on either side of roads for allowing facility of pedestrian traffic/two wheelers to move on the pucca side shoulder duly segregated from the heavy traffic in the main lane, pucca portion of side shoulder could also be used for road widening in future, construction of two lane asphalt road in length of about 800 mtrs. This portion of road was also proposed to*

have a pucca side shoulder of 1 mtr wide segregated from the trafficable lane for slow moving and pedestrian traffic and for use of widening in future, construction of RCC storm water drains on both sides of the roads for effective surface run off from the chemical zone away from the chemical zone through a outfall RCC storm water drain, so as to prevent the water logging in the area and keeping the road structure safe for long life and utility. Necessary support was provided for crossing the short drain run of to flow under the carriage way through RCC box culvert at an appropriate location and care was also taken for providing service duct on one side of the road and facility of crossing the service pipeline, cables, water supply lines, existing chemical pipeline, gas pipeline and other pipeline was to be laid in future under the traffic lane for crossing without any road portion to be excavated. Such facility was to be provided by encased RCC pipe under carriageway, construction of water supply network in the chemical sector to feed water to each and every industry to the required standard of the industrial needs through a network of D1 pipeline K-7 grade in a length of about 7250 mtrs. The diameter pipeline proposed to laid varies from 150 mm. dia to 400 mm dia., effluent,, collection system for conveyance of industrial effluent from individual industries to the final pumping station constructed by GIDC through the system of HOPE pipeline (6 kg. grade) of varying diameter from 160 to 800 dia in a length of about 8 kms. The conveyance pipe line is technically planned and designed with 2 nos. of lifting station at different location, as shown in the drawings with the documents provision is also made in developing the road by cost effective, efficient road lighting for the traffic to move safely at night. Necessary safety boards, safety road markings and glow shine road dividers were to be installed on the 4 lane and 2 lane carriageway system.

The cost of the contract was of Rs.31,51,40,326/-. The project was to be completed within a period of 11 months and free maintenance period was for a period of 60 months after completion of the project.

The terms and conditions of the contract were similar to those as mentioned in the contracts entered by the government or by its agencies for developing any infrastructure facility for public utility.

After having regard to the terms and conditions of the agreement for development of the infrastructure facility, the rulings of the courts and position of law on the issue, in my opinion, the assessee acted as a developer because he developed infrastructure facility and handed over the same to the authority concerned with guarantee period for maintenance.”

7.14 In addition to the observations made by Ld. CIT(Appeals), we have also perused terms of the contract/agreement and it would be useful to produce some of the terms, which would throw useful light on the additional responsibility of being undertaken by the assessee.

“Security Deposit

Initial Security Deposit shall be in the form of DD/FDR of Nationalized Banks/ Scheduled banks - UTI, ICICI, HDFC, IDBI banks & NSC or SSNNL bonds etc. equivalent to 2.5% of the estimated cost put to tender i.e. Rs.61,12,109.00 and 2.5% of the estimated cost i.e. Rs.61,12,109.00 shall be deducted from the running account bills as Security Deposit & 5% i.e. Rs.1,22,24,218.00 in form of performance bond of any Nationalized banks / UTI, ICICI, HDFC, IDBI banks & NSC or SSNNL bonds etc. so as to make total Security Deposit not more than 10% of the estimated cost i.e. 2,44,48,436.00.

Defect Liability Period

12 months after the actual date of completion of the completion of the work

Performance & Maintenance Guarantee

The Contactor shall give performance guarantee in form of unequivocal bank guarantee amount for 5% of Estimated cost put to tender i.e. Rs. 1,22,24,218.00. The performance guarantee shall be

deposited fifteen days prior to date of expiry of defect liability period and shall be valid upto 5 years from the date of completion of work. (5 years period shall be inclusive of one year of Defects Liability Period). Only after submission of performance guarantee/ performance bond Security Deposit shall become refundable.

EARNEST MONEY DEPOSIT :

EMD shall be amounting to Rs.24,44,844/- (Rupees Twenty Four Lacs Forty Four Thousand Eight Hundred Forty Four Only) shall be paid to GIDC in form of FOR / DD of Nationalised banks / Scheduled banks such as UTI / ICICI / HDFC & IDBI banks. DD shall be in name of Executive Engineer, GIDC, Bharuch & shall be submitted to the Executive Engineer GIDC Bharuch in a sealed cover marked EMD for the work of "Construction of Roads including SWD, Street Light providing Water Supply Distribution Network System and providing Treated Effluent Collection Network System for Chemical Zone at Dahej." latest from 07.05.2007 to 09.05.2007 upto 16.00 Mrs. This cover shall not contain any other submission to the bidder.

4.2 The technical bid of bidders who have deposited EMD as per para 4.1 shall only be down loaded for further process of ore qualification.

