

**IN THE INCOME TAX APPELLATE TRIBUNAL  
Hyderabad ' A ' Bench, Hyderabad**

**Before Shri R.K. Panda, Accountant Member  
AND  
Shri Laliet Kumar, Judicial Member**

**APPEALS**

Sl. No.	Appeal No.	A.Y.	Appellant	Respondent
1.	1937/Hyd/2014	2005-06	M/s. Madhucon Projects Limited, Hyderabad. PAN: AABCM4757A	Dy. Commissioner of Income-tax, Central Circle-3, Hyderabad
2.	1938/Hyd/2014	2006-07		
3.	1326/Hyd/2015	2005-06		

**MISCELLANEOUS APPLICATIONS**

Sl. No.	M.A.	ITA	A.Y.	Appellant	Respondent
1	126/Hyd/2015	683/Hyd/2010	2005-06	M/s. Madhucon Projects Limited, Hyderabad. PAN: AABCM4757A	Dy. Commissioner of Income-tax, Central Circle-4, Hyderabad
2	127/Hyd/2015	702/Hyd/2010	2006-07		-do-
3	128/Hyd/2015	1497/Hyd/2011	2005-06		ACIT, Central Circle-3, Hyderabad.
4	129/Hyd/2015	1498/Hyd/2011	2006-07		-do-
5	5/Hyd/2016	171/Hyd/2013 in 805/Hyd/2010	2005-06		DCIT, Central Circle 4, Hyderabad
6	6/Hyd/2016	172/Hyd/2013 in 806/Hyd/2010	2006-07		DCIT, Central Circle 4, Hyderabad.

Assessee by:	Shri P. Murali Mohan Rao
Revenue by:	Shri Jeevan Lal Lavidiya

Date of hearing: 13.01.2023  
Date of pronouncement: 02.03.2023

## **ORDER**

### **PER BENCH :**

The captioned three appeals filed by the assessee are against the separate orders passed by the learned Commissioner of Income Tax (Appeals) – 7, Hyderabad dt. 30.09.2014 for the assessment years mentioned above.

The captioned six miscellaneous applications are filed by the assessee feeling aggrieved by the order passed by the Tribunal in the captioned appeals i.e., ITA 683,702/Hyd/2010, 1497 & 1498/Hyd/2011 and 171 and 172/Hyd/2013, seeking to recall of the said orders u/s 254(2) of the Act.

2. The grounds raised by the assessee in ITA No.1937 and 1938/Hyd/2014 are similar except the amounts involved. Hence, we are reproducing the grounds in ITA No.1937/Hyd/2014 for A.Y. 2005-06 only for the sake of brevity.

*“1) The order of the ld.CIT(A) – VII, Hyderabad is erroneous both on facts and in law.*

*2) The ld.CIT(A) – VII, erred in not allowing the deduction claimed by the assessee u/s 80IA of the Act amounting to Rs.21,26,74,525/-.*

*3) The ld.CIT(A) – VII, ought to have appreciated that deduction claimed u/s 80IA should have been allowed following the order of Hon’ble ITAT Hyderabad Bench ‘A’ in the assessee own case for A.Y. 2008-09 in ITA No.1499/Hyd/2011 dt.28.12.2012.”*

3. The grounds raised by the assessee in ITA No.1326/Hyd/2015 for A.Y. 2005-06 read as under :

*“1. The Ld. Commissioner of Income Tax(Appca1s), Hyderabad erred both in law and on facts while dismissing the appeal.*

*2. The, Ld. Commissioner of Income Tax(Appca1s), Hyderabad erred in observing at para 4.0 of his order that the assessee had not claimed deduction u/s. 801A of the Act either in original return of income or the return of income filed in response to notice u/ s. 153A of the Act.*

*3. The Ld. Commissioner of Income Tax(Appeals) erred in appreciating that the only return of income filed by the appellant for the Asst. year under consideration was the return filed on 24-01-2007 in response to the notice issued u/ s 153A dated 16-06-2006 where in there was a claim made u/ s 801A of the I.T. Act for Rs.21,26,74,525/- after which the total income admitted of Rs.3,52,60,932/- was arrived at.*

*4. The Ld. Commissioner of Income Tax(Appeals) grossly erred in holding that the findings of the ITAT for the Asst. Years 2007-08 and 2008-09 could not be suomoto, extended backwards to earlier assessment years when there was no such claim.*

*5. The Ld. Commissioner of Income Tax(Appeals) grossly erred in holding that in the absence of any seized material and any claim in the return, fresh and different findings contrary to the already existing ITAT order could not be arrived at.*

6. *The Ld. Commissioner of Income Tax(Appeals) failed to appreciate the fact though the appellant had computed the total income admitted Of Rs.3,52,60,932/- based on the Books of account maintained where as in the original assessment made u/ s 143(3) rws 153A dated 31-12-2007, the Assessing Officer determined the total income at Rs.27,41,80,859/estimating the profit from contract works at 12.5% of gross receipts a*

7. *The Ld. Commissioner of Income Tax (Appeals), Hyderabad erred in sustaining the disallowance of claim made by the assessee u/ s. 80IA of the Act.*

8. *The Ld. Commissioner of Income Tax(Appeals), Hyderabad ought to have appreciated the direction of Hon'ble ITAT vide ITA No. 1970/ H/ 2011 and 1499/ Hyd/ 2011 in the case of the assessee and allowed the claim u/s 80IA for the Asst. year under consideration.*

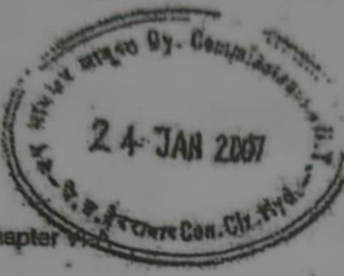
9. *The Ld. Commissioner of Income Tax(Appeals) erred in dismissing the appeal without adjudicating the appeal on merits.”*

#### **BRIEF BACKGROUND OF THE CASE :**

4. A search and seizure operation u/s 132 of the Income Tax Act was conducted in the case of the assessee on 20.10.2005. Pursuant thereto notice u/s 153A was issued to the assessee. The assessee had filed the return of income on 24.01.2007 claiming the deduction under Chapter VI A of the Act. The copy of the acknowledgment claiming deduction of Rs.21,26,74,525/- is reproduced hereinbelow for the sake of completeness. Similarly, for A.Y. 2006-07, the assessee had claimed the deduction of Rs.34,94,59,676/- under Chapter VI A of the Act. Copy of the acknowledgment is reproduced hereunder : (Page 1 and 2 of paper book).

**ACKNOWLEDGEMENT**

Received with thanks from M/s. MADHUCON PROJECTS LIMITED 2005-06  
return of Income and return of fringe benefits in Form No. 1 for assessment year 2006-07, having the following particulars.



(a) PAN	002890
(b) Gross total income	AABCMA7B7A
(c) Deductions under Chapter VI	247935457
(d) Total Income [(b) - (c)]	812674529
(e) Tax paid	35260932
(i) TDS/TCS	34468900
(ii) Advance tax	NIL
(iii) Self-assessment tax	NIL
(iv) Total of [(i) + (ii) + (iii)]	NIL
(f) Value of fringe benefits	34468900
(g) Tax paid	
(i) Advance fringe benefit tax	NIL
(ii) Fringe benefit tax on self-assessment	NIL
(iii) Total of [(i) + (ii)]	NIL

Acknowledgement No. \_\_\_\_\_ Date of Receipt \_\_\_\_\_

Ward/Circle/Range \_\_\_\_\_

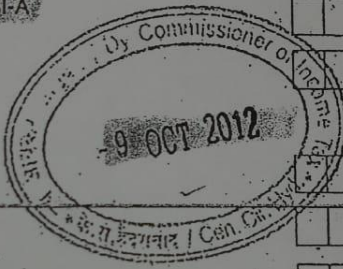
See [ ]

Name and signature of the Official receiving the return

ACKNOWLEDGEMENT

Received with thanks from M/s. MADHUCON PROJECTS LIMITED a  
return of Income and return of fringe benefits in Form No. 1 for assessment year 2006-07, having the  
following particulars.

(a) PAN	AABC M4757A
(b) Gross total income	418066400
(c) Deductions under Chapter VI-A	349459676
(d) Total income [(b) - (c)]	68606724
(e) Tax paid	
(i) TDS / TCS	50640571
(ii) Advance tax	1000000
(iii) Self-assessment tax	88000000
(iv) Total of [(i) + (ii) + (iii)]	139640571
(f) Value of fringe benefits	1979729
(g) Tax paid	
(i) Advance fringe benefit tax	517478
(ii) fringe benefit tax on self-assessment	1148899
(iii) Total of [(i) + (ii)]	666377



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Acknowledgement No. \_\_\_\_\_, Date of Receipt \_\_\_\_\_

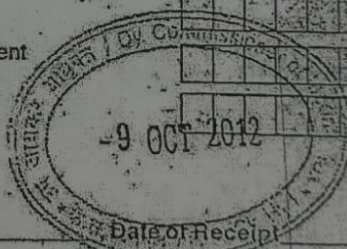
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ACKNOWLEDGEMENT

Received with thanks from M/s. MADHUCON PROJECTS LIMITED a  
return of income and return of fringe benefits in Form No. 1 for assessment year 2008-09, having the  
following particulars.

(a) PAN	AABC M4757A
(b) Gross total income	247935457
(c) Deductions under Chapter VI-A	212674525
(d) Total income [(b) - (c)]	35260932
(e) Tax paid	
(i) TDS/TCS	34468900
(ii) Advance tax	12000000
(iii) Self-assessment tax	44000000
(iv) Total of [(i) + (ii) + (iii)]	90468900
(f) Value of fringe benefits	
(g) Tax paid	
(i) Advance fringe benefit tax	
(ii) fringe benefit tax on self-assessment	
(iii) Total of [(i) + (ii)]	

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Acknowledgement No. \_\_\_\_\_ Date of Receipt \_\_\_\_\_

Ward/Circle/Range \_\_\_\_\_

Seal

Name and signature of the Official  
receiving the return.

5. The Assessing Officer had completed the assessment pursuant to the notice issued to the assessee for A.Ys. 2005-06 and 2006-07 and thereafter, assessed the income of the assessee at Rs.27,41,80,860/-. However, while estimating the income of the assessee, the Assessing Officer estimated the assessee's profit from the contract works before considering the depreciation at 12.5%. Besides that the Assessing Officer vide his order dt.31.12.2007 had disallowed the claim of the assessee u/s 80IA of the Act. The relevant portion of the order passed by the Assessing Officer for A.Y. 2005-06 is reproduced hereinbelow (page 19 of the assessment order):-

*"The proviso to section 80IA(4)(1)(c) lays down that in case an Infrastructure facility is transferred, The entire benefit of deduction will be available to the transferee for the unexpired , period during which the transferor would have been entitled to the deduction. In case the deduction was available to a civil contractor, then this proviso was not required.*

*Sub-section(e) to section 80IA(4)(i) lays down operation of the infrastructural facility is a condition precedent to this claim. Only when operational stage is achieved, the benefit under this section is available because only at the operation stage of the complete infrastructure facility, it can be said that the infrastructure facility was developed. The business of developing Infrastructure facility is to be looked upon as a complete whole and not in piecemeal. The assessee was participating in construction of an infrastructure facility but did not carry the risks associated with the infrastructure facility.*

*Section 80IA(2) lays down the time period during which-deduction can be claimed which starts only in the year in which the infrastructural facility is not only developed, but also begins to be operated.*

*In view of the above, I am not convinced that the assessee is entitled to claim that they had engaged in a business of developing infrastructure facility.*

*it may be mentioned in this connection that an infrastructure facility by itself requires a long gestation period and that is the reason why capital involvement and the risk is huge. The return on capital is to be achieved over a long period of time. It is for this reason that the deduction under this section has been provided for a period up to 20 years. In some cases, during which the infrastructure facility will be put to use through the medium of commercial enterprise, and the assessee has been given the option to choose a span of time during which it will like to claim the deduction, recognizing that there may not be any profits in the first few years of the development of infrastructure facility. In contrast, a civil contractor gets entitled to profits immediately on the very completion of the contract work itself and does not have to wait for any operations of contract work executed.*

*Moreover, the agreements relating to the works which have been submitted by the assessee all relate to execution and completion of civil contract works and not to development of Infrastructural facility.*

*Further, as per explanation to section 80IA(13) of the I.T.Act, inserted by Finance Act, 2007 with retrospective effect from 01.04.2000, nothing contained in section 80IA shall apply to a person who executes a works contract entered into with the undertaking or enterprise.*

*Thus, it is evident that the assessee is not entitled to the deduction provided by section 80IA of the I.T.Act, 1.981. As such, the assessee's claim u/s. 80IA amounting to Rs.21,26,74,525/- for the year is rejected and income computed based on discussion in this order as above."*

6. Feeling aggrieved by the order passed by the Assessing Officer, the assessee filed the appeals before the Id.CIT(A). On 30<sup>th</sup> January, 2018 the assessee had filed form 35 and along with that had filed the grounds of appeal and in the said grounds of appeal, the assessee had raised various grounds including the specific ground for denying 80IA deduction by raising ground no.8 which is to the following effect : Page 41 of the paper book.

