IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCHES "B" :: PUNE

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

ITA Nos.92 & 97/PUN/2020
Assessment Years 2012-13 & 2013-14

M/s.Suyojit Infrastructure , 1/2 , First Floor, Suyojit Heights, Sharanpur Road, Opp: Rajiv Gandhi Bhavan, Nashik – 422002. PAN ABGFS0351P	vs	The Income Tax Officer, Ward-2(1), Nashik.
Appellant/ Assessee		Respondent /Revenue

Assessee by	Shri Pramod Shingte, Advocate
Revenue by	Shri Sardar Singh Meena,IRS & Shri M.G.Jasnani, IRS – DR
Date of hearing	17.04.2023
Date of pronouncement	21.06.2023

आदेश/ ORDER

PER SATBEER SINGH GODARA, J.M. :

These assessee's twin appeals ITA.Nos.92 & 97/PUN./2020 for assessment years 2012-13 and 2013-14 arise against the CIT(A)-2, Nashik's separate orders, both dated 20.11.2019 passed in case nos.Nsk/CIT(A)-2/80/2015-16 and Nsk/CIT(A)-2/268/ 2015-16, respectively, in proceedings u/s.143(3) of the Income Tax Act, 1961 (in short "the Act").

Heard both the parties at length. Case files perused.

2. The assessee's former appeal ITA.No.92/PUN./ 2020 raises the following substantive grounds :

"1. On the basis of facts and in the circumstances of the case and as per law, the CIT(A) is not justified confirming the disallowance of deduction of Rs.2,51,56,948/- claimed U/s. 80- IA(4) of the Act.

2. On the basis of facts and in the circumstances of the case and as per law, the CIT(A) is not justified in confirming the disallowance of deduction of Rs.2,51,56,948/- claimed U/s. 80- IA(4) of the Act by holding that the deduction u/s. 80-IA(4) cannot be claimed by partnership firm ignoring the fact that the partners of the assessee firm are company M/s. Suyojit Infrastructure Private Limited and its directors.

3. On the basis of facts and in the circumstances of the case and as per law, the CIT(A) while confirming the disallowance of deduction of Rs.2,51,56,948/- claimed U/s. 80-IA(4) of the Act is not justified in holding that the assessee firm is not owned by M/s. Suyojit Infrastructure Private Limited as status of partnership firm and company are different.

4. On the basis of facts and in the circumstances of the case, the CIT(A) is not justified in not following the rule of consistency while rejecting the claim for deduction U/s. 80IA(4) of the Act particularly when the said claimed is

allowed to the appellant in the assessment for earlier years.

5. On the basis of facts and in the circumstancesof the case and as per law, the CIT(A) while confirming the disallowance of deduction of Rs.2,51,56,948/- claimed U/s. 80-IA(4) of the Act is not justified in holding that the company M/s. Suyojit Infrastructure Private Limited has sublet the work to assessee, ignoring the fact that the assessee firm is just a special purpose vehicle owned and controlled by company to carry out the infrastructural project.

6. The appellant craves for the addition to, deletion, alteration, modification of the above grounds of appeal."

3. Both the parties are ad idem during the course of hearing that the assessee's latter appeal ITA.No.97/PUN./2020 also raises the very similar issues since the only exception therein is the quantum of sec.80IA(4) deduction to the tune of Rs.12,56,333/-. Mr. Shingte at this stage takes us to the CIT(A)'s identical detailed discussion in both these cases holding the assessee as not eligible to claim the impugned deduction as under :

5.0 I have perused facts of the case, assessment order and submission of the appellant. The only issue to be decided is that whether a partnership firm can claim deduction u/s. 80IA(4) of the Act. In order to decide the issue, the provision of section 80IA(4) is relevant and therefore, the relevant portion of the section is reproduced below:

"80IA. (1)Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

(2) .....

(2A) .....

(3) .....

(4) This section applies to—

(i) any enterprise carrying on the business of (i) developing or

(ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfils all the following conditions, namely:—

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

(b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing

or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;

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

5.1 From the above provision, it is evident that, the condition prescribed in section 80IA(4)(i)(a) requires the appellant to carrying on prescribed business and to be a company registered in India for claiming deduction. The appellant who is executor of the infrastructure work is undisputedly a partnership firm registered under the Partnership Act. Therefore, the above condition is not fulfilled and hence, the AO is justified in disallowing the deduction claimed by the appellant firm u/s. 80IA(4) of the Act.

