IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI

BEFORE SHRI ABY T. VARKEY, HON'BLE JUDICIAL MEMBER AND SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO. 2485 & 2486/MUM/2017
(A.Ys: 2006-07 & 2007-08)

DCIT – CC-3(4) Central Range – 3 Room No. 1915, 19th Floor Air India Building, Nariman Point Mumbai – 400 021	*v.*	M/s. Patel Engineering Ltd. Patel Estate Road Jogeswari (W) Mumbai - 400102 **PAN: AAACP2567L**
(Appellant)		**(Respondent)**

C.O. NO. 265 & 355/MUM/2018
[ARISING OUT OF ITA NO. 2485 & 2486/MUM/2017 (A.Ys: 2006-07 & 2007-08)]

M/s. Patel Engineering Ltd. Patel Estate Road Jogeswari (W) Mumbai - 400102 **PAN: AAACP2567L**	*v.*	DCIT – CC-3(4) Central Range – 3 Room No. 1915, 19th Floor Air India Building, Nariman Point Mumbai – 400 021
(Appellant)		**(Respondent)**

ITA NO. 7260/MUM/2018 (A.Y: 2007-08)

M/s. Patel Engineering Ltd. Patel Estate Road, S.V. Road Jogeswari (W) Mumbai - 400102 **PAN: AAACP2567L**	*v.*	DCIT – CC-25 {Presently DCIT – CC – 3(4)} Room No. 1915, 19th Floor Air India Building Nariman Point Mumbai – 400 021
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri Anuij Kisnadwala**
Department Represented by	**:**	**Shri Manoj Kumar**
Date of conclusion of Hearing	**:**	**13.04.2023**
Date of Pronouncement	**:**	**07.07.2023**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. These appeals are filed by the revenue and assessee against separate orders of the Learned Commissioner of Income Tax(Appeals)-57, [hereinafter in short "Ld.CIT(A)"] dated 30.12.2016 for the A.Y.2006-07 and 2007-08. The assessee has filed cross objections against appeals filed by the revenue and the Appeal in ITA.No. 7260/Mum/2018 is filed by the assessee against order of the Ld.CIT(A) dated 17.02.2017 passed u/s. 154 of Income-tax Act, 1961 (in short "Act").

2. Since the issues raised in all the appeals and cross objection are identical, therefore, for the sake of convenience, these appeals and cross objections are clubbed, heard and disposed off by this

consolidated order. We are taking Assessment Year 2006-07 as a lead case.

ASSESSMENT YEAR: 2006-07

ITA.NO. 2485/MUM/2017 (A.Y. 2006-07) – DEPARTMENT APPEAL

3. Revenue has raised following grounds in its appeal: -

1. "On the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding the assessee as a developer and not a contractor as the agreement entered into by the assessee with various government authorities is for contractual work and not to develop/operate and maintain any infrastructure facilities to which deduction u/s. 80IA(4)(i) is intended to and allowing the deduction u/s 80IA(4) of the IT Act, 1961 and failed to appreciate that the section 80IA(4) as amended by the Finance Act, 2007, retrospectively from AY-2000-01 by inserting Explanation to section 80IA, which states that nothing contained in this section shall apply to a person who executes a work contract entered into with the undertaking or enterprises".

2. "On the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding that the credit of TDS be allowed othe assessee in contravention to section 199(2) of the IT Act, 1961, since the advances pertaining thereto are not credited in the P&L A/C of the assessee in the FY under consideration".

3. "On the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding that the assessee is eligible for enhanced claim of deduction u/s 80IA(4), in respect of M/s Ambica Steel and ShivamGiri Steel Ltd. to the extent of unsubstantiated purchases without appreciating the fact that the additions were made on account of accommodation entries in the nature of bogus purchases and the bogus purchases were not supported by any documentary evidences and therefore they were

mere book entries against which deduction u/s 80IA(4) cannot be allowed, as the purchases itself were not genuine and hence deduction u/s 80IA(4) cannot be allowed on the same."

4. "On the facts and in the circumstances of the case and in law, the CIT(A) was justified in deleting the adjustments made by the TPO ignoring the fact that the difference between the issue price and the book value of shares of the AES is nothing but loan in disguise."