*“8. I) In the facts and circumstances of the case the Assessing Officer is not justified in denying the claim of the appellant towards deduction u/s 80IA of the Income Tax Act in an amount of Rs.21,26,74,525/-.*

*ii) The Assessing Officer ought to have given the finding that the appellant is not entitled to the claim as per the contention put forth in the appellant’s letter filed on 19<sup>th</sup> November 2007.”*

7. In between, the Id.CIT(Central) had issued a show cause notice to the assessee for the following reasons :

*“2.1 During the course of search proceedings conducted under section 132 of the I.T. Act on 20.10.2005, certain incriminating documents were found and seized by the department. In response to notice under section 153A the company filed its return disclosing additional income of Rs.9 crores. The details are as under :*

<i>Asst. Year</i>	<i>Income assessed already</i>	<i>Additional Income disclosed</i>	<i>Total income disclosed as per return</i>
<i>2000-01</i>	<i>2,32,03,070</i>	<i>30,00,000</i>	<i>2,62,03,070</i>
<i>2001-02</i>	<i>3,56,25,110</i>	<i>1,00,00,000</i>	<i>4,56,25,110</i>
<i>2002-03</i>	<i>7,82,83,064</i>	<i>1,50,00,000</i>	<i>9,32,83,064</i>
<i>2003-04</i>	<i>12,39,36,890</i>	<i>2,40,00,000</i>	<i>14,79,36,890</i>
<i>2004-05</i>	<i>19,23,75,770</i>	<i>2,00,00,000</i>	<i>21,23,75,770</i>
<i>2005-06</i>		<i>1,80,00,000</i>	<i>24,79,35,457</i>

*The assessments were completed by rejecting the books of account and estimating the profit of contract work at 42.5% of the turnover shown in the audited profit / loss account before allowing depreciation. The Assessing Officer also made separate addition on account of gratuitous payment as per seized material for various years amounting to Rs.5.33 crores and has given telescoping effect to the remaining additional income of Rs.3.67 crores into the estimation of income made for different assessment years.*

*2.2 The action of the Assessing Officer appears to be incorrect in so far as the basis of estimation of profit from contract income at the rate of 12.5% of the turnover is concerned. While the Assessing Officer rejected the books of account for estimating income from contract business, he had not taken into consideration the profit disclosed in seized documents relating to some projects.*

Without making proper enquiry, he had accepted the company's claim that these seized documents, namely Monthly Review Meeting Statements cannot be the basis for estimating income in respect of entire contract receipt. The Assessing Officer had accepted the company's view that accounts maintained at head office reflected correct profit of each project. However, no enquiry as to how these figures were maintained by the head office was made by the Assessing Officer. The basis for accounting of these figures at the head office has not been looked into and examined by the Assessing Officer. The Assessing Officer without making enquiry has accepted the assessee's stand that the profit disclosed in the MRM statements did not reflect the true profit of the company and that the same cannot be taken as a basis for making an estimation of income.

2.3 While rejecting the books of accounts, the Assessing Officer held that accounts maintained at the head office could not be relied upon because there were certain defects in the accounts. However, while rejecting the result as mentioned in the MRM sheets, he had relied on the same Head Office accounts thereby contradicting his own stand. This action of the Assessing Officer rejecting the results contained in the MRM sheets without making proper enquiry had rendered the orders erroneous.

2.4 The company surrendered additional income of Rs.9 crores for the A.Y. 2000-01 to 2005-06. In the assessment order, the Assessing Officer estimated the income at 12.5%. He had also added gratuitous payment of Rs.5.34 crores. However, he had allowed telescoping of the balance income offered while computing the total income. As a result, the Assessing Officer had not made addition of Rs.3.67 crores for different assessment years. This action of the Assessing Officer in allowing telescoping of income had rendered the orders erroneous.

2.5 For all the A.Ys. 2000-01 to 2006-07, the Assessing Officer estimated income at the rate of 12.5% on which he had allowed depreciation. The net income after allowance of depreciation is substantially lower as is evident from the table below :

AY	Turnover of contract work	Income at 12.5%	Depreciation	Income assessed from contracts	Income assessed as percentage of turnover
2000-01	983469703	122933713	64434214	58499499	5.95
2001-02	1165820088	145727511	67648367	78079144	6.69
2002-03	2003284348	250410543	117900105	132510438	6.61
2003-04	2319082321	305528375	216879164	88649211	3.82
2004-05	3014293807	376786725	201999036	174787689	5.79
2005-06	3063147554	382893444	152463828	239429616	7.81
2006-07	3420902384	507612798	126158087	381454711	11.15

*The action of the Assessing Officer in allowing deduction for depreciation after estimation of income when book results are rejected. Is not in conformity with the decision of the jurisdictional High Court of Andhra Pradesh in the case of Indwell Constructions reported in 232 ITR 776 wherein it has been held that when books of accounts are rejected and income is estimated no deduction can be allowed as per provisions of section 30 to section 40D of the I.T. Act. The action of the Assessing Officer in not following the decision of the jurisdictional High Court has rendered the orders erroneous.*

2.6 *For the Asst. Years 2001-02 to 2006-07 it is also seen from record that the company had claimed huge amount of deduction towards royalty. The Assessing Officer had not examined this issue before allowing such huge deduction. Even the details of parties to whom the royalty payments were made are not brought on record. No enquiry was made to examine the deductibility of such claims, particularly applicability of section 40(a)(ia) of the I.T. Act. Failure on the part of the Assessing Officer to make enquiry on this issue has rendered the assessment orders erroneous.*

3. *In view of the above mentioned facts, I am of the opinion that the assessments for the Asst. Years 2000-01 to 2006-07 are erroneous and prejudicial to the interests of Revenue and require to be revised u/s 263 of the I.T. Act. Accordingly, you are afforded on opportunity of being heard to and for this purpose, your case is posted for hearing on 15.03.2010 at 10.30 AM on which date, you are requested to furnish your objections for the proposed revision with necessary evidence."*

7.1 After hearing the assessee, the Id.CIT(Central) had passed an order on 30.03.2010, thereby setting aside the order dt.31.12.2007 passed by the Assessing Officer for the A.Ys. 2000-01 to 2006-07. In Paragraph 10 of his order Id.CIT(Central) held as under 65 of the paper book.

*"10. To sum up, it is seen that the AO has not made proper enquiry and without any supporting material has accepted assessee's claim and he has also passed orders which is against the decision of jurisdictional High Court thereby-making the orders unsustainable in law. Therefore, I hold that the orders passed by the AO are erroneous and prejudicial to the interest of revenue liable for revision u/s 263. I therefore, set-aside the orders passed u/s 143(3) r.w.s 153A on 31.12.2007 for the Asst. Years 2000-01 to 2006-07 and direct the Assessing Officer to pass assessment orders afresh as per*

*law after making proper enquiry. He is directed to allow an opportunity of being heard to the assessee before passing assessment orders afresh."*

7.2 It may be pertinent to mention here that the Id.CIT(Central) has neither issued any show cause notice for disallowance of 80IA deduction nor had issued any direction to the Assessing Officer to examine the issue of 80IA afresh, in his order dt.30.03.2010.

8. The Id.CIT(A), without verifying, as to the subject matter of revision more particularly whether it dealt with the issue of 80IA or not vide his order dt. 31.03.2010 had dismissed the assessee's appeal filed against the order passed by the Assessing Officer u/s 143(3) r.w.s. 153A vide page 43 by holding as under :

*"These seven appeals are filed against the assessment orders dated 31.12.2007 passed by DCIT, Central Circle – 4, Hyderabad ' u/s 143(3) rws 153A of the Income-tax Act, 1961. The appeals were taken up for hearing. While the appellate proceedings were in progress, an order u/s 263 of the .I.T.Act dated 30-3-2010 was received from the CIT (Central), Hyderabad. In the said order, the CIT(Central), Hyderabad has set aside the assessment orders which are under the -present appeal and has directed the AO to Make the assessments afresh after giving an opportunity of being heard to the assessee. Thus, the assessment orders against which the present appeals have been "Meld cease to exist on passing of the- order u/s 263 passed by the CIT(Central),Hyderabad. To that extent the -present appeals are not maintainable and have become infructuous. Since the assessments have been set aside to be done afresh, the grounds of appeal raised by the appellant are not being reproduced in detail in this order."*

9. The assessee had also filed another appeal before the ITAT for A.Y. 2005-06 feeling aggrieved by the order of Id.CIT(Central) u/s 263 of the Act dt.30.03.2010. In the said appeal, the assessee had raised various grounds pertaining to the direction issued by the Id.CIT(Central). (Page 72 to 74 of the paper book).

*"1) The Hon'ble Commissioner of Income Tax (Central), Hyderabad has erred while passing the Order u/s. 263 for the Asst. year 2005416., wherein the income of the Assessee has been revised by enhancing the Income of the assessee which is not correct and not justified.*

*2) We would like to submit that the Assessee has already furnished all the information to the Assessing Officer and the same has been Rioted by the Assessing Officer. Once the Assessment has been completed u/s 143(3), the order cannot be revised enhancing the Income by making change of opinion u/s 263 which is not cornet and not justified.*

*3. We would like to submit that where two views are possible and where one view has been considered, the change of opinion cannot be made and the order cannot be revised.*

*4) The Hon'ble Commissioner of Income Tax (Central), Hyderabad has erred while passing the order u/s 263 wherein the total income of the assessee has been revised on the contention that the Assessing Officer has erred while rejecting the books of accounts, estimated income of the assessee company at 12.5% of the turnover without considering the profits disclosed in seized documents which is not correct and not justified.*

*5) We would like to submit that the seized documents cannot be the basis for estimating income in respect of entire contract receipt and the accounts maintained at bead office reflects correct profit of each project. The Assessing Officer has allowed the claim of the Assessee Company only after the detailed verifications and submissions made by the company.*

*6. The contention of CIT, Central, Hyderabad regarding action of the A.O. rejecting be results contained in the Monthly Review Meeting, without making proper enquiry had rendered the order erroneous, is not correct and not justified.*

*7. The A.O. has already convinced with the explanation clarification given by the Assessee Company towards the figures mentioned in the MRM ( Monthly Review Meeting) sheets and after due verification and confirmation only the MRM sheets has*

*not been considered and rejected by AO while passing the Order. Hence, the action of the A.O, is not erroneous to revise.*

*8. The Hon'ble CIT, Central has erred while passing the Order u/s.263 on the contention that the Order of the Assessing Officer is erroneous as the A.O. has Allowed telescoping of the additional income of, Rs. 3.47 Crores. while computing total income for different Asst. Years which is not correct and not justified.*

*9. We would like to submit that, there is no effect of telescoping as the income assessed by the Assessing Officer is more than the income offered by the Assessee Company.*

*10) The contention of CIT, Central regarding Income assessed as a percentage of turnover i.e., after estimating @ 12.5% of the turnover of contract work and thereon depreciation has been allowed by A,O. which is not justified and bad in law as the Assessing Officer has followed correctly and allowed depreciation as per I.T. Act Circular 29D.*

*11. The Hon'ble CIT, Central has erred while passing the Order u/s.263 on the contention that the order of the Assessing Officer is erroneous as the Assessing Officer has allowed depreciation claimed by the assessee company without following the decision of the Jurisdictional 'High Court of Andhra Pradesh In the case of Indwell Constructions reported in 232 ITR 776 which is not correct and not justified.*

*12) We would like to submit that the Assessing Officer has allowed depreciation claimed by the assessee Company by following the Board instructions vide CBDT circular No. 29D dated 31/08/1965. The Indwell Construction case relied upon by the Hon'ble CIT, Central is not applicable to the case of the assessee company as it deals with Sections 20 to 28 and not for the allowance of depreciation.*

*13) The Hon'ble Commissioner of Income Tax (Central), Hyderabad has erred while passing the Order u/s 263 on the contention that the Order of the Assessing Officer is erroneous as the Assessing Officer has allowed an amount of Rs. 2,95,76,407/- towards deduction of royalty claimed by the assessee company without examining the details of parties to whom the royalty payments, were made and not examined the applicability of section 40(a)(ia) of the IT Act which is not correct and not justified.*

*14) We would like to submit that, the Assessing Officer has allowed the claim of the Assessee Company only after the detailed verifications and submissions made by the Company. In the case of the Assesses, the payments are not towards payments made outside India and hence the provisions of section 40(a)(ia) do not-apply.*

*15) We would like to submit that, the books of accounts of the Assessee Company has been rejected and the same is on the basis of the estimates and hence no other-disallowance can be made.*

*16) The Assessee has placed the reliance on the following cases:*

*a) ITAT, Hyderabad decision in the case of KPC Ltd.*

- b) *Sri Ram Jhanwar Lal vs, Income Tax Officer [2010 – 321 ITR 400 Rajasthan High Court]*
- c) *Bharat Construction Co. v. Commissioner of Income Tax [2002 – 258 ITR 0140 Rajasthan High Court]*
- d) *Commissioner of Income Tax v. Jain Construction Co. [ 2000 – 245 ITR 0527 Rajasthan High Court ]*
- c) *Malabar Industrial Co, Ltd. v.. Commissioner of Income Tax ( 2000 –243 ITR 0083 SC ]”*

10. The assessee had challenged the order of Id.CIT(A) dt.31.03.2010 passed u/s 250 with reference to section 143(3) r.w.s. 153A before the ITAT by filing the appeal bearing No.805/Hyd/2010 wherein the assessee besides taking the other grounds had also taken the ground no.15 which is to the following effect : Page 49 of the paper book.

*“15. The Assessing Officer is not justified in denying the claim of the appellant towards deduction u/s 80IA of the Income Tax Act in an amount of Rs.21,16,74,525/-“*

For the assessment year 2006-07 the assessee had raised the identical ground in ground no.16 as under :

*“16. The Assessing officer is not justified in denying the claim of the appellant towards deduction u/s 80IA of the Income Tax Act in an amount of Rs. 34,94,59,676/-.”*

11. The Assessing Officer acting under the direction of Id.CIT(Central) had passed an order on 31.12.2010, giving effect to the direction of the Id.CIT(Central) dt.30.03.2010. In the said

order dt.31.12.2010, the Assessing Officer had estimated the income of the assessee @ 12.5%. Relevant paragraph of the order of Assessing Officer at page 78 provides as under :

*"I am constrained to arrive at the conclusion that the books results declared by the assess basing on the books of accounts which are incomplete and based on defective vouchers and-by incorporating payments which are legally lit allowable, are not true and correct and hence I propose to reject the books of accounts as defective U/s 145 and assess the income of the assessee company @ 12.5% of the gross receipts (Gross receipts Rs. 3,06,31,47,554/- @ 12.5% = Rs.38,24,93,444/-)*

12. In the order dt. 31.12.2010, the Assessing Officer had not dealt with the issue of 80IA deduction in his order passed u/s 143(3) r.w.s. 263 of the Act. There is no reference of examining the issue of 80IA afresh by the Assessing Officer, though, the Assessing Officer vide his earlier order dt.31.12.2007 had already denied the deduction claimed u/s 80IA of the Act.