NOTE:

- No interest shall be paid by the owner on the earnest money deposited by tenderer.*
- **The FOR furnished in lieu of earnest money shall be kept valid! for a period of " 120 days" from the date of opening of tender.***
- The earnest money deposited by successful tenderer shall be retained till submission of Initial Security Deposit, but shall be forfeited, if the tenderer fails to deposit the requisite initial security deposit as per para 4.0 of General Conditions of Contract Section - IV.*
- GIDC will refund the Earnest money of unsuccessful tenderers directly to the tenderer.*

4.0 SECURITY DEPOSIT

I Initial Security Deposit shall be in the form of DD/FDR of Nationalized Banks / Scheduled banks - UTI, ICICI, HDFC, IDBI banks & NSC or SSNNL bonds etc. shall be Rs. 61,12,109.00 equivalent to 2.5% of the estimated cost put to tender & Rs. 61,12,103.00 i.e. 2.5% of the estimated cost shall be deducted from the running account bills as security deposit & 5% i.e. Rs.1,22,24,218.00 in form of performance bond of any Scheduled banks / UTI, ICICI, HDFC, IDBI banks & NSC or SSNNL bonds etc. so as to make total Security Deposit not more than Rs. 2,44,48,436.00 equivalent to 10% of the estimated cost.

4.2 Earnest Money paid by furnishing the initial Security Deposit or adjusted against the Initial Security Deposit at the discretion of the Owner.

4.3 If the successful tenderer fails to commence the work within the prescribed time specified in the Contract the security deposit shall be forfeited to action under clause no. 7/8.

4.4 The Initial Security Deposit under this clause shall become due for discharge only after the completion of Defect Liability Period and issue of a Final Acceptance Certificate by the Engineer - in - Charge, settlement of dues to the Company and after the Contractor furnishes a Bank Guarantee in accordance with clause 56 towards Defect Liability.

4.5 If the Contractor/ Sub- Contractor or their employees shall damage, break, deface or destroy any property belonging to the Owner or others during the execution of the Contract, the same shall be made good by the Contractor at his own expenses in all respects and in default thereof, the Engineer - in - Charge may cause the same to be made good by other agencies and recover expenses from the Contractor (for which the Certificate of the Engineer- in - Charge shall be final and binding on the Contractor).

4.6 All compensation or other sums of money payable by the Contractor to the Owner under terms of this Contract may be deducted from or recovered by the encashment or sale of a sufficient

part of his Security Deposit or from any sums which may be due or may become due to the Contractor by the Owner on any sums which may be due or may become due to the Contractor by the Owner on any account whatsoever and in the event of his Security Deposit being reduced by reasons of any such deductions or sale as aforesaid, the Contractor shall within ten days thereafter make good in cash, Bank drafts as aforesaid any sum or sums which may have been deducted from or realised by sale/ encashment of his Security Deposit or any part thereof. No interest shall be payable by the Owner for sum deposited as Security Deposit.

42.0 MATERIALS TO BE SUPPLIED BY THE CONTRACTOR

42.1 The Contractor shall procure and provide within the value of Contract the whole of the materials required for the construction including steel and cement and other building materials, tools, tackles, construction plants and equipment for the completion and maintenance of the work except the materials which may be issued by the Owner from time to time and shall make his own arrangement for procuring such materials and for the transport thereof. The Owner may give necessary recommendation to the respective authority if so desired by the Contractor but assumes no further responsibility of any nature. The Owner will insist on the procurement of materials which bear IS! stamp and/or which are supplied by reputed suppliers.

42.2 The Contractor shall properly store ail materials either issued to him or brought by him to the site to prevent damages due to rain, wind, direct exposure to sun etc. as also from theft, pilferage etc., for proper and speedy execution of his works. The Contractor shall maintain sufficient stocks of ail materials required by him.

42.3 No materials shall be dispatched from the Contractor's stores before obtaining the approval in writing of the Engineer- in-Charge.

6.0 TWELVE MONTHS PERIOD OF LIABILITY FROM THE DATE OF COMPLETION

56.1 The Contractor shall guarantee the installation/work for a period of 12 months from the date of completion of work as certified

by the Engineer-in-Charge which is indicated in the Completion Certificate. Any damage or defect that may arise or lie undiscovered at the time of issue of Completion Certificate, connected in any way with the equipment or materials supplied by him or in the workmanship, shall be rectified or replaced by the Contractor at his own expense as deemed necessary by the Engineer-in-Charge or in default, the Engineer-in-Charge may carry out such works by other agencies and deduct actual cost incurred towards labour, supervision and materials, consumables or otherwise plus 15% towards overheads (of which the Certificate of Engineer-in-Charge shall be final) from any sums that may be then or at any time thereafter become due to the Contractor or from his Security Deposit or the proceeds of sale thereof or a sufficient part on thereof. This 12 months period will be termed as Defect Liability Period.

56.2 If the Contractor feels that any variation in work or in quality of material or proportions would be beneficial or necessary to fulfill the guarantees called for, he shall bring this to the notice of the Engineer-in-Charge in writing.

If during the Defect Liability Period any portion of the work/equipment found defective and is rectified/replaced, the period of liability for such equipment/portion of work shall operate from the date such rectifications/replacements are carried out and Contract Performance Guarantee shall be furnished separately for the extended period of liability for that portion of work/equipment only. Notwithstanding the above provisions, the supplier's guarantee/warranties for the replaced equipment shall also be passed on to the Owner.