5. "On the facts and in the circumstances of the case and in law, the CIT(A) was justified in deleting the disallowance u/s 14A ignoring the fact that the monthly summary of the joint venture capital account submitted by the assessee shows that in all the joint ventures, there is debit balance and further the investment have been made out of current account on which the assessee has paid interest"

6. "On the facts and in the circumstances of the case and in law, the CIT(A) was right in directing since the additions made u/s 14A has been deleted no adjustments to book profit can be made ignoring the fact that the monthly summary of the joint venture capital account submitted by the assessee shows that in all the Joint ventures, there is debit balance and further the investment have been made out of current account on which the assessee has paid interest and hence the Net Profit has to be enhanced by adding the disallowances u/s 14A while arriving the book profit."

7. The appellant craves to leave, to add, to amend and / or to alter any of the ground of appeal, if need be.

8. The appellant, therefore, prays that on the grounds stated above, the order of the CIT(A)-57, Mumbai, may be set aside and that ofthe Assessing Officer restored.

The appellant craves to leave, to add, to amend and / or to alter any of the ground of appeal, if need be.

The appellant, therefore, prays that on the ground stated above, the order of the Ld.CIT(A)-57, Mumbai, may be set aside and that of the Assessing Officer restored."

4. we proceed to dispose off this appeal of the revenue by adjudicating the issues ground wise.

5. At the time of hearing, with regard to Ground No. 1, which is in respect of deduction u/s. 80IA(4) of the Act, Ld.DR brought to our notice relevant facts of the case and filed his written submissions, for the sake of clarity it is reproduced below: -

> ***"AY 2006-07***
>
> *The departmental appeal relates to deduction u/s.80IA of the I. T. Act. In this case, it was mentioned that the scrutiny assessment had been completed for A.Y. 2006-07 and the case travelled upto the Hon'ble ITAT. The Hon'ble ITAT has decided the appeal vide its order dated 05.07.2016. This present appeal is against the order u/s.143(3) r.w.s. 153A of the I. T. Act, 1961 dated 25.03.2013.*
>
> *2. The fact involved in this case is that a search operation u/s.132 of the I. T. Act, 1961 was conducted on 16.12.2010. Subsequently, notice u/s.153A of the I. T. Act dated 02.09.2011 was issued and served upon the assessee on 16.09.2011 asking the assessee to file its return of income for the A.Y. 2006-07. In response, the assessee has filed return of income for the A.Y. 2006-07 declaring total income of Rs.11,50,21,545/- on 28.11.2011. This income was shown by the assessee after considering the findings of search operation. There are few facts which have to be seen before dealing with the ground of appeal in this case. These facts are as under:*
>
> > *a) The assessee filed original return of income u/s.139(1) of the I. T. Act on 30.01.2006.*
> >
> > *b) The assessee subsequently filed revised return of income on 25.07.2008 declaring total income of Rs.10,45,61,640/-.*
> >
> > *c) The case was also reopened u/s.148 and the assessment u/s.143(1) r.w.s. 147 was completed on 02.02.2011 determining total income of Rs.76,97,43,320/-*
> >
> > *d) The assessee declared total income of Rs.11,50,21,545/- In response to the notice u/s.153A which was issued subsequent to search operation.*
>
> *In view of the above, it is no more a disputed fact that there had been no consistency in declaring total income for the same*

Assessment Year. It is quite interesting to note that the assessee is a limited company and listed in recognized Stock Exchange i.e. Bombay Stock Exchange (BSE) and National Stock Exchange (NSE). Being a Limited Company, the assessee required stringent procedure while disclosing the correct financial statement to the public. Under these circumstances and the above facts of the case, a clear-cut inference is drawn that the assessee company have not fulfilled or followed or disclosed, true and correct financial statement. It is certain that if the financial statement had been made and publicized correctly, there would have been very limited and specific scope for redrawing or re-computing the total income of the assessee company but the fact for the A.Y. 2006-07 has been found otherwise. The assessee has every right to revise its total income under the provisions of the I.T. Act but being a nature of Public Limited Company, this assessee company has its own limit to draw the financial statement and the tax liability under the Company's Act. This is very important distinction when the affairs of the company and other persons in the I. T. Act. A company being artificial juridical person does not have liberty in drawing the financial statement which finally led to determine the correct tax liability. It must be in accordance with provisions of company Act. It means that the taxable profit can't varied multiple times. In this case it is an interesting point that the assessee being a public limited company have modified the taxable income from time to time in pursuance to action initiated under the Income Tax Act. This is a fact and can be drawn a strong presumption of probability against the assessee's action