13. The assessee feeling aggrieved by the order of Assessing Officer u/s 143(3) r.w.s. 263 had challenged the order dt.31.12.2010 before the Id.CIT(A). The assessee had raised various grounds mentioned at Pages 86 and 87 of the paper book.

*"1. The Assistant Commissioner of Income Tax, Hyderabad has erred while passing order u/s 143(3) r.w.s. 263 in respect of M/s Madhucon Projects Ltd. on the basis of orders passed by CIT(Central) u/s 263 and thus not considered the case of the appellants on merits which is not correct and not justified.*

- 2) *We would like to submit that the assessee has already preferred an appeal against the order of the CIT(Central) passed u/s 263 before the Hon'ble ITAT, Hyderabad for the A.Y. 2005-06 which is pending for its disposal as on today.*
- 3) *The Assessing Officer ought not to have rejected the books of account of the appellant, by involving the provisions of section 154 of the Income Tax Act.*
- 4) *The Assessing Officer ought not to have estimated the net profit @ 12.5% on the entire gross contract works of Rs.306.31 crores that consist of works carried on own as principle contractor, as sub-contractor for others and the works entrusted to others as sub-contractor and works on back to back basis and thus the addition made in this count is objected to.*
- 5) *The Assessing Officer has erred while rejecting the books of account of the appellant without considering the fact that for the rejection of the books results in the case of a corporate entity which is subject to statutory audit under Companies Act and Tax Audit as per Section 44AB of the I.T.Act, there should be definite adverse findings that necessitate the rejection of the books of account.*
- 6) *When the Contact receipts are not disturbed, the premise advocated by The Assessing Officer in the assessment order can not be the guiding factor for rejection of the book results and the consequent estimation of net profit.*
- 7) *The Assessing Officer having perused the books of account-and records Maintained by the Appellant and baying verified them, without adverse findings specifically, should not have invoked the, provisions of section 145 of the Act.*
- 8) *The Assessing Officer ought not to have made the add ton of its.40,\$1,16,255 separately as expenditure when once the amount was admitted as income in the return submitted and much less when the Income was estimated by rejecting the books of account and estimate the profit in which event it gets duly telescoped into such addition made.*
- 9) *The Assessing Officer ought not to have restricted the depreciation claim of the appellant by allowing depreddation in an amount of Rs.15,24,63,828/-. The Assessing Officer is not justified in concluding the appellant is not the owner of the plant and machinery and the plant and machinery not put to use for the appellant's business..*
- 10) *The Assessing Officer ought to have appreciated that it is not the-case there are two simultaneously for the plant and machinery and the appellant having invested in to capital assets and utilized the capital asset for its business of laying roads wherein the aggregates was the major component that was crushed from the quarries of the appellant by the associates with the use of the plant and machinery, is the owner and thus put to use for its business.*

11) *The Assessing Officer is not justified in denying the claim of depreciation of the appellant in respect of the said plant and machinery used for crushing the metal from the quarries owned by the appellant, and used by it and the associates being paid job charges only per metric ton. (Circular No.29D(XIX-14 annexure enclosed.)*

12) *The Assessing Officer has erred while levying the interest u/s 234A u/s 234B in an amount of Rs.1,86,11,625/-, Rs.2,78,25,606/- respectively. The appellant denies the liability and prays that the same may please be deleted."*

14. The ld.CIT(A) had granted partial relief to the assessee on the basis of the grounds raised by the assessee and estimated the income of the assessee at 10% instead of 12 ½% vide order dt.27.05.2011. The relevant finding of the ld.CIT(A) is available at page 101 at para 6.3 of the paper book.

*"6.3 in the light of above observation of the Assessing Officer, and also in view the submission furnished by the Authorized Representative, I am of the view that the Assessing Officer is justified to reject the books of accounts and estimate the- net income. However, it is seen that the estimate made- by the Assessing Officer is at higher side and I find that it is not a reasonable estimation. Therefore, I am inclined to direct the Assessing Officer to estimate the appellants income at 10% and also allow the depreciation accordingly. Hence, this ground of appeal is partly allowed.*

15. The assessee challenged the order passed under section 250 with reference to section 143(3) r.w.s. 263 of the Income Tax Act 1961 by the ld.CIT(A) dt.27.05.2011 before the ITAT. The grounds of appeal raised by the assessee in the appeal under section 250 with reference to section 143(3) r.w.s. 263 of the Income Tax Act 1961 were as under :

*"1. There was a search and seizure operation conducted u/s 132 of the IT Act, 1961. In Madhucon Group of cases on 20.10.2005 and other Subsequent dates. Consequent to the search operation conducted, the DCIT central circle-3, Hyderabad had Issued notice u/s.153A of the IT. Act and the assessment was completed accordingly.*

*2. The Assistant Commissioner of Income Tax, Hyderabad has erred while passing order u/s 143(3) r.w.s. 263 of M/s. Madhucon Projects Ltd., on the basis of orders passed by CIT(Central), u/s 263 and same was considered by the CIT(A) – VII by arriving appellants income as 10% instead of the estimating the method prescribed by the assessee by not considering the reasons explained by the assessee which is not correct and not justified.*

*3. We would like to submit that the assessee has already preferred an appeal against the order of the CIT(Central) passed u/s 263 before the Hon'ble ITAT, Hyderabad for the A.Y. 2000-01 which is pending for its disposal as on today.*

*4. We would like to submit that while passing the order under the provisions of section 263 the CIT has not considered the explanation given by the assessee and the gross receipts has been taken / considered on the basis of monthly review meeting which is not correct and justified.*

*5. The Monthly review meetings has been conducted to review the operations of the assessee company and the figures mentioned in the same are only estimated one and the same Cannot be considered as the evidence for calculating of the profitability of the concern.*

*6. We would like to submit that, when the books of accounts of the assessee company has been rejected, by the assessing officer then by strati h of imagination also the figures which are mentioned in the Monthly Review Meeting cannot be considered for the purpose. calculating the profit of the company which was confirmed by the CIT (A) –VII by estimating the income at 10% of gross contract receipts which is not correct and not justified and bad in law.*

*7. The assessee is doing the business in the construction activity and as per that the profit percentage at the rate of 3.98% will be considered. as correct and reasonable estimated income of the assessee and in view of the that we hereby request you to kindly consider the request of the assessee and Income of the assessee company should be considered at the rate of 3.98% on the turnover of the assessee company.*

*8. When the Contract receipts are not disturbed the premise advocated by the Assessing Officer in the assessment order cannot be the guiding for*

*rejection of the book results and the consequent estimation of net profit and the same is considered by the CIT(A)-VII which is not justified-and bad In law.*

9. *The Hon'ble CIT, Central has erred while passing the Order u/s.263 on the contention that the Order of the Assessing Officer is erroneous as the A.O. has Allowed telescoping of the additional income of, Rs. 3.67 Crores. while computing total income for different Asst. Years which is confirmed by the CIT(A)-VII which is not correct and not justified and bad in law.*

10. *The assessing officer has allowed telescoping of lithe balance income offered of Rs3.67 crores while computing the total income. As the 'telescoping for the balance income has to be allowed and it is the normal practice as the income cannot be taxed twice and as per that the Assessing Officer has correctly worked out the telescopic for the balance of income and hence the same cannot be considered as erroneous to the revenue as the same income cannot be considered twice for taxation and hence the telescopic has to be given for the balance of income which is as per the provision of the Income Tax Act, 1961.*

11. *The Assessing Officer having perused the books of account and records maintained by the Appellant and having verified them, without adverse findings specifically, should have invoked the provisions of section 145 of the Act.*

12. *The assessee has relied upon case-law of the Hyderabad Tribunal in the case of BHAGYANAGAR CONSTRUCTION (P) 124) VS INCOME TAX OFFICER vide 1993 (046) ITD-0236-THYD dated 12.04.1993 where in it was held that "in case of a building contractor, the revenue need not wait till the completion of the tract and the reasonable profit can be estimated from year to year and brought to tax. The -estimate of profit at 4% reasonable.'*

13. *The assessee has relied upon case law of SAURASTHRA BALL PEN (P) LTD. VS DEPUTY COMMLSSIONER OF INCOME TAX, ITAT MUMBAI "I" BENCH CITATION NO 2008-24 SOT 556 MUMBAI, p6where in it has been held that the profit has to be taken on the basis of average and the same should be followed in the case of the assessee. The rejection of books by itself does not empower the Assessing Officer to estimate higher income and thereby to make addition without cogent facts on the record.*

14. *The percentage of estimated Income taken on the basis of average and the same should be followed in the case of the assessee on gross receipts cannot be more than 3.98%, alternatively the income may be estimated at 6% of the gross receipts of the company."*

16. From the grounds raised by the assessee before the Id.CIT(A) as well as before the Tribunal while challenging the order passed by the Id.CIT(A) under section 250 with reference to section 143(3) r.w.s. 263 of the Income Tax Act 1961, no grounds pertaining to section 80IA was raised by the assessee before the Tribunal.

17. The Tribunal vide order dt. 28.12.2012 had disposed of various appeals filed by the assessee for various assessment years. The Tribunal had granted the relief to the assessee by remanding back the matter to the file of Assessing Officer in ITA No.1970/Hyd/2011 (for A.Y. 2007-08) and ITA 469/Hyd/2011, (for A.Y. 2007-08) ITA 1499/Hyd/2011 (for A.Y.s. 2008-09). The finding of the Tribunal is given at para 39 to the following effect :

*“39. We have heard both the parties and perused the material on record. Admittedly the assessee is liable for deduction of TDS as there is amendment to section 40(a)(ia) of the Act by Taxation Laws (Amendment) Act, 2006 with effect from 13.7.2006. As per clause (c) royalty introduced to subsection 194J(1) and as per section 40(a)(ia) of the Act which got amended with retrospective effect from 1.4.2006 wherein rent and royalty are introduced. Being so, the assessee is liable for deduction of TDS on the royalty payment. However, the Special Bench in the case of Marilyn Shipping & Transports (supra) held that the word "payable" used in section 40(a)(ia) of the Act has to be given its natural meaning and going by strict interpretation the section 40(a)(ia) of the Act is applicable only to expenditure which is payable as on on 31st March of every year and cannot be invoked to disallow the amounts which are already paid during the previous year, without deducting tax at source. Being so, we direct the Assessing Officer to disallow only that portion of the royalty payment which is shown as payable in the Balance Sheet of the assessee for the assessment year under consideration. We remit this issue to the file of the Assessing Officer for fresh consideration. At this point*

*we make it clear that at the time of giving effect order, if any jurisdictional High Court judgement is available on this issue, the Assessing Officer is directed to follow the same.*

40. *The assessee also raised the ground with regard to initiation of penalty proceedings u/s. 271(1)(c) of the Act. As the Assessing Officer not passed any order for levying penalty, this ground is preposterous and cannot be adjudicated. Dismissed accordingly.*

41. *In the result ITA No. 1970/Hyd/2011 and 1499/Hyd/2011 are partly allowed for statistical purposes. SA Nos. 83 and 84/Hyd/2012 are dismissed as infructuous as we have already disposed of the appeals itself.*

42. *Coming to the Department appeal No. 469/Hyd/2011 for A.Y. 2007-08 the Revenue raised the grounds as follows:*

*The CIT(A) erred in deleting the estimated disallowance made on*

- a) work expenditure at 3% of Rs. 8,69,16,861,*
- b) purchase of sand at 2% Rs. 1,57,43,298 and*
- c) machinery maintenance at 1% Rs. 33,57,671*

43. *We have heard both the parties on this issue. Most of the vouchers relating to this expenditure are self-made vouchers. Being so, the Assessing Officer disallowed 3% on work expenses, 2% on purchase of sand and 1% on maintenance. As we have held in earlier paras of this order, when the expenditure is supported by self-made vouchers there is every chance of inflating expenditure. Accordingly, the disallowance is justified. Revenue appeal in ITA No. 469/Hyd/2011 is allowed.”*

18. The assessee had filed various appeals for A.Y. 2005-06 and 2006-07. The said appeals of the assessee were decided by the Tribunal along with the other appeals vide its order dt.28.12.2012. Particulars of various appeals filed by the assessee and the Revenue relating to A.Ys. 2005-06 and 2006-07 are as under :

Sl.No. in ITAT order	Appeal No.	A.Y.	Remarks
20	ITA No.683/Hyd/2010	2005-06	Appeal of assessee against the order of Id.CIT(Central) dt.30.03.2010
21	ITA No.702/Hyd/2010	2006-07	-do-
27	ITA No.1479/Hyd/2011	2005-06	Revenue appeal against the order of Id.CIT(A) dt.27.05.2011
28	ITA No.1480/Hyd/2011	2006-07	-do-
33	ITA No.1833/Hyd/2011	2005-06	The appeal of assessee against the order of Id.CIT(A) passed u/s 154 of the Act
34	ITA No.1834/Hyd/2011	2006-07	-do-
46	ITA No.1497/Hyd/2011	2005-06	Appeal of assessee against the order of Id.CIT(A) filed u/s 250 referred to section 143(3) r.w.s. 263 of the Act dt.27.05.2011.
47	ITA No.1498/Hyd/2011	2006-07	-do-
53	ITA No.805/Hyd/2010	2005-06	Appeals of assessee filed against the order of Id.CIT(A) dt.31.03.2010
54	ITA No.806/Hyd/2010	2006-07	-do-

19. The Tribunal had decided the issue of the estimation of income while deciding ITA Nos.683 and 702/Hyd/2010 of assessee against the order of Id.CIT(Central) dt.30.03.2010 passed under section 263 of the Income Tax Act 1961 and had granted partial relief to the assessee. The relevant portion of the Tribunal finding are given in Para 24 to the following effect. (Pages 125 and 126 of the paper book).