PERFORMANCE GUARANTEE

The Contractor shall give performance guarantee in form of unequivocal bank guarantee amount for 5% of Estimated cost put to tender Rs. 1,22,24,218/-. The performance guarantee shall be deposited fifteen days prior to date of expiry of defect liability period and shall be valid upto 5 years from the date of completion of work. (i.e. 5 years period shall be inclusive of one year of Defects Liability

Period). After submission of performance performance bend shall become refundable.”

7.15 In light of the above the above terms of the contract, we are of the considered view that the assessee is not acting as a mere “works contractor” in respect of this project. The assessee has taken the responsibility of complete handholding of the project and also additional maintenance for 60 months post completion of project.

7.16 Accordingly, we are of the view, that Ld. CIT(Appeals) has not erred in facts and in law in holding that the assessee is eligible for claim of deduction under section 80-IA (4) of the Act in respect of contract number 10 mentioned above.

Contract number 11: GIDC Dahej Road:

7.17 In this case, Ld. CIT(Appeals) while allowing the relief with the following observations:

*“11.10 The contract at Sr.No.11 was between the Gujarat State Road Development Corporation Ltd. **and the appellant for construction of additional two lanes between Bharuch and Dahej Road in SEZ-I, at GIDC, Dahej.** The works included upgradation about 7.50 kms of existing roads in GIDC Dahej estate including the following works. Developing existing 2 Lane road C-C1 to C7 by widening form 6.70 mt. width to 7.00 met width, strengthening the same leading to a 7.00 met. Wide concrete pavement carriage way. Developing a new 2 lane road with concrete carriage way C-C1 to C7 besides existing roads to have a 4 lane concrete carriage way. Providing a 5 met. Wide central verge, within 4 lane carriage way, bound by R.C.C. kerb wall with*

due provision in between to facilitate vehicles to change lanes at locations defined in working drawings. Providing 2 met wide cycle track / foot path on either side of 4 lane concrete carriage way with necessary R.C.C. guard stones and on either side of both the cycle track / foot path to separate heavy traffic and pedestrians and the two wheeled light traffic. Developing a new 4 lane concrete carriage way in portion C7 to C8 including central verge and cycle track / **foot** path as specified under para 1b (i) 1b(ii) above. Construction of R.C.C. storm water drain on both sides of 4 lane road concrete carriage C- C1 to C8 for effective disposal of the surface water run off for preventing the damage in the road structure as well as adding to the aestheticism in all adverse situations. Necessary support is provided in crossincpthe S.W.D. runoff to flow under the carriage way through R.C.C. box culverts at appropriate locations. **Care has been taken to provide facility of un hindered maintenance and inspection of existing services of water supply lines, chemical and gas pipe lines, cables without affecting the movement of heavy industrial and light traffic at any time to come.** Provisions are also made for encasing R.C.C. pipes for crossing the carriage way, for the need of providing new services of any type to industries from main lines on one side to another side. Provision is also made in developing the road by cost effective, efficient road lighting for the traffic to move safely at night. Necessary safety boards, safety road marking and glow road dividers are also proposed to be installed in the 4 lane carriage way system. The roads within the planned ROW as provided in the DD plan for proposed up gradation, widening strengthening of existing carriage way for vehicles of 40 T capacities with about 12 MSA as traffic potential. The cost of the contract was of Rs. 7,16,94,222/-. **The project was to be completed within a period of 12 months and free maintenance was for a period of 60 months after completion of the project.**

The terms and conditions of the contract were similar to those as mentioned in the contracts entered by the government or by its agencies for developing any infrastructure facility for public utility. After having regard to the terms and conditions of the agreement for development of the infrastructure facility, the rulings of the courts and position of law on the issue, in my opinion, the assessee acted as a developer because he developed Infrastructure facility and handed

over the same to the authority concerned with guarantee period for maintenance. Therefore, the assessee was eligible for claim of deduction u/s. 80IA (4) (i) of the Act. Accordingly, the same is allowed.”

7.18 In addition to the observations made by Ld. CIT(Appeals), we have also perused terms of the contract/agreement and it would be useful to produce some of the terms, which would throw useful light on the additional responsibility of being undertaken by the assessee.

“PERFORMANCE GUARANTEE

The Contactor shall give performance guarantee in form of unequivocal bank guarantee amounting to 5% of Estimated cost put to tender. The performance bond in the format given shall be submitted along with the security and shall be refunded only after completion of work.

MAINTENANCE GUARANTEE

*The Contactor shall give maintenance guarantee bond in form of unequivocal bank guarantee amounting to 5% of Estimated cost put to tender **The maintenance guarantee bond in the format given shall be submitted at the time of issue of completion certificate and having validity of 5 years from the date of completion certificate.***

10.0 DEDUCTIONS FROM THE CONTRACT PRICE

ALL costs, damages or expenses which 60-Developer may have paid or incurred which "under the provisions of the Contract the Contractor ,s liable/will be liable, will be claimed by the Co-Developer. All such claims shall be billed by the Co-Developer to the Contractor regularly as and when they fall due Such claims shall be paid by the Contractor within 15 (fifteen) days of the receipt of the

corresponding bills and if not paid by the Contractor within the said period, the Co-Developer may then deduct the amount from any moneys due i.e. Security Deposit or becoming due to the Contractor under the Contract or may be recovered by actions of law or otherwise, if the Contractor fails to satisfy the Co-Developer of such claims.