5.2 The above proposition of law is further supported by the decision of Hon'ble ITAT Chennai, in the case of M/s. Eshwarnath Constructions Vs. ACIT, ITA No. 185/Mds/2012 A.Y. 2008-09 order dated 15/1/2013. In this case, the assessee was a partnership firm and has claimed deduction u/s. 80IA(4). The Hon'ble ITAT has held that, the assessee, being a partnership firm is not eligible for deduction u/s. 80IA(4) of the Act. The operative portion of the order of the Tribunal is reproduced below:

"8. We have given our thoughtful consideration to the submissions of both parties and also gone through the findings of the Assessing Officer and CIT(A). The voluminous paper book referred to by the assessee has also *4 I.T.A. No.185/M/12 been perused. The undisputed facts of the case are that the assessee's claim raised under section 80IA of the "Act" has been negatived by the Assessing Officer as well as the CIT(A) on the ground that it is a contractor and not a developer. At this stage, we deem it appropriate to reproduce hereunder section 80IA of the "Act" providing deduction in respect of profits and gains from industrial undertaking or enterprises engaged in infrastructure development which reads as follows:-*

80IA. (1)Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

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(4) This section applies to—

(i) any enterprise carrying on the business of (i) developing or

(ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfils all the following conditions, namely:—

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

(b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing

or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;

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

Provided that where an infrastructure facility is transferred on or after the 1st day of April, 1999 by an enterprise which developed such *5 I.T.A. No.185/M/12 infrastructure facility (hereafter referred to in this section as the transferor enterprise) to another enterprise (hereafter in this section referred to as the transferee enterprise) for the purpose of operating and maintaining the infrastructure facility on its behalf in accordance with the agreement with the Central Government, State Government, local authority or statutory body, the provisions of this section shall apply to the transferee enterprise as if it were the enterprise to which this clause applies and the deduction from profits and gains would be available to such transferee enterprise for the unexpired period during which the transferor enterprise would have been entitled to the deduction, if the transfer had not taken*

place. Explanation.—For the purposes of this clause, "infrastructure facility" means—

(a) a road including toll road, a bridge or a rail system;

(b) a highway project including housing or other activities being an integral part of the highway project;

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

(d) a port, airport, inland waterway, inland port or navigational

channel in the sea;

(5) .....

(13) .....

Explanation. - For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub-section (1).