“24. Now coming to the issue of allowability of depreciation, we have carefully gone through the judgement of the jurisdictional High Court in the case of Indwell Constructions (cited supra). In the case before the jurisdictional High Court an addition was made towards interest and remuneration paid to partners when the profit was estimated. The High Court after considering the provisions of sections 29 and 40 found that no separate addition/ deduction shall be made. The contention of the Department is that no depreciation has to be allowed. The contention of the learned AR is that depreciation on the WDV of the assets shall be allowed. Estimation of income in these cases is taken clue from the provisions of section 44AD of the Act. Earlier this provision is applicable to cases where the contract receipts not exceeded Rs. 40 lakhs. However, by Finance (No. 2) Act, 2009 w.e.f. 1.4.2011 the Legislature removed the restriction of the total contract receipts of Rs. 40 lakhs. By taking clue from this provision u/s. 44AD as is applicable for the assessment year under consideration and the provisions which are applicable w.e.f. 1.4.2011, we find that the deduction available u/ss. 30 to 38 shall be deemed to have been given full effect and no further deduction under these provisions shall be allowed. Depreciation is allowable u/s. 32 of the Act. Therefore, as provided in section 44AD no other/separate deduction shall be allowed. However, in our opinion, estimation of income at 12.5% on the gross receipts is at higher side. The AR relied on the order of the Tribunal in the case of Krishna Mohan Constructions in ITA Nos. 116 & 117/Hyd/2007 for the A.Ys. 1993-94 and 1994-95 wherein the Tribunal estimated the income of the assessee at 12.5% and thereafter given deduction towards depreciation. But when we come across the order of the Special Bench of Ahmedabad in the case of Arihant Builders Pvt. Ltd. vs. ACIT (291 ITR (AT) 41) (SB) (Ahd) wherein income is estimated at 8% of the main contract receipts and at 5% on sub-contract receipts. **Being so, in our opinion, considering the facts of the assessee's case income of the assessee has to be estimated at 8% on main contract receipts and 5% on sub-contract receipts.** Similar view has been taken by this Tribunal in Teja Constructions in ITA No. 1191/Hyd/2011 order dated 17.2.2012. In view of the above discussion, we modify the order of the CIT passed u/s. 263 of the Act to estimate income of the assessee at 8% on main contract receipts and 5% on sub-contract receipts and the assessee is not entitled for any deduction towards depreciation. Further, we make it clear that once the income of the assessee is estimated there cannot be any further addition on any account under the head 'income from business' as held by the co-ordinate Bench in the case of Vishal Infrastructure Ltd., (104 ITD 537) (Hyd). However, income from other heads would be computed separately.”

20. Further, the Tribunal had disposed of the appeal of the Revenue in ITA Nos.1479 & 1480/Hyd/2011 whereby the Revenue had challenged the order of Id.CIT(A) passed u/s 250 r.w.s. 143(3) r.w.s. 263 of the Act dt.27.05.2011. The finding of the Tribunal at paragraph 27 of the order of Id.CIT(A) to the following effect :

*“27. We have heard both the parties and perused the material on record. As we have given certain direction in the appeals by the assessee against the orders of CIT passed u/s. 263 of the Act, the consequential orders passed by the Assessing Officer have become infructuous. Accordingly, all the above 7 departmental appeals in ITA Nos. 1474 to 1480/Hyd/2011 are dismissed as infructuous.”*

21. The Tribunal had disposed of appeals in ITA Nos.1497 and 1498/Hyd/2011 for A.Ys. 2005-06 and 2006-07 filed by the assessee challenging the order of Id.CIT(A) passed u/s 250 referred to section 143(3) r.w.s. 263 of the Act dt.27.05.2011. The order of the Tribunal is available at para 44 of page 140 of the paper book.

*“44. These appeals by the assessee are directed against the order passed by the CIT(A) u/s. 250 consequent to appeal against the order of Assessing Officer u/s. 143(3) r.w.s. 263 of the CIT. There is a delay of 350 days in filing ITA No. 1077/Hyd/2012 and 1078/ Hyd/2012. However, we are not going to adjudicate the issue relating to delay in filing these appeals as all the appeals have become infructuous in view of our findings in appeals by the assessee against the orders passed by the CIT u/s. 263 of the Act in these assessment years. As we have modified the order of the CIT(A) passed u/s. 263 of the Act in ITA Nos. 668, 669, 676, 677, 682, 683 and 702/Hyd/2010, accordingly, all these appeals are dismissed as infructuous.”*

22. The Tribunal had disposed of appeals in ITA Nos.805 and 806/Hyd/2010 for A.Ys. 2005-06 and 2006-07 filed by the assessee challenging the order passed by the ld.CIT(A) dt.31.03.2010. All these appeals of the assessee were dismissed by the Tribunal as Tribunal held these appeals have become infructuous by holding as under:-

*“46. After hearing both the parties, we are of the opinion that these appeals have become infructuous in view of our findings in ITA No. 668, 669, 676, 677, 682, 683 & 702/Hyd/2010 wherein we have modified the order of the CIT passed u/s. 263 of the Act. Being so, there are no surviving assessment orders in these years. Accordingly, ITA Nos. 800 to 806/Hyd/2010 are dismissed as infructuous.”*

23. Similarly, the Tribunal vide order dt.28.12.2012 had dismissed 7 appeals filed by the assessee against the order of ld.CIT(A) whereby he had passed an order withdrawing the depreciation granted to the assessee while estimating the income for A.Y. 2000-01 to 2006-07. The assessee filed appeal against the rectification order passed by the ld.CIT(A) withdrawing the depreciation before the Tribunal. The ITA Nos. 1833 and 1834/Hyd/2011 were filed by the assessee for A.Y. 2005-06 and 2006-07. The said appeals along with other appeals were dismissed by the Tribunal. The relevant finding of the Tribunal is given in Para 29 to the following effect.

*“29. Since we have already held in assessee's appeals directed against the order of the CIT u/s. 263 of the Act that the assessee is not entitled for depreciation once the income is estimated and also held in earlier paras of this*

*order that the orders passed by the Assessing Officer/CIT(A) consequent to orders of the CIT u/s. 263 have become infructuous, these orders passed by the CIT(A) rectifying the orders passed u/s. 250 of the Act also no more survive. Accordingly, ITA Nos. 1829, 1830, 1831, 1832, 1833, 1834 and 1835/Hyd/11 are dismissed as infructuous.”*

24. The Assessing Officer after the second search , which took place on 4.2.2011 had passed the order under section 143(3) r/w 153A on 31.03.2013 for the A.Y. 2005-06 and 2006-07. However, in both the orders, the Assessing Officer has not given any deduction claimed by the assessee. In the assessment order dt.31.03.2013 mentioned as under :

*“Search and seizure operations u/s. 132 of the I.T. Act, 1961 were carried out in the case of M/s. Madhucon Projects. Limited and its' group of cases on 04.02.2011 Accordingly, notice u/s. 153A of the I.T. Act, 1961 was issued on 13.01.2012.*

*2. In response to notice issued the assessee filed a copy of the original return filed declaring a total income of Rs.3,52,60,932/-. Notices u/s. 143(2) and 142(1) of the .I.T. Act,. 1961 and questionnaire were issued on 27.11.2012. In response to the notices issued Sri. P. Murali Mohan Rao, AR of the assessee appeared and filed the information called for.*

*3. Before the present search, there was a search in the case of the assessee on 20.10.2005. The search assessments were completed u/s. 143(3) r.w.s. 153A of the I.T, Act, 1961 on 31.12,2009 assessing the income at Rs. 27,41,80,860/-. The assessee preferred appeal against the assessment order before CIT(A).*

*3.1 Proceedings u/s. 263 of the I.T. Act, 1961 were initiated and the Commissioner of Income Tax (Central) vide his order u/s. 268 dated 30,03.2010 has set aside the assessment order passed by the AO, directing the AO to redo the assessment as per the directions detailed in the order. As the assessments were set aside, the CIT(A) -1 dismissed the appeal as infructuous as the order against which the appeal-was filed has been set aside.*

3.2 The assessee preferred an appeal before ITAT, Hyderabad against the order .of the CIT(C), Hyderabad. The assessments u/s. 143(3) r.w.s. 263 were passed on 31.12.2010 assessing the income at Rs.44,33,77,187/-. The assessee preferred an appeal before CIT(A). The CIT(A) - VII, Hyderabad passed the orders' giving partial relief. Both the department and the assessee preferred appeal before ITAT, Hyderabad.

3.3 The Hon'ble ITAT, Hyderabad in a consolidated order disposed off the appeal against the order passed by CIT(C) u/s. 263 and the appeals . of the department as well as the assessee against the assessment passed u/s. 143(3) r.w.s. 263 of the I.T. Act, 1961, vide its order dated 28.12.2012. After giving effect to the order of the ITAT, Hyderabad, the net. income of the assessee company was arrived at Rs.1 9,40,32,08/-.

4. In light of the information furnished and after going through the seized material, Ole income 28is assessed as per .consequential order passed giving effect to the order of the ITAT, Hyderabad and assessment is completed, as under:

Income assessed as discussed above Rs.19,40,32,008.

Assessed Income	Rs.	194032008
Tax thereon	Rs.	67911203
Add: Surcharge	Rs.	1697780
Add: EC + SHEC	Rs.	1392180
Total tax payable	Rs.	71001163
Less: TDS	Rs.	26165215
Less : Advance Tax	Rs.	12000000
Balance Tax	Rs.	32835948
Add: Interest u/s 234A	Rs.	1970157
Add: Interest u/s 234B	Rs.	10835863
Add: Interest u/s 234C	Rs.	0
Total tax + Int payable	Rs.	45641967
Less: Self tax paid	Rs.	
Less: Regular by adjustment of refund	Rs.	29414128
Balance Payable.	Rs.	16227839

25. The assessee filed a rectification application on 17.04.2013. However, the said rectification application was dismissed by the Assessing Officer vide order dt.11.06.2013 by observing in para 2 as under :

*“2. The assessee vide his petition u/s 154 dated 17.04.2013 has requested for grant of deduction u/s 80IA as the same allowed for the subsequent years. In this regard, it is to inform that while adjudicating the appeal of the assessee and the department for the A.Y. 2005-06, the ITAT, while pronouncing the order has not given any direction with regards to deduction u/s 80IA as the same was not subject matter of appeal before the Hon’ble ITAT. As the assessment was finalized basing on the findings of the Hon’ble ITAT and as there is no finding by the ITAT, with regards to deduction u/s 80IA for A.Y. 2005-06, accordingly no deduction u/s 80IA was allowed.*

26. The assessee filed an appeal against the order of the Assessing Officer passed u/s 154 of the Act before the Id.CIT(A). The Id.CIT(A) vide his order dt.30.09.2014 has dismissed the appeal of the assessee by observing para 5.2 as under :

*“5.2. In the present case, as brought out in the facts of the case at para 2, the appellant apparently had not claimed the deduction u/s 80IA and accordingly, it was not considered by the Assessing Officer while completing the scrutiny assessment. Further, even in appeal before the Id.CIT(A) or the Hon’ble ITAT, this was not the issue at all as he had not claimed such deduction. It is only in A.Y. 2008-09, that there was such a claim and the Hon’ble ITAT had allowed such appeal. This specific finding for a specific subsequent assessment year cannot be extended suo moto and deduction be allowed in an earlier year when it was not claimed originally. Moreover such claims do not constitute “mistake apparent from record”, which is the only ground or basis for carrying out any rectification*

*action u/s 154. The Assessing Officer has therefore, rightly rejected the petition u/s 154 seeking deduction u/s 80IA."*

27. The assessee vide his application dt.04.07.2013 filed two M.A. Nos.171 and 172 /Hyd/2013 in ITA Nos.805 and 806/Hyd/2010 for A.Y.s 2005-06 and 2006-07 before the Tribunal. The submissions made by the assessee in the said M.As are as under :

*"The assessee M/s Madhucon Projects Limited had filed its return of income for the assessment year 2006-07 and claimed deduction u/s 80IA of the Act for Rs. 34,94,59,676/, The Honorable Income Tax Appellate Tribunal, Bench-B has passed an order on 28-12-2012 dismissing the assessee's appeals as infructuous vide their order in ITA No. 806/Hyd/2010 dated 28.12.2012.*

*While passing the order, the Honorable ITAT at paras 45 and 46 observed as under:*

***"45. All these appeals by the assessee are directed against the common order of the CIT(A) dated 31.3.2010. In these cases the Assessing Officer passed the order u/s. 143(3) r.w.s. 153A of the Income-tax Act, 1961. Against this the assessee went in appeal before the CIT(A) for all these A.Ys. 2000-01 to 2006-07. The CIT(A) dismissed these appeals holding that the assessment orders giving rise to the appeals before him were subject matter of revision u/s. 263 of the Act. Being so, he dismissed these appeals. Against this, the assessee is in appeal before us. "***

***"46. After hearing both the parties, we are of the opinion that these appeals have become infructuous in view of our findings in ITA No. 668, 669, 676, 677, 682, 683 & 702/Hyd/2010 wherein we have modified the order of the CIT passed u/s. 263 of the Act. Being so, there are no surviving assessment orders in these years. Accordingly, ITA Nos. 800 to 806/Hyd/2010 are dismissed as infructuous."***

*Herein, it may be submitted before your kind honours that the appellant was in appeal for the year under consideration with regard to the following issues.*

- i. *Rejection of books of accounts and estimation of income*
- ii. *Disallowance of deduction u/s 80IA.*

*As far as the rejection of books of accounts and estimation of income is Concerned, your honours have dismissed the ground of the appellant as the same matter has been disposed vide appeal no. 668,669,676,677,682,683 & 702/Hyd/2010 and the appellant herein, has no grievance. However, it is humbly submitted that in the appeal nos. 668,669,676,677,682,683 & 702/Hyd/2010, the issue of deduction u/s 80IA was not there at all. **Being so, the issue of deduction u/s 80IA ought to have been adjudicated by the Hon'ble ITAT vide their order in ITA No. 806/Hyd/2010 dated 28.12.2012.***