3.0 CONTRACTOR TO INDEMNIFY THE CO-DEVELOPER

The Contractor shall indemnify the Co-Developer and every member and employee of the Co-Developer and also the Engineer-in-Charge and his staff against all actions, proceedings, claims, demands, costs and express whatsoever arising out of or in connection with the matters referred is in clause 102.0 and elsewhere and all actions, proceedings, claims, damages, costs and expenses which may be made against the Co-Developer for or in respect of or arising out of any failure by the Contractor in the performance of his obligations under the Contract Document. The Co-Developer shall be liable for or in respect of any demand or compensation payable by law in respect or in consequence of any accident or injury to any workman person in the employment of the Contractor or his Sub- Contractor. The Contractor shall indemnify and keep indemnified the Co-Developer against all claims, damages, proceedings, costs, charges and expenses whatsoever in respect thereof or in relation thereto, damages, proceedings, costs charges and expenses whatsoever in respect thereof or in relation thereto.

12.0 ADVANCE AGAINST DELIVERY OF MATERIALS

As stipulation in clause no 24 of special conditions of contract. No secured advance will be payable to the contractor against delivery of materials at site for the execution of work.”

7.19 In light of the above the above terms of the contract, we are of the considered view that the assessee is not acting as a mere “works contractor” in respect of this project. The assessee has taken the responsibility of complete handholding of the project and also additional maintenance after

60 months post completion of project. In this case, it may be useful to refer to CIRCULAR NO. 4/2010 [F.NO. 178/14/2010-IT(A-I)], DATED 18-5-2010, wherein Board considered the issue as to whether widening of existing roads constitutes creation of new infrastructure facility for the purpose of section 80-IA(4)(i) of the Income-tax Act, 1961. Vide the above Circular, CBDT clarified that widening of an existing Road by constructing additional lanes as a part of a highway project by an undertaking would be regarded as a new infrastructure facility for the purpose of section 80-IA(4)(i). However, simply relaying of an existing Road would not be classifiable as a new infrastructure facility for this purpose.

7.20 Accordingly, we are of the view, that Ld. CIT(Appeals) has not erred in facts and in law in holding that the assessee is eligible for claim of deduction under section 80-IA (4) of the Act in respect of contract number 11 mentioned above.

Contract number 13: Bhopal Vidisa Road:

7.21 In this case, Ld. CIT(Appeals) while allowing the relief made the following observations:

“11.12 The Contract at Sr. No. 13 was between the appellant and the Public Works Department to construct road of 36.10 k. mtrs. as between Bhopal and Vidisa as a part of the Madhya Pradesh State Road Sector Development Programme, Phase I, Six" State Highway Corridors.

The appellant, after completion of the work, handed over the developed infrastructure facility to the Madhya Pradesh Public Works Department, Thereafter, the assessee had to undertake maintenance of the said infrastructure for a period as specified in the terms of the contract. If any damage occurred during this period, it was the responsibility of the appellant and the entire infrastructure had to be maintained by him alone.

*The appellant undertook an obligation to design the project which was approved by the competent authority of Gujarat Maritime Board and was assigned with the duty to develop the facility, the appellant was fully responsible to execute and complete the work. He was given possession of the land and property during the period of **development agreement and he used to exercise complete domain over the land and the project, he had to arrange finances, suitable man- power, machinery and equipments and managerial force. The risk in execution of work was also undertaken by the assessee as he was responsible for any damage or loss to the property.** The assessee had to develop the infrastructure facility and in the process all the works were to be executed by him. It may be laying of drainage system, provision of way for traffic etc. without any hindrance. The assessee's duty was to develop infrastructure whether it involved construction of a particular item as agreed to in the agreement or not. The agreement was not for a specific work, it was for development of the facility as a whole. The assessee was not entrusted,, with any specific work to be done by him. The material required was to be brought in by the assessee by adhering to the quality and quantity irrespective of cost of such material. **The employer did not provide any material to the assessee.** Thus, the contract was provided for the works in package and not as a works contract. **The assessee utilized its funds, its expertise, its employees and took the responsibility of developing the infrastructure facility. The losses suffered either by the employer, the workers of the developer or the people in the process of such development would be that of the assessee. The appellant handed over the developed infrastructure facility to the Madhya Pradesh Public Works Department on completion of the infrastructure facility.***

After having regard to the terms and conditions of the agreement for development of infrastructure facility, the rulings of the courts and position of law on the issue, in my opinion, the assessee acted as a developer because he developed infrastructure facility from an undeveloped area and handed over the same to the Madhya Pradesh Public Works Department. Therefore, he was eligible for claim of deduction u/s.80IA(4) (i) of the Act and the same is allowed.

7.22 In addition to the observations made by Ld. CIT(Appeals), we have also perused terms of the contract/agreement and it would be useful to produce some of the terms, which would throw useful light on the additional responsibility of being undertaken by the assessee.