**It introduced by Finance (No.2) Act, 2009 w.r.e.f. 1.4.2000*

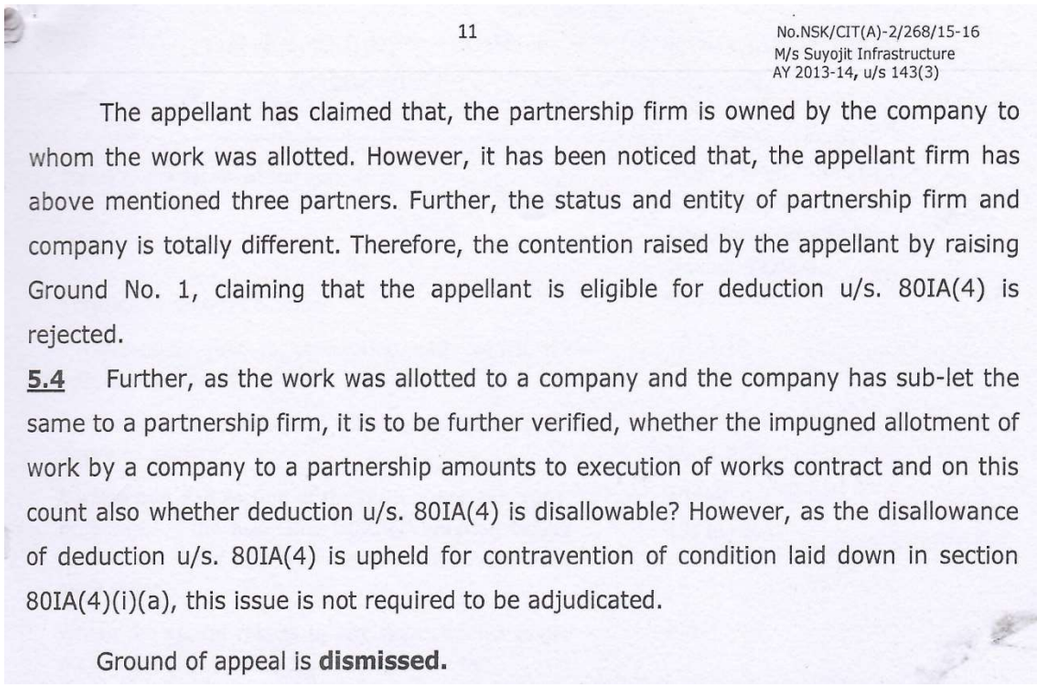
A perusal of the statutory provisions makes it clear that it does not provide a blanket deduction i.e. in order to succeed in a claim of deduction; the concerned assessee has to derive profits and gains from any business referred to in sub-section 4. Further, sub-section 4 prescribes applicability of clause i.e. the case in which the deduction provision would apply. It is in this sub-section that the legislature has enumerated the nature of the undertakings, their activities in contributing raising of infrastructure. Further, *6 I.T.A. No.185/M/12 in the explanation attached to the sub-section, the legislature has also entrusted the meaning of the infrastructure facilities. In our opinion, an assessee while claiming deduction has to satisfy all conditions in sub-section 4(1)(a) or (b) or (c). It is mandatory for the assessee to first satisfy subsection clause i(a), then (b) then (c), then proviso and so on. In case the concerned assessee fails in any one of the clauses, even if it satisfies the other part of the sub-section, the claim has to be rejected. Now we proceed to decide as to whether the assessee firm satisfies sub-section 4(i) of the "Act" or not. For the said sub-section, a reading of the provision makes it unambiguous that the concerned claimant has to be an enterprises carrying on the business of developing or operating and maintaining or developing, operating and maintaining any infrastructure*

facility and it has to be owned by a consortium of such company or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act. Admittedly, the assessee is a partnership firm. As we notice from the relevant statutory provision, the enterprise in the nature of firm nowhere finds mention in the mandate of the legislature. Although the assessee has emphasized from the definition of the word 'body' in the Law Lexicon which reads as follows:

"Statutory definition, includes partnership, Financial Services and Markets Act, 2000 (c.8), S. 367(2) (Stroud, 6th Edn., 2000, Supplement, 2003). It also includes group of bodies, partnership of enterprise card on www.taxguru.in 7 I.T.A. No.185/M/12 by one or more persons or bodies and a body which is substantially the same at or successor, to, another body, Government Resources and Accounts Act, 2000 (c.20), S. 17(7) (Stroud, 6th Edn., 2000, Supplement, 2003). The main-central or principal part [Art. 110 (2), Const.]; physical or material frame of a man or animal; gang of thieves etc." In our opinion, the said definition being a general preposition does not help the assessee's case. It is a trite preposition of law while interpreting a statute and more so a fiscal statue, neither the judicial forum concerned can insert its own words nor it can take away any from the statute. As it is seen, the earlier portion of the statutory provision prescribes a company registered in India or a consortium of such companies or by an authority or corporation or any other body established or constituted and so on. In our view, the latter part is liable to be read in the light of the earlier part by following the principles of ejusdem generis. The vehement contention of the assessee is that it is also a body established or constituted under a Central Act as it is governed by Partnership Act, cannot be accepted for the reason that under the provisions of Partnership Act a firm is not created i.e. it is not a creation of statute, but it is a body of individual regulated by the statute namely Partnership Act. Hence, we hold that the assessee fails to satisfy the applicability clause of the provision as envisaged under section 80IA(4)(i) of the "Act"."