*In this connection, we would further like to submit that in respect of the deduction u/s 80IA, the appellant had taken a ground in the appeal filed before the honourable ITAT vide ground no 16 which is reproduced below:*

*"16. The Assessing officer is not justified in denying the claim of the appellant towards deduction u/s 80IA of the Income Tax Act in an amount of Rs. 34,94,59,676/-."*

*Therefore, your honours are requested to kindly recall the appeal and the ground related to the deduction u/s 80IA may please be adjudicated."*

28. The Tribunal vide order dt.23.04.2014 had dismissed both the M.As 171 and 172/Hyd/2013 by holding in Paras 5 to 8 as under :

*"5. We have heard both the parties and perused the material available on record. In this case, originally, the Assessing Officer passed separate assessment orders for these assessment years u/s. 143(3) r.w.s. 153A of the Act vide order dated 31.1.2007. These two orders for the above assessment years are subject matter of revision order u/s. 263 of the Act dated 30.3.2010. Accordingly, the CIT in his order set aside the order of the AO passed u/s. 143(3) r.w.s. 153A dated 31.12.2007 of the Act for both the assessment years. For clarity we reproduce the relevant portion of the CIT order as follows:*

*"10. To sum up, it is seen that the AO has not made proper enquiry and without any supporting material has accepted assessee's claim and he has also passed orders which is against the decision of jurisdictional High Court thereby making the orders unsustainable in law. Therefore, I hold that the orders passed by the AO are erroneous and prejudicial to the interest of revenue liable for revision u/s. 263. 1, therefore, set aside the orders passed u/s. 143(3) r.w.s. 153A on 31.12.2007 for the Asst. Years 2001-01 to 2006-07 and direct the Assessing Officer to pass assessment orders afresh as per law after making proper enquiry. He is directed to allow an opportunity of being heard to the assessee before passing assessment orders afresh."*

6. *As seen from the above order, there is no survival of the assessment order passed by the AO for the above two assessment years. The CIT while exercising powers u/s. 263 of the Act categorically set aside the order passed u/s. 143(3) r.w.s. 153A of the Act for these two assessment years and directed the AO to pass fresh assessment order as per law after making proper enquiry. Setting aside the assessment by the CIT(A) means that he had annulled the assessment and given certain direction to redo the assessment.*

7. *As per Black's Law Dictionary, Sixth Edition at page 1372, the words "set aside" means:*

*"To reverse, vacate, cancel, annul or revoke a judgement, order, etc."*

*Further the meaning of the word 'annul' at page 90 of the Black's Law Dictionary has been given as under:*

*"To reduce to nothing; annihilate; obliterate, to make void or of no effect; to nullify; to abolish, to do away with. To cancel, destroy; abrogate. To annul a judgement or judicial proceeding is to deprive it of all force and operation, either ab initio or prospectively as to future transaction."*

8. *Being so, the contention of the learned AR that the grounds raised by the assessee with regard to deduction u/s. 80IA in its appeal is to be adjudicated independently does not hold any merit as the original order passed by the AO u/s. 143(3) r.w.s. 153A of the Act has already got vacated by the order of the CIT u/s. 263 of the Act dated 30.3.2010. Being so, we are inclined to dismiss the grounds raised by the assessee in these MAs."*

29. The assessee had filed another M.A.Nos.05 and 06/Hyd/2016 for A.Ys. 2005-06 and 2006-07 against the order dt.28.12.2012 raising the following submissions :

*"The assessee M/s Madhucon Projects Limited had filed its return of income for the assessment year 2006-07 and claimed deduction u/s 80IA of the Act for Rs. 34,94,59,676/, The Honorable Income Tax Appellate Tribunal, Bench-B 'has passed an order on 28-12-2012 dismissing the assessee's appeals as infructuous vide their order in ITA No. 806/Hyd/2010 dated 28.12.2012.*

*While passing the order, the Honorable ITAT at paras 45 and 46 observed as under: "45. All these appeals by the assessee are directed against the common order of the CIT(A) dated 31.3.2010. In these cases the Assessing Officer passed the order u/s. 143(3) r.w.s. 153A of the Income-tax Act, 1961. Against this the assessee went in appeal before the CIT(A) for all these A.Ys. 2000-01 to 2006-07. The CIT(A) dismissed these appeals holding that the assessment ordii-s giving rise to the appeals before him were subject matter of revision u/s. 263 of the Act. Being so, he dismissed these appeals. Against this, the assessee 'is in appeal before us. "*

*"46. After hearing both the parties, we are of the opinion that these appeals have become infructuous in view of our findings in ITA No. 668, 669, 676, 677, 682, 683 & 702/Hyd/2010 wherein we have modified the order of the CIT passed u/s. 263 of the Act. Being so, there are no surviving assessment orders in these years. Accordingly, ITA Nos. 800 to 806/Hyd/2010 are dismissed as infructuous."*

*Herein, it may be submitted before your kind honours that the appellant was in appeal for the year under consideration with regard to the following issues.*

- i. Rejection of books of accounts and estimation of income*
- ii. Disallowance & deduction u/s 80IA.*

*As far as the rejection of books of accounts and estimation of income is concerned, your honours have dismissed the ground of the appellant as the same matter has been disposed vide appeal no. 668,669,676,677,682,683 & 702/Hyd/2010 and the appellant herein, has no grievance. However, it is humbly submitted that in the appeal nos. 668,669,676,677,682,683 & 702/Hyd/2010, the issue of deduction u/s 80IA was not there at all. Being*

*so, the issue of deduction u/s 80IA ought to have been adjudicated by the Hon'ble ITAT vide their order in ITA No. 806/Hyd/2010 dated 28.12.2012.*

*In this connection, we would further like to submit that in respect of the deduction u/s 80IA, the appellant had taken a ground in the appeal filed before the Hon'ble ITAT vide ground no 16 which is reproduced below:*

*"16. The Assessing officer is not justified in denying the claim of the appellant towards deduction u/s 80IA of the Income Tax Act in an amount of Rs. 34,94,59,676/-."*

30. The assessee had filed another M.A.Nos.126/Hyd/2015 in ITA No.683/Hyd/2010 for A.Y. 2005-06 and M.A. No.127/Hyd/2015 in ITA No.702/Hyd/2010 for A.Y. 2006-07. In the said two M.As the assessee had challenged the order passed by the Tribunal in ITA Nos.683 and 702/Hyd/2010 against the order of Id.CIT(Central) u/s 263 raising the following submissions :

*"The appellant herein, submits that the Hon'ble ITAT, Hyderabad, Bench 'A', Hyderabad in ITA No.683/Hyd/2010 has partly allowed the appellant's appeal for the Asst. year 2005-06 vide their common order in ITA Nos. 668,669,676,677,682,683 and 702/Hyd/2010 dated 28-12-2012 (Page Nos. 7 to 18) issued for the Asst. years 2000-01 to 2006-07 respectively and there has crept in a mistake in respect of which this miscellaneous petition is filed now. Before pointing out the mistake, the appellant herein would like to submit brief facts of the case for kind consideration of the Hon'ble Tribunal. Brief facts:*

*(i) A search and seizure operation u/s 132 of the I.T. Act, 1961 was conducted in the appellant's case on 20-10-2005 and in response to the notice issued u/s 153A of the Act, the appellant furnished its Return of Income for the Asst. year 2005-06 on 24-01-2007 admitting the total income at Rs.3,52,60,932/- after claiming, among other things, deduction u/s 8bIA for Rs.21,26,74,525/- .*

*(ii) The Assessing Officer completed an assessment u/s 143(3) r.w.s 153A on 31-12-2007 determining the total income at Rs.27,41,80,859/- with the following computation:*

**Computation by Assessing Officer**

(a) Profit from contract works at 12.5% of Gross receipts of Rs.306,31,47,554/-	Rs.38,28,93,444/-
Less: Depn.	<u>Rs.15,24,63,828/-</u>
Net Profit from contract works	Rs.23,04,29,616/-
(b) Add: Gratuitous cash payments as per entries in diary :	Rs.
(c) Add: Disallowance of claim u/s 35D	
(d) Add: Income from other sources as admitted	9,00,000/-
(e) Taxable Income	Rs.

*While arriving at the above said total income of Rs.27,41,80,859/-, the Assessing Officer has denied the deduction claimed u/s 80IA for Rs.21,26,74,525/-. The relevant discussion on the rejection of claim u/s 80IA is at Page Nos. 13 to 20 of the assessment order u/s 143(3) r.w.s 153A dated 31-12-2007.*

*(iii) Aggrieved by the assessment, the appellant preferred an appeal before the Ld.Commissioner of Income Tax (Appeals) - 1, Hyderabad.*

*(i) In the mean while, the Commissioner of Income Tax (Central), Hyderabad vide his order u/s 263 dated 30-03-2010 has set aside the assessment dated 31-12-2007 with certain directions to the Assessing Officer on certain issues other than the issue of deduction u/s 80IA of the Act which means that the Commissioner of Income Tax (Central) has agreed with the Assessing Officer on the rejection of the claim made u/s 80IA for Rs.27,41,80,859/-.*

*(ii) Aggrieved by the Revision order u/s 263 of the Act dated 30-03-2010, the appellant herein, has preferred the appeal in ITA No.683/Hyd/2010 before the ITAT and the Hon'ble ITAT vide their common order dated 28-12-2012, while deciding the appeal on merits, has held at page Nos. 7 to 18, as under:*

- i. There is no infirmity in rejecting the books of account.*
- ii. The income of the appellant has to be estimated at 8% on main contract receipts and 5% on sub-contract receipts.*
- iii. The appellant is not entitled for any deduction towards depreciation.*
- iv. Once the income is estimated there cannot be further addition on any account under the head "Income from Business".*

2. As can be seen from the above findings of the Hon'ble Tribunal, it is clear that the Tribunal has not given any finding on the claim of deduction u/s 80IA made by the assessee in the Return of Income filed and this is a clear mistake apparent from the order of the Hon'ble Tribunal."

31. Similarly, the assessee had filed another M.A.No.128/Hyd/2015 in ITA No.1497/Hyd/2011 for A.Y. 2005-06 and M.A. No.129/Hyd/2015 in ITA No.1498/Hyd/2011 for A.Y. 2006-07. In the said two M.As the assessee had challenged the order passed by the Tribunal in ITA Nos.1497 and 1498/Hyd/2011 against the order of Id.CIT(A) u/s 250 with reference to section 143(3) r.w.s. 263 raising the following submissions :

*"The appellant, herein, submits that the Hon'ble ITAT, Hyderabad, Bench 'A', Hyderabad in ITA No.1498/Hyd/2011 has dismissed the appellant's appeal for the Asst. year 2006-07 vide their common order dated 28-12-2012 (Page Nos. 32 & 33) in ITA Nos. 1494 to 1498/Hyd/2011 for the Asst. years 2000-01, 2001-02, 2002-03, 2005-06 and 2006-07 respectively and in ITA Nos. 1077 86 1078/Hyd/2012 for the Asst. years 2003-04 86 2004-05 respectively. However, there has crept in a mistake in respect of which this miscellaneous petition is filed now. Before pointing out the mistake, the appellant herein would like to submit brief facts of the case for kind consideration of the Hon'ble Tribunal.*

*Brief facts:*

*(i) A search and seizure operation u/s 132 of the I.T. Act, 1961 was conducted in the appellant's case on 20-10-2005 and in response to the notice issued u/s 153A of the Act, the appellant furnished its Return of Income for the Asst. year 2006-07 on 30-11-2006 admitting the total income at Rs.6,86,06,724/- after claiming, among other things, deduction u/s 80IA for Rs.34,94,59,676/- .*

*(ii) The Assessing Officer completed an assessment u/s 143(3) r.w.s 153B on 31-12-2007 determining the total income at Rs.45,62,75,177/- with the following computation:*

*While arriving at the above said total income of Rs. 45,62,75,177/-, the Assessing Officer has denied the deduction claimed u/s 80IA for Rs.34,94,59,676/-. The relevant discussion on the rejection of claim u/s 80IA is at Page Nos. 12 to 20 of the assessment order u/s 143(3) r.w.s 153B dated 31-12-2007.*

*(iii) Aggrieved by the assessment, the appellant preferred an appeal before the Ld. Commissioner of Income Tax (Appeals) - 1, Hyderabad.*

*(i) In the mean while, the Commissioner of Income Tax (Central), Hyderabad vide his order u/s 263 dated 30-03-2010 has set aside the assessment dated 31-12-2007 with certain directions to the Assessing Officer on certain issues other than the issue of deduction u/s 80IA of the Act which means that the Commissioner of Income Tax (Central) has agreed with the Assessing Officer on the rejection of the claim made u/s 80IA for Rs.34,94,59,676/-.*

*(ii) Aggrieved by the Revision order u/s 263 of the Act dated 30-03-2010, the appellant herein, has preferred the appeal in ITA No.683/Hyd/2010 before the ITAT and the Hon'ble ITAT vide their common order dated 28-12-2012, while deciding the appeal on merits, has held at page Nos. 7 to 18, as under:*

- i. There is no infirmity in rejecting the books of account.*
- ii. The income of the appellant has to be estimated at 8% on main contract receipts and 5% on sub-contract receipts.*
- iii. The appellant is not entitled for any deduction towards depreciation.*
- i. Once the income is estimated there cannot be further addition on any account under the head "Income from Business".*

*2. Consequent to passing of Revision order u/s 263 dated 30-03-2010 by the Commissioner of Income Tax (Central), Hyderabad, the Assessing Officer passed an order u/s 143(3) r.w.s 263 on 31-12-2010 determining the total income at Rs.58,20,65,764/- with the following computation.*

<b><u>Computation made in the above order</u></b>		
(a) Profit from contract works at 12.5% of Gross receipts of		
Rs. 342,09,02,384/-	}	Rs.50,76,12,798/-
Less: Depreciation (not allowed)		Nil
Profit from contract works		Rs.50,76,12,798/-
(a) <u>Add:</u> Income from 'other sources' as admitted		<u>Rs. 7,44,52,966/-</u>
(b) <u>Total Income</u>		Rs.58,20,65,764/-

3. *Aggrieved by the above said order u/s 143(3) r.w.s 263, the appellant herein, preferred an appeal before the Commissioner of Income Tax (Appeals) and the Commissioner of Income tax (Appeals), vide his order dated 27-05-2011, allowed the appeal in part. The Ld. Commissioner of Income Tax (Appeals) directed to estimate the income @ 10% instead of @ 12.5% on gross contract receipts. He also directed to allow depreciation.*

4. *As can be seen from the brief facts of the case submitted above, it is an admitted fact that the appellant has claimed deduction u/s 80IA for Rs.34,94,59,676/- in the Return of Income filed on 30-11-2006 in response to the notice issued u/s 153A dated 16-06-2006. It is also an admitted fact that there is a clear discussion by the Assessing Officer at page Nos. 12 to 20 of the assessment order u/s 143(3) r.w.s 153A dated 31-12-2007 rejecting the claim u/s 80IA for Rs. 34,94,59,676/-. But in the order u/s 143(3) r.w.s 263 dated 31-12-2010, the Assessing officer, without giving any finding on the claim made by the assessee u/s 80IA, determined the total income at Rs.58,20,65,764/- with the detailed computation given at para No. 2 above. While arriving at "profit from contract works" at Rs.50,76,12,798/-, the Assessing Officer has not allowed the deduction claimed of Rs. 34,94,59,676/- u/s 80IA of the Act. While allowing the appeal in part, the Ld. Commissioner of Income Tax (Appeals) has not given any finding on the claim of deduction u/s 80IA of the Act. The Hon'ble ITAT, also has not discussed the issue of deduction u/s 80IA while dismissing the appellant's appeal in ITA No.1497/Hyd/ 11 and this is a clear mistake apparent from the order of the Hon'ble Tribunal.*

32. The Revenue was duly served with the notices on all these M.As and all these M.As are pending adjudication before the Tribunal for the last more than ten years.