“Sub-Clause 10.1: **Performance Security**

Substitute Sub-Clause 10.1 by the following:

"The Contractor shall provide security for his performance of the Contract to the Employer within 28 days after the receipt of the Letter of Acceptance. The Performance Security shall be in the form of an unconditional bank guarantee from any nationalised bank or scheduled bank in India or foreign bank. The amount of the bank guarantee shall be 10% (ten percent) of the Contract Price. The performance security shall be denominated in the types and proportions of currencies in which the Contract Price is payable. The same shall be furnished to the Employer in a proforma included in Section VIII of the Bidding Documents. The Contractor shall notify the Engineer when providing the performance security to the Employer. The performance security of a Joint Venture shall be in the name of the Joint Venture. In cases where the Bid of the successful bidder is seriously unbalanced or front loaded, the Employer may require that the amount of the 'Performance Security set forth above, be increased at the expense of the successful bidder to a level sufficient to protect the Employer against financial loss in the event of default of the successful bidder under the Contract.

Without limitation to the provisions of the preceding paragraph, whenever the Engineer determines an addition to the Contract Price as a result of a change in cost and/or legislation or as a result of a variation amounting to more than 25 per cent of the portion of the Contract Price payable in a specific currency, the Contractor at the Engineer's written request, shall promptly increase the value of the performance security in that currency by an equal percentage.

Mobilisation Advance Loan

(a) The Employer will make an interest - free advance to the Contractor for the costs of mobilisation in respect of the Works in a lump sum amount equivalent to 5 (five) percent of the Contract Price named in the Letter of Acceptance, in types and proportionate amounts of currencies, as agreed to in the Contract. Payment of the advance will be due under separate certification by the Engineer after (i) execution of the Form of Agreement by the parties thereto, (ii) provision by the Contractor of the Performance Security in accordance with Clause 10.1 and (iii) provision by the Contractor of an unconditional bank guarantee in a form and by a bank acceptable to the Employer in amounts and currencies equal to the advance payment. Such bank guarantee shall remain effective until the advance payment has been repaid pursuant to paragraph (d) below, but the amount thereof shall be progressively reduced by the amount repaid by the Contractor as indicated in Interim Payment Certificates issued in accordance with this Clause. Payment of advances will be in the form of an interim payment certificate and numbered as such.

(b) In addition to the advance mentioned in sub-para (a) above, the Employer will pay another interest-free advance against key plant and machinery required for the works and brought to site, if so requested by the Contractor. The maximum amount of such advance shall be 5 (five) percent of the Contract Price stated in the Letter of Acceptance, in types and proportionate amounts of currencies, as agreed to in the Contract. In the case of new plant and equipment, the advance shall be limited to ninety percent of the price of such new plant and equipment, brought at site by the contractor for which the Contractor

shall produce satisfactory evidence. In the case of used plant and equipment, the amount of such advance shall be limited to ninety percent of the depreciated value of plant and equipment as may be determined by the Engineer. This advance shall be further subject to the condition that: (i) such , plant and equipment are considered by the Engineer to be necessary for the-Works, (ii) such plant and equipment are in working order, and (iii) the Contractor provides an unconditional bank guarantee by a bank acceptable to the Employer in an amount equal to the advance. Such bank guarantee to remain effective until the advance has been completely re-paid by the Contractor out of current earnings under the contract and certified accordingly by the Employer. No advance shall be granted on any piece of plant or equipment with a value of less than Rs.50,000/- (Rupees fifty thousand). No advance for plant and equipment shall be granted after six months from the date of commencement, which period may be extended if considered reasonable by the Employer.

(c) The bank guarantee shall be denominated in the types and proportions of currencies in which the mobilisation advance is payable. The Contractor has the option of splitting the bank guarantee into parts each not less than 2.5% (two and one half percent) of the Contract Price aggregating separately to the amount stipulated in Clause 60.7 (a), and 60.7 (b) herein. Each part of the guarantee shall remain effective for the period determined pursuant to Sub-Clause 60.7 (a) and 60.7 (b). Such part guarantee shall be returned to the Contractor by the Engineer on recovery under the Contract of the full amount of such part guarantee within 28 (twenty-eight) days of the said recovery.”

7.23 In light of the above the above terms of the contract, we are of the considered view that the assessee is not acting as a mere “works contractor” in respect of this project. The assessee has taken the responsibility of complete handholding of the project and also additional maintenance for 12 months post completion of project. We would like to further add that in respect of the mobilisation advance received by the assessee, subject to