5.3 It has also been noticed that, originally the impugned infrastructure work was allotted to M/s. Suyojit Infrastructure Ltd. as per agreement dated 30/8/2006, by Governor of Maharashtra, vide work order dated 30/8/2006. Thereafter, Tri-Party agreement dated 23/6/2008 was entered into between Governor of Maharashtra, M/s. Suyojit Infrastructure Ltd and M/s. Suyojit Infrastructure, a partnership firm. As per the partnership deed dated 22/6/2006 the partners were:

(i) M/s. Suyojit Infrastructure Ltd through directors
(ii) Shri Anant Keshav Rajegaonkar
(iii) Shri Anil Bhavarlal Jain



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M/s Suyojit Infrastructure
AY 2013-14, u/s 143(3)

The appellant has claimed that, the partnership firm is owned by the company to whom the work was allotted. However, it has been noticed that, the appellant firm has above mentioned three partners. Further, the status and entity of partnership firm and company is totally different. Therefore, the contention raised by the appellant by raising Ground No. 1, claiming that the appellant is eligible for deduction u/s. 80IA(4) is rejected.

5.4 Further, as the work was allotted to a company and the company has sub-let the same to a partnership firm, it is to be further verified, whether the impugned allotment of work by a company to a partnership amounts to execution of works contract and on this count also whether deduction u/s. 80IA(4) is disallowable? However, as the disallowance of deduction u/s. 80IA(4) is upheld for contravention of condition laid down in section 80IA(4)(i)(a), this issue is not required to be adjudicated.

Ground of appeal is **dismissed.**

3.1. Mr. Shingte's sole substantive contention raised before us is that this tribunal's earlier common order in assessment years 2010-11 and 2011-12 involving assessee's twin appeals ITA.Nos.850 & 851/PUN./2016 decided on 06.11.2018 has already declined the Revenue's stand contesting its' eligibility for claiming sec.80IA(4) deduction. He quotes learned coordinate bench's detailed discussion to this effect reading as under :

> *"12. We have heard the rival contentions and perused the record. Under the provisions of section 263 of the Act, the Commissioner is empowered to exercise his jurisdiction where the order passed by Assessing Officer is erroneous and prejudicial to the interest of Revenue. In case both the conditions of section 263 of the Act are*

satisfied i.e. order is erroneous and prejudicial to the interest of Revenue, then the Commissioner is empowered to exercise his jurisdiction under section 263 of the Act. However, where the Assessing Officer has considered the issue and has taken a view on the issue, merely because the Commissioner does not agree with the view taken by Assessing Officer would not entitle the Commissioner to exercise his jurisdiction of revision under section 263 of the Act. Such is the proposition laid down by the Hon'ble Supreme Court and various other Courts.

13. Now, coming to the facts of present case, the assessee has been claiming aforesaid deduction under section 80IA(4) of the Act in the preceding years and even in succeeding years. The claim of assessee was duly verified by the Assessing Officer in preceding year i.e. assessment year 2009-10 and by speaking order passed under section 143(3) of the Act, the said claim of assessee was allowed. The status of assessee remains the same as in earlier years even for the year under consideration. The Assessing Officer has accepted the status of assessee and allowed deduction claimed under section 80IA(4) of the Act by passing speaking order under section 143(3) of the Act. The assessment proceedings in the hands of assessee were initiated under CASS solely for the purpose of

verifying the claim of assessee under section 80IA(4) of the Act. The assessee has also filed on record the submissions made before the Assessing Officer justifying its claim of deduction under section 80IA(4) of the Act, which has been verified by Assessing Officer and specific comments to the same has been made. It is undisputed that the assessee was partnership concern and had claimed the aforesaid deduction being income from eligible business of development, operation and maintenance of infrastructural facilities. Vide para 6.1 (wrongly numbered), the Assessing Officer in assessment order dated 01.06.2012 gives his clear finding that Further the partnership firm fulfills all these criteria's provided u/s. 80IA(4)(i)(a)&(b) of the Act, and therefore the said project is eligible for getting the benefits of the provisions of the said section. Once the criteria of section has been verified and the assessee has been found to have fulfilled the same and the Assessing Officer has thus, accorded the benefits of said section to the assessee, then such a view is not open for any revision by the Commissioner under section 263 of the Act. Here, it may be pointed out that the said order was passed on 01.06.2012 and had become final. The Commissioner has initiated proceedings under section 263 of the Act by issue of show cause notice, which is

dated 08.01.2016. In case the Commissioner had to exercise its jurisdiction of revision of assessment order passed on 01.06.2012, then show cause notice under section 263 of the Act could be issued only upto March, 2015, which is not so. Hence, the assessment order becomes final.