**Finding of the Tribunal in M.A.Nos.126 and 127/Hyd/2015:**

33. We have heard the rival contentions of the parties and perused the material available on record. Admittedly, these two M.As were filed by the assessee feeling aggrieved by the order passed by the Tribunal in ITA Nos.683 & 702/Hyd/2010 on 28.12.2012. From the perusal of the record, it is abundantly clear that the assessee had not raised the ground pertaining to 80IA in the above said two appeals filed before the Tribunal. Therefore, in our view, the assessee cannot be said to be aggrieved by the order passed by the Tribunal on 28.12.2012. Besides the above, the assessee had filed an application dt.01.11.2016 in M.A.Nos.126 and 128/Hyd/2015 and in the said application it is mentioned as under :

*“As far as the rejection of books of accounts and estimation of income is concerned, The Hon. ITAT dismissed the ground of the appellant as the same matter has been disposed vide appeal no. 668,669,676,677,682,683 and 702/Hyd/2010 and the appellant herein, has no grievance. However, it is humbly submitted that in the appeal nos. 668,669,676,677,682,683& 702/Hyd/2010, the issue of deduction u/s 80IA was not there at all. Being so, the issue of deduction u/s 80IA ought to have been adjudicated by the Hon. ITAT vide their order in ITA No. 805/Hyd/ 2010, dt. 28.12.2012.*

*It is further submitted that, the Appellant had taken the ground of deduction u/s 80IA, before the Hon. ITAT, vide ground no. 15, which is reproduced below.*

*"15. The Assessing Officer is not justified in denying the claim of the appellant towards deduction u/s 80IA of the Income Tax Act in an amount of Rs. 21,26,74,525"*

*Therefore, the Hon. ITAT, has only missed to mention the A.Y. 2005-06 while discussing the issue of deduction u/s 80IA and adjudicating on this issue.*

*As discussed above, it is a mistake apparent from record and the Miscellaneous Petition No. 5/H/2016 holds good in all respects, as it is directly emulating from the Order of the A.O. passed u/s 143(3)rws153A, denying Appellant's claim of deduction u/s 80IA and consequent orders passed by the CIT (A) and Hon'ble ITAT.*

***In view of the above, we further submit that we are withdrawing the M.P. NO. 126/H/2015 and M.P.No.128/H/2015, filed by us before the Hon. Income Tax Appellate Tribunal.***

*Therefore, the Hon. ITAT, is requested to consider the M.P.No.5/H/2016 filed on 22.06.2016 on the order of the Hon. ITAT in ITA No. 805/Hyd/10, and kindly recall the appeal and adjudicate on the ground relating to deduction u/s 80IA of the Income Tax Act, 1961."*

34. The Revenue had filed its objections to the M.A.s filed by the assessee. In its reply dt.09.06.2019 it was submitted by the Revenue as under :

*"1. It is humbly submitted that the MAs are not admissible on prima facie considerations itself. The assessee has filed the above MAs on the orders of Hon'ble ITAT. in ITA Nos. 683 & 702/Hyd/2010 passed on 28/12/2012 against revision u/s 263 and ITA Nos. 1497 & 1498/Hyd/2011 on the decisions of the CIT(A), It is humbly submitted that the issue of deduction was not subject matter of the appeals nor any ground on this issue was taken by the assessee in appeal. In the latter two appeals, the issue was not raised even before the CIT(A). Therefore, there is no mistake apparent from record in the orders of the Hon'ble ITAT.*

*2. It is also humbly submitted that vide written submissions filed by the assessee on 01/11/2016 in MA No: 5/Hyd/2016 in ITA No: 805/Hyd/2010, **the AR of the assessee stated that the assessee is withdrawing MA No:***

**126& 128/Hyd/2010.** This fact is asserted in the written submissions filed on the same date in MA No: 6/Hyd/2016 in ITA No: 806/Hyd/2010.

3. It is also humbly submitted that the assessee filed multiple MAs on the same issue even when the same issue on which the plea for recall is made is not subject matter of the respective appeals nor any ground is raised.

4. It is also humbly submitted that in the case of Ganjikunta Kishore Babu (MA No: 85/2016 in ITA No: 839/Hyd/2015), in its order dated 28/02/2017, the Hyderabad Bench of the Hon'ble ITAT held that review of the order of ITAT is not possible u/s 254(2). Therefore, the assessee cannot seek a new issue or a new line of enquiry for adjudication. In light of the above, the MAs may kindly be dismissed."

35. From the reading of the written submissions of the assessee dt.01.11.2016 and the reply filed by the Revenue, it is abundantly clear that assessee on its own choose to withdraw M.A.No.126 and 127/Hyd/2015. In the light of the submission made by the assessee, nothing survives in these two M.As. and accordingly, these M.As are required to be dismissed as withdrawn. Even otherwise, the assessee was not aggrieved by the order passed by the Tribunal in ITA Nos.683 & 702/Hyd/2010 as no ground was urged by the assessee in the appeals filed before us. In the result, **M.A.Nos.126 and 127/Hyd/2015 are dismissed as being not maintainable.**

**Finding of the Tribunal in M.A.Nos.128 and 129/Hyd/2015**

36. Admittedly, these two M.As were filed by the assessee feeling aggrieved by the order passed by the Tribunal in ITA Nos.1497 and 1498/Hyd/2015 on 28.12.2012. From the perusal of the grounds of appeal raised by the assessee in ITA No.1497 and 1498/Hyd/2015, it is abundantly clear that the assessee had not raised the ground pertaining to section 80IA in the above said two appeals filed before the Tribunal. Therefore, in our view, the assessee cannot be said to be aggrieved by the order passed by the Tribunal on 28.12.2012, as the Tribunal was not duty bound to decide and adjudicate any ground not urged before it. In the light of the above, we do not find any substance in the M.As. filed by the assessee. Besides the above, the law is fairly settled by the decision of Hon'ble Supreme Court in the case of Reliance Telecommunications Ltd. **Therefore, respectfully relying on the decision of Hon'ble Supreme Court, we hereby dismiss these two M.A.Nos.128 and 129/Hyd/2015.**

**Finding of the Tribunal in M.A.Nos.5 and 6/Hyd/2016**

37. These two M.As were filed by the assessee feeling aggrieved by the order passed by the Tribunal in ITA Nos.805 and 806/Hyd/2010 for the reasons reproduced hereinabove.

38. The Id.DR for the Revenue had filed written submissions before the Tribunal on 29.03.2019 and in the said submissions, it was submitted by the Id.DR as under :

*"1. It is humbly submitted that the MAs are not admissible on prima facie considerations itself. The assessee has filed the above MAs on the orders of Hon'ble ITAT in ITA Nos. 805 & 806/Hyd/2010 passed on 28/12/2012. It is humbly submitted that the assessee filed repeated MAs even when on an earlier occasion MA Nos: 171 & 172/Hyd/2013 were dismissed on the same issue on 23/04/2014. In the said MAs, the assessee raised the issue of allowability of deduction u/s 80IA which was not a subject matter of appeal against the order u/s 263 passed by the CIT. Therefore, it is humbly submitted that in the first place, there is no mistake apparent from record in orders passed by Hon'ble ITAT in ITA Nos: 805 & 806/Hyd/2010. There is no mistake apparent from record even in the order of the Hon'ble ITAT in ITA nos: 683 & 702/Hyd/2010 also because the issue of disallowance u/s 80IA was not challenged in those appeals also.*

*2. It is humbly submitted that the present MAs are nothing but misrepresentation of facts even when the issue of disallowance u/s 80IA was never raised in the appeals, orders of which are sought to be rectified now. It is also submitted that similar issue was examined by the Hon'ble Delhi High Court in the case of NR Portfolio P Ltd [2019] 103 taxmann.com 17 (Delhi) where in the assessee raised an infructuous issue of dismissal of cross objection filed by him and awarded costs on the assessee. It is humbly submitted that in the present MAs, no mention is made by the assessee about the decision of the Hon'ble ITAT in MA Nos: 171 & 172/Hyd/2013 and the assessee is misleading Hon'ble ITAT in this regard. As there is serious misrepresentation by the assessee, appropriate costs may kindly be awarded against the assessee.*

*3. It is also humbly submitted that the Hon'ble ITAT, Hyderabad Bench examined the issue of filing repeated MAs in the case of Sri Mathurdasji Ayodhyabai Rathi Charitable Trust [2011] 13 taxmann.com 50 (Hyderabad), wherein it was held that "it was not open to Tribunal to entertain second application which was filed on same set of facts and to recall its appellate order on alleged premise that there was an error apparent in order of Tribunal".*

4. *Reliance is also placed on the decision of the Jurisdictional High Court in the case of Ideal Engineers [2001] 118 Taxman 915 (Andhra Pradesh) wherein it was held that "It is very pertinent to notice that the earlier two miscellaneous petitions were rejected by the Tribunal not on technical grounds but on merits. In that view of the matter, there was force in the contention of the revenue that the order made by the Tribunal on the third miscellaneous petition tantamount to review of its earlier order".*

39. The assessee had filed a detailed written submissions in support of the M.As on 13.11.2019. It was the contention of the Id.AR that the Id.CIT(Central) while passing the revision order u/s 263 had set aside the order passed u/s 143(3) r.w.s. 153A of the Act by the Assessing Officer. It was the contention of the Id.AR that it is necessary to adjudicate the following contention of the assessee :

**"Whether the claim of the assessee under section 80IA which was denied by the Assessing Officer while passing the order u/s 143(3) r.w.s. 153A of the Act was the subject matter of section 263 proceedings before the Id.CIT(Central) or not ?**

40. In support of the above contention, the Id.AR for the assessee has drawn our attention to the show cause notice issued by the Id.CIT(Central) u/s 263 of the Act and also the order passed by him.

41. It was the contention of the assessee that neither in the show cause notice nor in the order passed u/s 263 proceedings, the issue of grant / denial of deduction u/s 80IA of the Act was the subject matter of the proceedings before the Id.CIT(Central). It was the submission of the Id.AR that the Assessing Officer while passing the original assessment order u/s 143(3) r.w.s. 153A had already denied the deduction u/s 80IA claimed and against which the assessee had filed the appeal before the Id.CIT(A), who had dismissed the appeal of the assessee vide his order dt. 31.03.2010. Against the order passed by the Id.CIT(A) on 31.03.2010, the assessee was in appeal before the Tribunal on various grounds including the grounds of denial / grant of deduction u/s 80IA by filing substantial appeal Nos.805 and 806/Hyd/2010.

42. The Id.AR further submitted that the denial of section 80IA deduction for A.Y. 2005-06 and 2006-07 was not the subject matter of the appeals filed by the assessee in ITA Nos.683 and 702/Hyd/2010 and ITA Nos.1497 and 1498/Hyd/2011 as the Id.CIT(Central) had not issued any directions with respect to 80IA in the order passed on 30.03.2010 or in the order subsequently passed by the Id.CIT(A).

43. It was submitted by the ld.AR that the ld.DR had not denied in the reply dt.29.03.2019 reproduced hereinabove that these issue of section 80IA was not the subject matter of appeal in ITA No.805 and 806/Hyd/2010. The ld.DR had repeatedly submitted that the issue of section 80IA was not the subject matter of ITa No.683 and 702/Hyd/2010. It was submitted that the Tribunal had committed a mistake while dismissing the earlier M.A. of the assessee on 23.04.2014, as the Tribunal failed to consider the ground raised by the assessee in ITA Nos.805 and 806/Hyd/2010 of its appeal.

44. We have heard the rival contentions of the parties and perused the material available on record. Admittedly, the Tribunal vide order dt.23.04.2014 had dismissed the M.A. Nos.171 and 172/Hyd/2013 on the pretext that the ld.CIT(Central) had set aside the order passed by the Assessing Officer u/s 143(3) r.w.s. 153A of these two assessment years. The setting aside of the order by the ld.CIT(Central) would be annulment of the assessment made by the Assessing Officer and direction was given to redo the assessment.