certain conditions, the ITAT (Hyderabad) in case of **Siva Swathi Constructions Pvt. Ltd. vs DCIT, Circle-3(2) in ITA No.1008-09/Hyd/2013 for AYs 2009-10 & 2010-11 dated 25.10.2013** observed that *"The next reason given by the CIT(A) is with regard to non- financial participation by the assessee, as the assessee has got mobilization advance. The mobilization advance has not been given freely. **It has been given only after the assessee furnished a bank guarantee, and the bank guarantee has been given by the bank only after getting enough security from the assessee, to protect itself from any risk on account of any default on the part of the assessee.** The assessee has taken financial assistance from bank and paid huge interest of Rs. 2,87,10,943.00 for assessment year 2009-10 and of Rs. 9,35,78,373.00 for assessment year 2010-11, as seen from the Profit and Loss Account of the assessee for the relevant years ending on 31.3.2009 and 31.3.2010 respectively, copies of which are furnished by the assessee at pages 20 and 65 of the paper-book. Similarly, assessee has invested its own fund of Rs.5,55,00,000.00 for assessment year 2009-10 and of Rs. 7,86,75,710.00 for the assessment year 2010-11, as seen from the Balance Sheet of the assessee as on 31.3.2009 and 31.3.2010 respectively, copies of which are furnished by the assessee at pages 21 and 66 of the paper-book. In this view of the matter, the reason given by the CIT(A) on this aspect for denying deduction to the assessee under S.80-IA is also not valid".* Thus, in light of the aforesaid decision of the Tribunal Hyderabad Bench, we are of the view that merely because the assessee was receiving payments from the Government in progress of work it cannot be said that the projects were financed by Government. The attendant conditions at the time of grant of mobilisation advance play an important role in deciding whether

the project is a “works contract” or “development project”. In the instant facts, we observe that mobilisation advance was given to the assessee after imposing strict conditions in the form of security deposits/bank guarantee as a precondition before such mobilisation advance was granted to the assessee. This is a pointer to the fact that the assessee was acting as a “developer” in the instant set of facts in respect of the contract mentioned above.

7.24 Accordingly, we are of the view, that Ld. CIT(Appeals) has not erred in facts and in law in holding that the assessee is eligible for claim of deduction under section 80-IA (4) of the Act in respect of contract number 13 mentioned above.

7.25 In the combined result, the Department’s appeal is partly allowed. Now we shall take of the assessee’s appeal.

Assessee’s Appeal:

8. The assessee is in appeal before us in respect of projects for which Ld. CIT(Appeals) has denied the claim of deduction under section 80-IA (4) of the Act. As noted earlier, Ld. CIT(Appeals) has made specific observation in respect of each project, before denying the claim of the assessee. We shall reproduce the observations made by Ld. CIT(Appeals) in respect of each of the projects to decide whether the assessee was eligible for claim of deduction under section 80-IA (4) of the Act in respect of the above projects.

Contract No. 1: Morbi Maliya Rural P-2 Road

8.1 In this case, Ld. CIT(Appeals) while disallowing the claim of deduction u/s 80-IA(4) of the Act with the following observations:

*“11. The contract at Sr.No.1 was entered between the Gujarat State Roads and Building Department and the appellant for **Improvement of Rural Roads under** the scheme of Kishan Path Yojana (Package No. Kishan Path / P-2/Raj, in Taluka, Morbi-Maliya, district Rajkot.*

*The terms and conditions of the contract work were examined and it was observed that the assessee **did not develop any infrastructure facility but only rendered services of civil work in the form of repairing and restoring the existing road.** As there was no development of any infrastructure facility, in my opinions, the assessee was not eligible for claim of deduction u/s.80IA (4) of the. IT. Act. Therefore, the action of the A.O. is confirmed.”*

8.2 From perusal of the observations made by Ld. CIT(Appeals), it is evident that the assessee has not developed any infrastructure facility but only rendered services of civil work in the form of repairing and restoration of the existing road. The ITAT Bangalore in the case of **GMR Tambaram Tindivanam Expressways Ltd v DCIT in I.T.A Nos.545 & 546/Bang/2018**, held that a clear distinction can be made between widening an existing road by constructing additional lanes as part of the highway project vis-à-vis improving, maintaining and refurbishing an existing road. For a specific patch of road, as the taxpayer was only operating and maintaining an already existing four lane road by strengthening it, no new infrastructure facility came into existence. Laying a service road and laying a main line were two different activities and laying a service road could not

be termed as a new infrastructure facility, to claim deduction under section 80-IA of the Act.

8.3 Accordingly, in our view, we find no infirmity in the order of Ld. CIT(Appeals) with respect to Contract Number 1. Accordingly, in our view, the assessee is not eligible for claiming deduction under section 80-IA of the Act in respect to Contract number 1.

Contract No. 2: KKS RJTI-A Road

8.4 In this case, Ld. CIT(Appeals) while disallowing the claim of deduction u/s 80-IA(4) of the Act with the following observations:

*“11.1 The contract at Sr.No.2 was entered between Gujarat State Roads and Building Department and the appellant **for Improvement of Rural Roads under the scheme of "12th Finance Commission" in Subdivision of Rajkot district.***

***The contract was for executing repairing and resurfacing of roads in the district of Rajkot.** The work included extension of shoulders on both sides of roads, repairing the potholes, fill up depression, excavate and carry out the full depth repair with GSBC, WMM, Prime coat and SD overlay and Wearing of surface, seal the cracks by Fog/Slurry seal, clean the surface, provide tack coat and lay profile corrective course and lay bituminous macadam overlay, providing surface dressing (two coat)/ bituminous concrete, fill up and compact the shoulders with gradular sub base material, Mark centerline where necessary after providing necessary traffic signs, clear/provide drains, clear inlet outlet of C.D. Works, and provide hump type speed breaker etc.*

The terms and conditions of the contracts were examined and it was revealed that the assessee did not develop any infrastructure facility but only rendered services of civil work in the form of repairing and re-surfacing of the existing roads. As there was no development of any infrastructure facility, in my considered opinion, the assessee was not eligible for claim of deduction u/s.80IA (4) of the IT. Act. Accordingly, the action of the A.O. is confirmed.”