14. Now, coming to second stage of proceedings in the case of assessee, where after passing of said assessment order, the Assessing Officer had recorded reasons for reopening the assessment proceedings, wherein the sole reason for reopening the assessment was as under :-

> *"On verification of e-return of income for A.Y. 2010-11 filed by the assessee firm, it is seen that it has claimed deduction of ₹ 1,42,40,062/- under section 80-IA of the Act. The deduction u/s 80-IA of the Act is allowable in the case of company only and not to any other person like individual, HUF, firm, etc. needs to be verified."*

15. The basis for reasons recorded for reopening the assessment under section 148(2) of the Act was deduction claimed under section 80IA(4) of the Act, wherein the Assessing Officer observed that it was

allowable in the case of company only and not to any other person i.e. individual, HUF, firm, etc. and hence, it needed verification. Similar reasons have also been recorded for assessment year 2011-12, wherein admittedly, original return of income was processed under section 143(1) of the Act and no assessment order was passed under section 143(3) of the Act. In response to the aforesaid reopening of assessment in the case of assessee, the assessee raised objections to notice issued under section 148(2) of the Act and pointed out that the said issue of allowability of deduction to a person other than company was discussed during assessment proceedings and the Assessing Officer had granted deduction after being satisfied with explanation given on behalf of assessee. The assessee alleged that there was no new material coming to light for initiation of action under section 147 / 148 of the Act and mere change of opinion could not constitute 'reason to believe'. Hence, request was made for dropping proceedings initiated under section 148 of the Act. The Assessing Officer vide order passed under section 143(3) r.w.s. 147 of the Act, dated 31.01.2014 for assessment year 2010-11 and even for assessment year 2011-12, even dated held that The assessment proceedings u/s 147 of the Income Tax Act,

1961 initiated by issuing the notice u/s 148 of the Income Tax Act, 1961 on 17.10.2012, is hereby dropped. Hence, a proper assessment order was passed by Assessing Officer dropping initiated proceedings under section 148 of the Act.

16. The Commissioner in show cause notice under section 263 of the Act refers to reopened proceedings in the case of assessee by issue of notice under section 148 of the Act and holds that action of Assessing Officer in dropping proceedings was not in accordance with law and hence, was erroneous in so far as it is prejudicial to the interest of Revenue. The allegation of Commissioner was that the assessee firm was not eligible for claiming the deduction under section 80IA(4) of the Act, where the agreement was between Suyojit Infrastructure Ltd. and Government of Maharashtra and not with the firm M/s. Suyojit Infrastructure. Another reason for which show cause notice was issued, was the balance shown in bank as per Balance Sheet at about ₹ 3.21 crores, whereas the firm M/s. Suyojit Infrastructure had not shown any interest credited to the Profit and Loss Account for the year and the Assessing Officer had not conducted any enquiries in this regard. At the outset, it may be pointed out that where the Commissioner has exercised his jurisdiction

against reopened assessment under section 147 / 148 of the Act, then he has to consider only the said order passed under section 143(3) r.w.s. 147 of the Act. As pointed out by us in the paras hereinabove, re-assessment proceedings were initiated for the sole purpose of verifying the claim of deduction under section 80IA(4) of the Act. Undoubtedly, the said proceedings were dropped by passing speaking order. In other words, allowability of deduction which was by earlier order passed under section 143(3) of the Act, dated 01.06.2012 was not disturbed. Once the said assessment order has become final, then second order passed by Assessing Officer under section 143(3) r.w.s. 147 of the Act merely dropping re-assessment proceedings cannot be held to have decided the issue of eligibility of claim of deduction under section 80IA(4) of the Act. The said issue stands settled in favour of assessee by earlier order dated 01.06.2012, which has not been disturbed by any of the authorities. The exercise of jurisdiction by Commissioner in such circumstances by issuing show cause notice and holding the assessee to be not eligible for claiming the deduction under section 80IA(4) of the Act does not stand. Where the Commissioner had exercised jurisdiction against second assessment order passed i.e. dropping 147/148

proceedings, then the stand of Commissioner in holding that the assessee was not eligible to claim the aforesaid deduction, cannot stand in the eyes of law because the said order does not decide the said issue.