45. In our view, the above said finding given by the Tribunal was based on the presumption that the issue 80IA was decided in favour of the assessee. However, the facts are contrary as the claim of deduction u/s 80IA was the subject matter of the

appeal Nos.805 and 806/Hyd/2010. Further, as pointed out by the Id.AR that the issue of section 80IA cannot be the subject matter of the proceedings u/s 263, as on that issue, the matter was pending before the Id.CIT(A). Unfortunately, the Id.CIT(A) had not decided this issue while passing the order on 31.03.2010. In the light of the above, we are of the opinion that the assessee was made to suffer on account of the mistake committed by the Id.CIT(A) and the Tribunal was wrongly persuaded based on the submission of the revenue that the issue of 80IA was required to be decided by the Assessing Officer afresh while passing the order giving effect. In our view, the Assessing Officer cannot pass, modify or recall its order denying the deduction under section 80IA to the assessee more particularly when the issue of section 80IA was not the subject matter of show cause notice issued u/s 263 or the direction of the Id.CIT(Central) dt.30.03.2010.

46. In view of the above, the order of the Tribunal passed on 28.12.2012 should have been recalled by the Tribunal while passing the order on M.A.No.171 and 172/Hyd/2013. However, the Tribunal had dismissed the M.A. for the reasons reproduced hereinabove.

47. In our considered opinion, though the assessee has made out a good case for recalling of the order, however, the order of the Tribunal passed in M.A. dt.23.04.2014, had attained finality. Admittedly, the present M.As. 05 and 06/Hyd/2016 were filed by the assessee in M.A. Nos.171 and 172/Hyd/2013 in ITA Nos.805 and 806/Hyd/2010. In our considered opinion, the powers of the Tribunal are circumscribed by section 254 of the Act. The plain reading of section 254(2) and 254(1) of the Act makes abundantly clear that an order can be passed by the Tribunal rectifying any mistake apparent from the record, thereby amending any of its order passed u/s 254(1) of the Act. Thus, the Tribunal can rectify any order passed in appeal by it and it does not have a power to rectify any order passed u/s 254(2) of the Act. In view of the above, the present M.As filed in the M.A.s 171, 172/Hyd/2013 are not maintainable. Assuming these two M.As are independently filed by the assessee, then also the same are not maintainable and these two M.As are identical in content and submissions. Besides the above, we may rely upon the decision of Hon'ble Supreme Court in the case of Reliance Telecom Ltd (supra) and the decision of the jurisdictional High Court in the case of Ideal Engineers 118 Taxamnn 915, relied upon by the Revenue. In light of the above, these **two M.As. i.e., M.A. 5 and 6/Hyd/2016 are also dismissed.**

**ITA No.1937, 1938/Hyd/2014 and ITA 1326/Hyd/2015**

48. These two appeals bearing no ITA No.1937, 1938/Hyd/2014 are filed by the assessee against the order passed by the Id.CIT(A) on 30.09.2014 u/s 154 read with Section 143(3)/153A of the Act on the grounds reproduced hereinabove.

49. In the impugned order, the Id.CIT(A) has mentioned that the assessment under section 143(3) r.w.s 153A was completed on 31.03.2013 by the Assessing Officer after the direction of the Tribunal passed on 28.12.2012. In the said assessment order, the Assessing Officer has not granted the deduction u/s 80IA, while passing the order in second search proceedings. The assessee had filed the application under section 154 seeking the modification of the order passed by the Assessing Officer on the ground that the deduction under section 80IA was granted for the subsequent years for the same projects and assessee is entitled to deduction. However, the Assessing Officer dismissed the application on the pretext that while pronouncing the order for A.Ys. 2005-06 and 2006-07, in respect to first Assessment Years, the Tribunal has not given any direction with regard to deduction under section 80IA.

50. The Id.CIT(A) had dismissed the appeal of the assessee on the pretext that the assessee has not claimed deduction under section 80IA of the Act. The finding of the Id.CIT(A) was mentioned at para 5.2 to the following effect :

*“5.2. In the present case, as brought out in the facts of the case at para 2, the appellant apparently had not claimed the deduction u/s 80IA and accordingly, it was not considered by the Assessing Officer while completing the scrutiny assessment. Further, even in appeal before the Id.CIT(A) or the Hon’ble ITAT, this was not the issue at all as he had not claimed such deduction. It is only in A.Y. 2008-09, that there was such a claim and the Hon’ble ITAT had allowed such appeal. This specific finding for a specific subsequent assessment year cannot be extended suo moto and deduction be allowed in an earlier year when it was not claimed originally. Moreover such claims do not constitute “mistake apparent from record”, which is the only ground or basis for carrying out any rectification action u/s 154. The Assessing Officer has therefore, rightly rejected the petition u/s 154 seeking deduction u/s 80IA.”*

51. The Id.AR submitted that the assessee had claimed the deduction under section 80IA in the return filed by it for A.Y. 2005-06 and 2006-07 after the first search and second search . The Assessing Officer has discussed the issue of 80IA while passing the assessment order under section 143(3) r.w.s. 153A of the Act during the second search proceedings. The Assessing Officer had denied the claim of the assessee under section 80IA for both the assessment years by relying upon the order of Tribunal passed on 28/12/2012 in the first search proceedings. The Tribunal while passing order dt.28.12.2012 had partly allowed the appeals u/s 263 of the Act. Thereafter, in the same order, the

Tribunal had mentioned that ITA 805 and 806/Hyd/2010 in respect to the first search , it was observed as under “..... *Being so, there are no surviving assessment orders in these years.*” It was the contention of the ld.AR that the assessee cannot be denied the relief in the rectification application and in the appeal filed by the assessee challenging the order u/s 154 of ld.CIT(A), as the assessee had raised the issue of denial of section 80IA in appeal before the ld.CIT(A) in the original appellate proceedings as well as had claimed in original return of income.

52. On the other hand, the ld.DR relied upon the order passed by the lower authorities.

53. We have heard the rival contentions of the parties and perused the material available on record. Admittedly, the assessee had claimed 80IA deduction in the return of income filed for A.Ys. 2005-06 and 2006-07 after the search on 20.10.2005 and 4.2.2011. The Assessing Officer had denied 80IA deduction in passing the order under section 143(3) r.w.s 153A of the Act while his order dt.31.03.2013 passed u/s 143(3) r.w. 153A of the Act in respect of the second search which took place on 04.02.2011. In the assessment order, the reason given by the Assessing Officer was that the Tribunal in its earlier order dt.28.12.2012 in respect to first search on 20.10.2005 had not decided the issue. It was mentioned by the Assessing Officer that

after giving effect to the order of the Tribunal, the income of the assessee was assessed to Rs.29,32,48,217/-. In respect to the second search, the order was passed by the learned Assessing Officer relying upon the observations of the Tribunal that the appeal of the assessee had become infructuous. However, the Assessing Officer for A.Y. 2005-06 has mentioned in his order for second search dt.04.02.2011, that while giving effect to the order of the Tribunal, the net income of the assessee was arrived at Rs.19,40,32,008/-. Again, the Assessing Officer had merely relied upon the order passed by the Tribunal in respect to the first search and had not given any independent finding in the assessment order regarding the claim of the assessee under section 80IA of the Act.

54. The ld.CIT(A) had denied the relief to the assessee on the pretext that the assessee has not claimed such deduction in the return of income filed by the assessee. In Para 5.2, the above said reasoning was given which was reproduced hereinabove.

55. A perusal of the acknowledgment of the return, which has already been reproduced at paras 5 to 7 of this order clearly shows that the deduction u/s 80IA at the time of filing the return of income as reproduced hereinabove for the A.Y. 2005-06 and 2006-07. Further, he had also claimed section 80IA deduction in the return of income filed after the second search on 04.02.2011.

Therefore, the error has been committed by the Revenue authorities, by observing that the assessee has not claimed section 80IA prior to the second search, as such, the above aspect is required to be corrected.

56. Interestingly, the Tribunal while passing the order on the Miscellaneous Application of the assessee had held “that after the setting aside of the order, pursuant to the direction of the Id.CIT(Central) u/s 263 of the Act, nothing survives in the order passed by the Assessing Officer for the A.Y. 2005-06 and 2006-07”. However, as mentioned hereinabove, the Assessing Officer in order giving effect to section 263 did not make any disallowance u/s 80IA for these assessment years. The above said fact became relevant as the assessee was in appeal before the Tribunal challenging the order passed by the Id.CIT(A) denying the section 80IA deduction to the assessee. The Id.CIT(A) on appeal by the assessee had dismissed the appeal of the assessee on the ground that the Id.CIT(Central) had passed the order under section 263 of the Act. Against the order of Id.CIT(A), the assessee was in appeal before the Tribunal in ITA Nos.805 and 806/Hyd/2010. The Tribunal vide order dt.28.12.2012 had dismissed the appeals of the assessee holding as “dismissed as infructuous”.

57. The Tribunal while deciding issue for A.Ys. 2007-08 and 2008-09 pertaining to section 80IA deduction had remanded back the matter to the file of the Assessing Officer with the following direction :

30. *These two appeals (ITA No. 1499/Hyd/2011 and 1970/Hyd/ 2011) by the assessee for assessment years 2008-09 and 2007-08, respectively, are directed against the different orders of the CIT(A). The assessee also filed SA Nos. 83 and 84/Hyd/2012 for these assessment years. The first common issue in these appeals is with regard to allowability of deduction u/s. 80IA of the Act for the development of infrastructure facilities for various Government agencies.*

31. *After hearing both the parties we are of the opinion that the allowability of deduction u/s. 80IA is subject matter of appeal before this Tribunal in various cases and the Tribunal given a finding in these cases. The same issue was considered by this Tribunal in the case of M/s. Maytas-NCC (JV) in ITA No. 1292/ Hyd/2010 for A.Y. 2007-08. The Tribunal vide order dated 27.8.2012 held as follows:*

*"22. We have heard both the parties and perused the material on record. In our opinion, this issue came for consideration before this Tribunal in the case of M/s. Koya & Co. Construction (P) Ltd. v. ACIT, 51 SOT 203 (Hyd) (URO) wherein the Tribunal held as follows:*

*"24. ... We find that the provisions of Section 80IA (4) of the Act when introduced afresh by the Finance Act, 1999, the provisions under section 80IA (4A) of the Act were deleted from the Act. The deduction available for any enterprise earlier under section 80IA (4A) are also made available under Section 80IA (4) itself. Further, the very fact that the legislature mentioned the words (i) "developing" or (ii) "operating and maintaining" or (iii) "developing, operating and maintaining" clearly indicates that any enterprise which carried on any of these three activities would become eligible for deduction. Therefore, there is no ambiguity in the Income-Tax Act. We find that where an assessee incurred expenditure for purchase of materials himself and executes the development work i.e., carries out the civil construction work, he will be eligible for tax benefit under section 80 IA of the Act. In contrast to this, a assessee, who enters into a contract with another person including Government or an undertaking or enterprise referred to in Section 80 IA of the Act, for executing works contract, will not be eligible for the tax benefit under section 80 IA of the Act. We find that*

*the word "owned" in sub-clause (a) of clause (1) of sub section (4) of Section 80IA of the Act refer to the enterprise. By reading of the section, it is clear that the enterprises carrying on development of infrastructure development should be owned by the company and not that the infrastructure facility should be owned by a company. The provisions are made applicable to the person to whom such enterprise belongs to is explained in sub-clause (a). Therefore, the word "ownership" is attributable only to the enterprise carrying on the business which would mean that only companies are eligible for deduction under section 80IA (4) and not any other person like individual, HUF, Firm etc.*

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

*26. The next question is to be answered is whether the assessee is a developer or mere works contractor. The Revenue relied on the amendments brought in by the Finance Act 2007 and 2009 to mention that the activity undertaken by the assessee is akin to works contract and he is not eligible for deduction under section 80IA (4) of the Act. Whether the assessee is a developer or works contractor is purely depends on the nature of the work undertaken by the assessee. Each of the work undertaken has to be analyzed and a conclusion has to be drawn about the nature of the work undertaken by the assessee. The agreement entered into with the Government or the Government body may be a mere works contract or for development of infrastructure. It is to be seen from the agreements entered into by the assessee with the Government. We find that the Government handed over the possession of the premises of projects to the assessee for the development of infrastructure facility. It is the assessee's responsibility to do all acts till the possession of property is handed over to the Government. The first phase is to take over the existing premises of the projects and thereafter developing the same into infrastructure facility. Secondly, the assessee shall facilitate the people to*

*use the available existing facility even while the process of development is in progress. Any loss to the public caused in the process would be the responsibility of the assessee. The assessee has to develop the infrastructure facility. In the process, all the works are to be executed by the assessee. It may be laying of a drainage system; may be construction of a project; provision of way for the cattle and bullock carts in the village; provision for traffic without any hindrance, the assessee's duty is to develop infrastructure whether it involves construction of a particular item as agreed to in the agreement or not. The agreement is not for a specific work, it is for development of facility as a whole. The assessee is not entrusted with any specific work to be done by the assessee. The material required is to be brought in by the assessee by sticking to the quality and quantity irrespective of the cost of such material. The Government does not provide any material to the assessee. It provides the works in packages and not as a works contract. The assessee utilizes its funds, its expertise, its employees and takes the responsibility of developing the infrastructure facility. The losses suffered either by the Govt. or the people in the process of such development would be that of the assessee. The assessee hands over the developed infrastructure facility to the Government on completion of the development. Thereafter, the assessee has to undertake maintenance of the said infrastructure for a period of 12 to 24 months. During this period, if any damages are occurred it shall be the responsibility of the assessee. Further, during this period, the entire infrastructure shall have to be maintained by the assessee alone without hindrance to the regular traffic. Therefore, it is clear that from an undeveloped area, infrastructure is developed and handed over to the Government and as explained by the CBDT vide its Circular dated 18-05-2010, such activity is eligible for deduction under section 80IA (4) of the Act. This cannot be considered as a mere works contract but has to be considered as a development of infrastructure facility. Therefore, the assessee is a developer and not a works contractor as presumed by the Revenue. The circular issued by the Board, relied on by learned counsel for the assessee, clearly indicate that the assessee is eligible for deduction under section 80IA (4) of the Act. The department is not correct in holding that the assessee is a mere contractor of the work and not a developer.*