8.5 From perusal of the observations made by Ld. CIT(Appeals), it is evident that the assessee has not developed any infrastructure facility but only rendered services of civil work in the form of repairing and restoration of the existing road. In this case, it may be useful to refer to CIRCULAR NO. 4/2010 [F.NO. 178/14/2010-IT(A-I)], DATED 18-5-2010, wherein Board clarified that widening of an existing Road by constructing additional lanes as a part of a highway project by an undertaking would be regarded as a new infrastructure facility for the purpose of section 80-IA(4)(i). **However, simply relaying of an existing Road would not be classifiable as a new infrastructure facility for this purpose.**

8.6 Accordingly, Accordingly, in our view, we find no infirmity in the order of Ld. CIT(Appeals) with respect to Contract Number 2.

8.7 Accordingly, in our view, the assessee is not eligible for claiming deduction under section 80-IA(4) of the Act respect to Contract number 2.

Contract No. 3: Morbi Malaiya KP/RAJ/P-2 ROAD:

8.8 In this case, Ld. CIT(Appeals) while disallowing the claim of deduction u/s 80-IA(4) of the Act with the following observations:

“11.2 The contract at S. No.3 was entered between Gujarat State Roads and Building Department and the appellant for Improvement of Rural Roads under the scheme of Kishan Path Yojana (Package No. Kishan Path / P-2/Raj. Taluka, Morbi - Maliya district Rajkot. The terms and conditions of the contract work were examined and it was observed the assessee did not develop any infrastructure facility but only rendered services of civil work in the form of repairing and restoring of the the existing road. As there was no development of any infrastructure facility, in my considered opinion, the assessee, was not eligible for claim of deduction u/s.80IA(4) of the I.T. Act Therefore, the action of the A.O. was confirmed.”

8.9 From perusal of the observations made by Ld. CIT(Appeals), it is evident that the assessee has not developed any infrastructure facility but only rendered services of civil work in the form of repairing and restoration of the existing road. In this case, it may be useful to refer to CIRCULAR NO. 4/2010 [F.NO. 178/14/2010-IT(A-I)], DATED 18-5-2010, wherein Board clarified that widening of an existing Road by constructing additional lanes as a part of a highway project by an undertaking would be regarded as a new infrastructure facility for the purpose of section 80-IA(4)(i). **However, simply relaying of an existing Road would not be classifiable as a new infrastructure facility for this purpose.** Accordingly, in our view, we find no infirmity in the order of Ld. CIT(Appeals) with respect to Contract Number 3.

8.10 Accordingly, in our view, the assessee is not eligible for claiming deduction under section 80-IA(4) of the Act respect to Contract number 3.

Contract No. 4: Morbi TankaraKP/RAJ/P-3 ROAD:

8.11 In this case, Ld. CIT(Appeals) while disallowing the claim of deduction u/s 80-IA(4) of the Act with the following observations:

“11.3 The contract at Sr.No.4 was entered between Gujarat State Roads and Building department and the appellant for repairing of the existing road of 4 km. between State Highway and Jivapar and 5 km. from National Highway to Lakhadhipur approach road under the scheme of Kishan Path Yojana Package No.KP/RJ/P-3,Tal-,Morbi, Tankara, district Rajkot.

The terms and conditions of the contract were examined and it was revealed that the assessee did not develop any infrastructure facility but only rendered services of civil work in the form of repairing and restoring the existing road in Rajkot district. As there was no development of any infrastructure facility, in my opinion, the assessee was not eligible for claim of deduction u/s.80IA(4) of the I.T. Act. Therefore, the action of the A.O. is confirmed.”

8.12 From perusal of the observations made by Ld. CIT(Appeals), it is evident that the assessee has not developed any infrastructure facility but only rendered services of civil work in the form of repairing and restoration of the existing road. In this case, it may be useful to refer to CIRCULAR NO. 4/2010 [F.NO. 178/14/2010-IT(A-I)], DATED 18-5-2010, wherein Board clarified that widening of an existing Road by constructing additional lanes as a part of a highway project by an undertaking would be regarded as a new infrastructure facility for the purpose of section 80-IA(4)(i). **However, simply relaying of an existing Road would not be classifiable as a new infrastructure facility for this purpose.** Accordingly, in our view, we find no infirmity in the order of Ld. CIT(Appeals) with respect to Contract Number 4.

8.13 Accordingly, in our view, the assessee is not eligible for claiming deduction under section 80-IA(4) of the Act respect to Contract number 4.

Contract No. 5:Nabard/RAJ/P-4WMT ROAD:

8.14 In this case, Ld. CIT(Appeals) while disallowing the claim of deduction u/s 80-IA(4) of the Act with the following observations:

“11.4 The contract at Sr.No.5 was entered between Gujarat State Roads and Building Department and the appellant for repairing of the existing road of Rajkot district under NABARD RIDF XI- (Package No. Raj-P-04)-Taluka, Wankaner - Tankara - Morbi in district of Rajkot.