17. Another point, which may be pointed out herein is that original assessment order was consequent to picking up the issue during CASS of claim of deduction under section 80IA(4) of the Act and even re-assessment proceedings were vis-à-vis aforesaid deduction by assessee, who was the partnership concern. The Assessing Officer has already taken a view in this regard and the same cannot be disturbed by Commissioner on the same grounds as that would amount to change of opinion. Further, in any case, under the provisions of section 80IA(4) of the Act, an enterprise is entitled to claim the aforesaid deduction and the Commissioner is wrong in proposing that the company is entitled to claim the aforesaid deduction. Even on this ground, the order of Commissioner under section 263 of the Act, fails. Hence, we hold that exercise of jurisdiction by Commissioner under section 263 of the Act is both invalid and bad in law.

18. Now, coming to second issue raised in the show cause notice i.e. in respect of balance shown in the

Balance Sheet and corresponding interest, no such issue was decided in 148 proceedings neither in reasons recorded for reopening nor in the final assessment order dropping the said proceedings. Hence, the Commissioner has exceeded the jurisdiction vested under section 263 of the Act and the said issue could not form the basis for initiating 263 proceedings against the assessee. Accordingly, even for the second issue, order of Commissioner is both invalid and bad in law. We hold so.

19. Similarly, for assessment year 2011-12, facts are similar except to the extent that original assessment in the case was completed under section 143(1) of the Act. It may be pointed out that once the claim has been allowed to assessee for the preceding years and there was no change in factual aspects, then there was no need to disturb the position, since rule of consistency is to be applied. Applying the same, where the Assessing Officer had allowed deduction claimed under section 80IA(4) of the Act to the assessee, then even while processing return of income under section 143(1) of the Act, such a stand cannot be said to be erroneous or prejudicial to the interest of Revenue. Hence, there is no merit in the order passed by Commissioner under section 263 of the Act. The grounds of appeal raised by assessee are thus, allowed."

3.2. The assessee accordingly prayed that both these CIT(A)'s identical orders in issue also deserve to be reversed in very foregoing terms.

4. The Revenue has placed strong reliance on the CIT(A)'s above extracted detailed reasoning holding that the assessee, a partnership firm, is not entitled for the impugned sec.80IA(4) deduction.

5. We have given our thoughtful consideration to the foregoing vehement rival stands and find no merit in assessees' arguments. We make it clear that the clinching issue which arise for our apt adjudication in the instant appeals is that of the assessee's eligibility itself to claim sec.80IA(4) deduction. There is hardly any dispute between the parties that this assessee namely M/s. Suyojit Infrastructures; is a partnership firm, wherein not only the eponymous company M/s. Suyojit Infrastructure Ltd., through directors but also two individuals S/Shri Anant Keshav Rajegaonkar and Anil Bhavarlal Jain hold their respective stakes (supra). That being the case, we are of the view that the latter twin individual stakeholders would violate sec.80IA(4)(i)(a) of the Act being not "owned by a company". This is indeed coupled with the fact that this tribunal's coordinate bench's order in M/s. Eshwarnath Constructions (supra) has already adjudicated the very issue against the assessee and in

Revenue's favour. We also have the benefit of hon'ble apex court's recent landmark decision in Commissioner of Customs (Imports) vs. Dilip Kumar And Co. & Ors. [2018] 9 SCC 1 (SC) (FB) that such deduction provisions ought to be strictly construed only.

5.1. So far as the learned counsel's strong reliance on the earlier learned coordinate bench's order is concerned, we nowhere see any specific detailed discussion regarding sec.80IA(4)(i)(a) qua the clinching "ownership" aspect which has to be treated as a mandatory condition. We wish to quote CIT vs. BR Constructions [1993] 202 ITR 222 (AP) holding that such an adjudication not considering the corresponding statutory provision is not a binding precedent as under :

> *"37. The effect of binding precedents in India is that the decisions of the Supreme Court are binding on all the courts. Indeed, article 141 of the Constitution embodies the rule of precedent. All the subordinate courts are bound by the judgments of the High Court. A single judge of a High Court is bound by the judgment of another single judge and a fortiori judgments of Benches consisting of more judges than one. So also, a Division Bench of a High Court is bound by judgments of another Division Bench and Full . A single judge or Benches of High Courts cannot differ from the earlier judgments of co-ordinate jurisdiction merely*

because they hold a different view on the question of law for the reason that certainty and uniformity in the administration of justice are of paramount importance. But, if the earlier judgment is erroneous or adherence to the rule of precedents results in manifest injustice, differing from the earlier judgment will be permissible. When a Division Bench differs from the judgment of another Division Bench, it has to refer the case to a Full Bench. A single judge cannot differ from a decision of a Division Bench except when that decision or a judgment relied upon in that decision is overruled by a Full Bench or the Supreme Court, or when the law laid down by a Full Bench or the Supreme Court is inconsistent with the decision.