*27. We also find that as per the provisions of the section 80IA of the Act, a person being a company has to enter into an agreement with the Government or Government undertakings. Such an agreement is a contract and for the purpose of the agreement a person may be called as a*

*contractor as he entered into a contract. But the word “contractor” is used to denote a person entering into an agreement for undertaking the development of infrastructure facility. Every agreement entered into is a contract. The word “contractor” is used to denote the person who enters into such contract. Even a person who enters into a contract for development of infrastructure facility is a contractor. Therefore, the contractor and the developer cannot be viewed differently. Every contractor may not be a developer but every developer developing infrastructure facility on behalf of the Government is a contractor.*

*28. We find that the decision relied on by the learned counsel for the assessee in the case of CIT vs. Laxmi civil Engineering works [supra] squarely applicable to the issue under dispute which is in favour of the assessee wherein it was held that mere development of a infrastructure facility is an eligible activity for claiming deduction under section 80IA of the Act after considering the Judgement of the Mumbai High Court in the case of ABG Heavy Engineering [supra]. The case of ABG is not the pure developer whereas, in the present case, the assessee is the pure developer. We also find that Section 80IA of the Act, intended to cover the entities carrying out developing, operating and maintaining the infrastructure facility keeping in mind the present business models and intend to grant the incentives to such entities. The CBDT, on several occasions, clarified that pure developer should also be eligible to claim deduction under section 80IA of the Act, which ultimately culminated into Amendment under section 80IA of the Act, in the Finance Act 2001, to give effect to the aforesaid circulars issued by the CBDT. We also find that, to avoid misuse of the aforesaid amendment, an Explanation was inserted in Section 80IA of the Act, in the Finance Act-2007 and 2009, to clarify that mere works contract would not be eligible for deductions under section 80IA of the Act. But, certainly, the Explanation cannot be read to do away with the eligibility of the developer; otherwise, the parliament would have simply reversed the Amendment made in the Finance Act, 2001. Thus, the aforesaid Explanation was inserted, certainly, to deny the tax holiday to the entities who does only mere works contract or sub-contract as distinct from the developer. This is clear from the express intension of the parliament while introducing the Explanation. The explanatory memorandum to Finance Act 2007 states that the purpose of the tax benefit has all along been to encourage investment in development of infrastructure sector and not for the persons who merely execute the civil construction work. It categorically states that the deduction under section*

*80IA of the Act is available to developers who undertakes entrepreneurial and investment risk and not for the contractors, who undertakes only business risk. Without any doubt, the learned counsel for the assessee clearly demonstrated before us that the assessee at present has undertaken huge risks in terms of deployment of technical personnel, plant and machinery, technical know-how, expertise and financial resources.*

.....

*35. Same view was taken in the case of Maytax-NCC-NV in ITA No. 1875/Hyd/2011 for A.Y. 2008-09 vide order dated 31st October, 2012 and accordingly the issue is remitted to the file of the Assessing Officer with a direction to examine the issue afresh and to see whether the assessee carried on the development of infrastructure facilities cumulatively with the activities of design, development, operation, maintenance, financial involvement, defect correction of the contract executed by the assessee itself. In the event, the assessee itself carried on the development of infrastructure facilities/contract along with design, development, operation, maintenance, financial involvement, defect correction of the contract during the warranty period, then such contract to be considered as a development of infrastructure facility executed by the assessee and thereby eligible for deduction u/s. 80IA of the Act.*

*36. Considering the above order of the Tribunal, as the facts and circumstances are same, we are inclined to remit the issue back to the file of the Assessing Officer with a direction to examine the issue afresh and to see whether the assessee carried on the development of infrastructure facilities cumulatively with the activities of design, development, operation, maintenance, financial involvement, defect correction of the contract executed by the assessee itself. In the event, the assessee itself carried on the development of infrastructure facilities/contract along with design, development, operation, maintenance, financial involvement, defect correction of the contract during the warranty period, then such contract to be considered as a development of infrastructure facility executed by the assessee and thereby eligible for deduction u/s. 80IA of the Act.*

58. During the course of argument, the Id.AR had pointed out that while giving effect to the order of the Tribunal for A.Y. 2007-08 and 2008-09, the Assessing Officer had granted the relief to the assessee vide order dated 2.5.2016. In para 5 of order it was mentioned as under:-

*“5. After verification of the details submitted by the assessee, it is observed that the assessee is having four BoT contracts from which it is generating profit. The assessee company has incorporated SPV companies for the purpose of satisfying the specific requirements for taking up the activity of roads formation on BOT basis. The nature of works are as follows :*

- i) Trichy – Thanjavur Expressways Limited.*
- ii) TN DK Expressways Limited.*
- iii) Madhurai Tuticorin Expressways Limited.*
- iv) Madhucon Agra Jaipur Expressways Limited.*

*The details has been carefully examined and placed on record. After verification of concession agreements and contract agreement, it is observed that assessee is eligible for deduction u/s 80IA(4) as per direction of Hon’ble ITAT, Hyderabad and the claim of assessee for deduction u/s 80IA(4) is allowed as under :*

*.....”*

59. The assessee could not be made to suffer on account of the jumbling of fact and errors committed at the ends of the Assessing Officer and thereafter, however, nonetheless, the assessee has continuously been urging before the Assessing Officer, Id.CIT(A), Id.CIT(Central) and Tribunal that the assessee is entitled for deduction u/s 80IA of the Act for A.Y.s 2005-06 and 2006-07. In our view, the assessee cannot be denied the benefit of deduction u/s 80IA, for the reasons, not attributed to him. As mentioned hereinabove the assessee had claimed deduction u/s

80IA before the Assessing Officer and therefore, the Assessing Officer was duty bound to decide the above said issue in the light of the applicable law. However, the Assessing Officer has not decided the issue on the pretext that the same was not subject matter of the order of Tribunal dt.28.12.2012. The above said understanding of the Assessing Officer was not correct for the reasons mentioned hereinabove, more particularly, when the assessee had claimed the deduction u/s 80IA of the Act at the very inception.

60. In the present case, the sole ground of the denial of the rectification was that the Assessing Officer / Id.CIT(A) were of the opinion that the assessee had not claimed the deduction u/s 80IA in the original return of income / return of income filed pursuant to the date of search. However, the Revenue was wrong on both the grounds. The Assessing Officer while passing the assessment order on 31.12.2007, after the first search on 20.10.2005 had disallowed the deduction u/s 80IA for A.Y. 2005-06 and the finding of the learned Assessing Officer is available at page 12 to 20 of the order. The relevant findings of the Assessing Officer for A.Y. 2005-06 are reproduced hereinabove in this regard. Besides the above, we have reproduced the acknowledgment of the return of income filed after the date of second search wherein the assessee had claimed a similar deduction in the return of income. However, the same had been denied by the Assessing Officer citing the decision of the Tribunal dt.28.12.2012. The above said

understanding of the Assessing Officer and Id.CIT(A), are against the facts of the present case and as such, error has been committed by the lower authorities while passing the impugned order.

61. In our opinion, as the Assessing Officer was duty bound to decide the ground of deduction of section 80IA on its own merits by following the decision given by the Tribunal in the case of the assessee for the subsequent assessment years. In our view, the decision of the Co-ordinate Bench of the Tribunal is binding on the Assessing Officer and for the said purpose, we may fruitfully rely upon the decision in the case of Mylan Laboratories Ltd reported in [2022] 137 taxmann.com 178 (TELANGANA) wherein it was held as under :

*“33. The approach of the Assessing Officer, as manifest in Clauses (a) to (d) as extracted above, to our mind is problematic. Insofar the decision of the Income Tax Appellate Tribunal, Hyderabad 'A' Bench, Hyderabad in respect of petitioner's own case for the Assessment Year 2014-15 is concerned, the Assessing Officer has stated that the Department has not accepted the said decision. The views of the Income Tax Appellate Tribunal is not acceptable to the Department, and therefore, it has been appealed before the High Court. As such, the issue of addition of depreciation claimed on goodwill has not attained finality.*

*34. We are afraid such a view taken by the Assessing Officer can be justified. Rather, it is highly objectionable for an Assessing Officer to say that decision of the Income Tax Appellate Tribunal is not acceptable; and that since it has been appealed against, the issue of allowability of depreciation on goodwill has not attained finality. Unless there is a stay, order/decision of the jurisdictional Income Tax Appellate Tribunal is binding on all income tax authorities within its jurisdiction.*

*35. In Union of India v. Kamlakshi Finance Corporation Ltd. 1992 taxmann.com 16, Supreme Court held and reiterated that the principles of*

*judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not acceptable to the department, which in itself is an objectionable phrase, and is the subject matter of an appeal can be no ground for not following the appellate order unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to the assessee and chaos in administration of the tax laws.*

*36. Following the above decision, Supreme Court again in Collector of Customs v. Krishna Sales (P.) Ltd. 1994 Supp. (3) SCC 73, reiterated the proposition that mere filing of an appeal does not operate as a stay or suspension of the order appealed against. It was pointed out that if the authorities were of the opinion that the goods ought not to be released pending the appeal, the straight-forward course for them is to obtain an order of stay or other appropriate direction from the Tribunal or the Supreme Court, as the case may be. Without obtaining such an order they cannot refuse to implement the order under appeal.*

*37. Following the above decisions of the Supreme Court, a Division Bench of the Bombay High Court in Ganesh Benzoplast Ltd. v. Union of India 2020 (374) ELT 552 held that non-compliance of orders of the appellate authority by the subordinate original authority is disturbing to say the least as it strikes at the very root of administrative discipline and may have the effect of severely undermining the efficacy of the appellate remedy provided to a litigant under the statute. Principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities.*

*38. This principle has been reiterated by the Bombay High Court in Himgiri Buildcon & Industries Ltd. v. Union of India 2021 (376) ELT 257.*

*39. Therefore, the stand taken by the Assessing Officer that since the decision of the Income Tax Appellate Tribunal in the case of the petitioner itself for the assessment year 2014-15 has been appealed against the issue in question has not attained finality, is not only wrong but is required to be deprecated in strong terms being highly objectionable.*

*40. The second view expressed by the Assessing Officer vis-à-vis the decision of the Supreme Court in SMIFS (1 supra) is still more problematic. It is not open to the Assessing Officer to try to evade from the binding effect of a Supreme Court decision by trying to find out 'distinguishing features'. Though unnecessary, we are still compelled to refer to Article 141 of the Constitution of India which says that the law declared by the*

*Supreme Court shall be binding on all Courts within the territory of India. Therefore, it is the bounden duty of all authorities whether administrative or quasi judicial or judicial to follow the law declared by the Supreme Court.*

*41. While we agree with the learned Standing Counsel that the draft Assessment Order has not yet attained finality as it still has to be placed before the Dispute Resolution Panel and therefore, in the circumstances, we feel that interfering at this stage may not be justified as it would pre-empt decision-making by the high-powered Dispute Resolution Panel. However, we hope and trust that the Dispute Resolution Panel shall look into all aspects of the matter, more particularly, the discussions made above while passing appropriate order(s) under sub-section (8) of section 144C of the Act, and if necessary further personal hearing shall be afforded to the petitioner.”*

62. In view of the above, we are of the opinion that the appeal No.1937 and 1938/Hyd/2014 are required to be allowed and the matter is required to be remitted back to the file of Assessing Officer for consideration of the granting of deduction u/s 80IA in accordance with law after following the decision of the Tribunal for A.Y. 2007-08 and 2008-09, after correcting the error committed by him while passing the assessment orders. Needless to say that the above said exercise be carried out by the Assessing Officer after affording opportunity of hearing to the assessee.

63. In ITA No.1326/Hyd/2015, the assessee had sought relief against the order passed by the ld.CIT(A) on 20.06.2013. In the said order, the ld.CIT(A) had mentioned in sub-para 2 of Para 4 at page 4 of under :

*“02. It is significant to note that the appellant had not claimed deduction u/s.s 80IA either in the original return or in the returns filed in response to return filed u/s 153A.*

64. The assessee had claimed the similar relief while filing the rectification application before the Assessing Officer for A.Ys. 2005-06 and 2006-07, which are subject matter of ITA Nos.1937 and 1938/Hyd/2014. As we are remanding back those two appeals to the file of the Assessing Officer, therefore, we deem it appropriate to remand this appeal also to the file of Assessing Officer with similar directions. However, we may point out that this appeal i.e., ITA 1326/Hyd/2015 had become academic once we have granted the relief for the same assessment year to the assessee in ITA Nos.1937/Hyd/2014. As mentioned hereinabove, the assessment order in both these appeals i.e., ITA No.1326/Hyd/2015 and 1937/Hyd/2014 were passed by the Assessing Officer on 31.03.2013. In the light of the above, all the appeals of assessee are allowed for statistical purposes.

65. To sum up, all the captioned miscellaneous applications filed by the assessee are dismissed and the appeals of assessee are allowed for statistical purposes. A copy of this order may be placed in all respective case files.

Order pronounced in the Open Court on 2<sup>nd</sup> March, 2023.

**Sd/-**

**Sd/-**

<b>(RAMA KANTA PANDA)</b> <b>ACCOUNTANT MEMBER</b>	<b>(LALIET KUMAR)</b> <b>JUDICIAL MEMBER</b>
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Hyderabad, dated 2<sup>nd</sup> March, 2023.

**TYNAM/sps**

Copy to:

S.No	Addresses
1	M/s. Madhucon Projects Ltd., c/o. M/s. P. Murali & Co., Chartered Accountants, 6-3-655/2/3, 1st Floor, Somajiguda, Hyderabad-82.
2	The Dy. Commissioner of Income-tax. Central Circle-4, Hyderabad / DCIT, Central Circle 3, Hyderabad.
3	ACIT, Central Circle-3, Hyderabad.
4	DR, ITAT Hyderabad Benches
5	Guard File

*By Order*