*Terms and conditions of the agreement were examined. As a **matter of fact, the contract was made for improving/resurfacing rural roads in district of Rajkot.** The work included providing and laying thick mix seal surface using stone chips, rolling and consolidation of WBM including sealing depression, preparing the surface by brushes for removing caked mud, loose dirt etc., supplying and spreading of murrum for road-side shoulders including rolling and watering, providing and laying thick bituminous macadam layer, fixing ordinary kilometer stones, indicator stones, guard stones and road sign boards jaf M.S plates and angle irons, including painting, lettering etc. complete with fixing in C.C. block with necessary excavation, pre-casting including necessary reinforcement, painting, including necessary reinforcement, painting, lettering and and fixing hector-meters etc.*

*It was revealed from the terms and conditions of the contracts that the assessee did not develop any infrastructure facility but only **rendered services of civil work in the form of repairing and restoring of the existing road.** As there was no development of any*

infrastructure facility, in my opinion, the assessee was not eligible for claim of deduction u/s. 80IA(4) of the IT. Act Accordingly, the action of the A.O. is confirmed.”

8.15 From perusal of the observations made by Ld. CIT(Appeals), it is evident that the assessee has not developed any infrastructure facility but only rendered services of civil work in the form of repairing and restoration of the existing road. In this case, it may be useful to refer to CIRCULAR NO. 4/2010 [F.NO. 178/14/2010-IT(A-I)], DATED 18-5-2010, wherein Board clarified that widening of an existing Road by constructing additional lanes as a part of a highway project by an undertaking would be regarded as a new infrastructure facility for the purpose of section 80-IA(4)(i). **However, simply relaying of an existing Road would not be classifiable as a new infrastructure facility for this purpose.** Accordingly, in our view, we find no infirmity in the order of Ld. CIT(Appeals) with respect to Contract Number 5.

8.16 Accordingly, in our view, the assessee is not eligible for claiming deduction under section 80-IA(4) of the Act respect to Contract number 5.

Contract No. 12:GKA KM42 TO 248 NH-8 NHAI ROAD:

8.17 In this case, Ld. CIT(Appeals) while disallowing the claim of deduction u/s 80-IA(4) of the Act with the following observations:

“11.11 The contract at Sr.No.12 was for periodic maintenance works comprising of bituminous concrete overlay on Gurgaon,

Kotputli and Amer Section (km 42 to km. 248) in the state of Haryana and Rajasthan on NH-8.

*This contract was entered between the National Highways Authority of India and the appellant. Terms and conditions of the agreement were examined. **The contract was made for improving/resurfacing rural road in affected district of, Rajkot.** The work included providing and laying thick mix seal surface using stone chips, rolling and consolidation of WBM including sealing depression which occurred during the process with power roller, preparing the surface by brushes for removing caked mud etc. sweeping with brooms and finally fanning the surface with gunny bags to remove all loose dirt etc., water bound macadam surface (new), supplying and spreading of murrum for road-side shoulders including rolling and watering, providing and laying thick bituminous macadam in one layer, fixing ordinary kilometer stones, indicator stones, guard stones and road sign boards of M.S plates and angle irons, including painting, lettering etc. complete with fixing in C.C. block with necessary excavation, pre-casting including necessary reinforcement, painting, lettering and fixing hector-meters etc..*

The terms and conditions of the contracts were examined and it was observed the assessee did not develop any infrastructure facility but only rendered services of civil work in the form of repairing and maintenance of the existing road. As there was no development of any infrastructure facility, the assessee was not eligible for claim of deduction u/s. 80IA(4) of the IT. Act. Accordingly, the action of the A.O. is confirmed.”

8.18 From perusal of the observations made by Ld. CIT(Appeals), it is evident that the assessee has not developed any infrastructure facility but only rendered services of civil work in the form of repairing and restoration of the existing road. In this case, it may be useful to refer to CIRCULAR NO. 4/2010 [F.NO. 178/14/2010-IT(A-I)], DATED 18-5-2010, wherein Board clarified that widening of an existing Road by constructing additional lanes as a part of a highway project by an undertaking would be regarded as

a new infrastructure facility for the purpose of section 80-IA(4)(i).
However, simply relaying of an existing Road would not be classifiable as a new infrastructure facility for this purpose. Accordingly, in our view, we find no infirmity in the order of Ld. CIT(Appeals) with respect to Contract Number 12.

8.19 Accordingly, in our view, the assessee is not eligible for claiming deduction under section 80-IA(4) of the Act respect to Contract number 12.

8.20 In the result, appeal of the assessee is dismissed.

9. In the combined result, the appeal of the Department is partly allowed and the appeal of the assessee is dismissed.

Order pronounced in the open court on 28-09-2022

Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Sd/-
(SIDHHARTHA NAUTIYAL)
JUDICIAL MEMBER

Ahmedabad : Dated 28/09/2022 TRUE COPY

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order,

Assistant Registrar,
Income Tax Appellate Tribunal,
Rajkot