38. It may be noticed that precedent ceases to be a binding precedent -

(i) if it is reversed or overruled by a higher court,

(ii) when it is affirmed or reversed on a different ground,

(iii) when it is inconsistent with the earlier decisions of the same rank,

(iv) when it is sub silentio, and

(v) when it is rendered per incuriam.

39. In paragraph 578 at page 297 of Halsbury's Laws of England, Fourth Edition, the rule of per incuriam is stated as follows :

"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decided which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."

40. In Punjab Land Development and Reclamation Corporation Ltd. v. Presiding Officer, Labour Court, the Supreme Court explained the expression "per incuriam" thus (at page 36 of 77 FJR) :

"The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given per incuriam when the Supreme Court has acted in ignorance of a pervious decision of its own or when a High Court has acted in ignorance of a decision of the Supreme Court."

42. As has been noticed above, a judgment can be said to be per incuriam if it is rendered in ignorance or

forgetfulness of the provisions of a statute or a rule having statutory force or a binding authority. But, if the provision of the Act was noticed and considered before the conclusion arrived at, on the ground that it has erroneously reached the conclusion the judgment cannot be ignored as being per incuriam. In Salmond on Jurisprudence, Twelfth Edition, at page 151, the rule is sated as follows :

"The mere fact that (as is contended) the earlier court misconstrued a statute, or ignored a rule of construction, is no ground for impugning the authority of the precedent. A precedent on the construction of a statute is as much binding as any other, and the fact that it was mistaken in its reasoning does not destroy its binding force."

43. In Choudhry Brothers' case, as noticed above, the Division Bench treated the judgment in Ch. Atchaiah's case , as per incuriam on the ground that the earlier Division Bench did not notice the significant changes the charging section 3 has undergone by the omission of the words "or the partners of the firm or the members of the association individually"-. In our view, this cannot be a ground to treat an earlier judgment as per incuriam. The change in the provisions of the Act was present in the mind of the court which decided Ch. Atchaiah's case. Merely because the conclusion arrived at on construing the

provisions of the charging section under the old Act as well as under the new Act did not have the concurrence of the latter Bench, the earlier judgment cannot be called per incuriam.

44. Though a judgment rendered per incuriam can be ignored even by a lower court, yet it appears that such a course of action was not approved by the House of Lords in Cassell and Co. Ltd. v. Broome [1972] 1 All ER 801, wherein the House of Lords disapproved the judgment of the Court of Appeal treating an earlier judgment of the House of Lords as per incuriam. Lord Hailsham observed (at page 809) :

"It is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way."

45. It is recognised that the rule of per incuriam is of limited application and will be applicable only in the rarest of rare cases. Therefore, when a learned single judge or a Division Bench doubts the correctness of an otherwise binding precedent, the appropriate course would be to refer the case to a Division Bench or Full Bench, as the case may be, for an authoritative pronouncement on the question

involved as indicated above. The above-said two questions are answered as indicated above."

5.2. We accordingly conclude that both the learned lower authorities have rightly held the assessee as not eligible for the impugned deduction once it fails to fulfill the statutory condition u/s.80IA(4)(i)(a) of the Act. Their respective findings stand upheld therefore. The assessee fails in both these instant appeals. Ordered accordingly.

6. These assessees' twin appeals are dismissed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open Court on 21.06.2023.

Sd/-	**Sd/-**
(DR. DIPAK P. RIPOTE)	**(SATBEER SINGH GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Pune, Dated 21st June, 2023
VBP/-

Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, "बी" बेंच, पुणे / DR, ITAT, "B" Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

Senior Private Secretary
आयकरअपीलीयअधिकरण, पुणे/ITAT, Pune.