3. The assessee has taken a plea that deduction u/s 80IA to the tune of Rs.62,68,52,171/- has been already assessed in the original assessment order and the Hon'ble ITAT has allowed deduction. The operative part of the ITAT's order for the A.Y. 2006-07 is mentioned in para 2.6, page no.-9, which is as under:-

> *"During hearing before us, both the parties and more specifically the Revenue have not brought any adverse material. It is also noted that the Tribunal in the aforesaid order has considered the decision of earlier Assessment Years, terms and conditions of the agreement and then reached to a particular conclusion. The scope of work, risk and responsibilities, under taken by the assessee and after applying the proposition of law laid down in various cases including B. T. Patil & Sons, CIT vs ABG Heavy Industries Ltd. 322 ITR 323, etc. and thereafter, concluded that the assessee is a*

developer and not a contractor as has been held by the Id. Assessing Officer. The cases relied upon by the Revenue has also been dealt with. Since the facts are identical, following the earlier orders of the Tribunal and also from higher forums including Hon'ble High Court, we find no infirmity in the conclusion of the Ld. Commissioner of the Income Tax (Appeal). The same is affirmed.

2.7. So far as, the issue of Teesta Lower Dam is concerned, we find that the Tribunal for Assessment year 2005- 06 held that NHPC performs functions akin to state, therefore, assessee is eligible for deduction u/s80IA(4) of the Act on this project (refer para 40 & 41, pages 62 & 63 of the order of the Tribunal).

2.8. So far as, the issue on Halflong Tunnel 7, NLIP I, Bheema Lift Irrigation Project, Kameng I & II is concerned, this issue is also covered by the order of the Tribunal dated for Assessment Year 2005-06 in the context of NHPC, as NEEPCO also performs functions akin to state.

2.9. So far as, the claimed deduction u/s.80IA(4) of the Act with respect to M24 is concerned, the Id. CIT(A) disallowed the claim of the assessee for the reason that infrastructure facility, being developed under this project cannot be considered as "new" infrastructure (refer para 6.21) at page 74 of the impugned order. We find that the assessee has merely made relying on the existing roads, therefore, we are in agreement with the finding of the Id. CIT(A) as no new infrastructure development was made by the assessee, Even Circular No.4 of 2010 dated 18.05.2010 (F.No.178/14/2010- ITA.1) as per which widening of existing roads was examined by the CBDT and held that widening of an existing road by constructing additional layers as part of highway project by an undertaking would be regarded as new infrastructure facility. In the present appeal (on the issue under hand-M24) neither there is widening of existing road nor construction of additional lanes as part

of highway projects, therefore, on this issue, we don't find any merit in the claim of the assessee, therefore, it is decided against the assessee."

4. In this regard, following are the submissions by me:

a) The assessee has modified the total taxable income in response to notice u/s.153A of the Act. This means there are certain documents and material which were originally not considered or taken into account for the computation of income and the same have been revealed during the search operation conducted on the assessee to modify and enhance the total income.

b) The Hon'ble ITAT while deciding the issue in favour of the assessee followed its decision/judgment in case laws earlier year and various citations relied upon the case law of ABG Heavy Industries Ltd. reported in 320 ITR 323 Bombay High Court and B. C. Patil and Sons. Facts of the case is distinguishable and therefore decision cannot be applied mutatis mutandis. The Apex court in the case of Bharat Petroleum Corporation limited in the case no. 7467 of 2003 held thatCourts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes."

5. It is clear from the Para 2.9 of the Hon'ble ITAT's order dated 05.07.2016 that certain amount being in the nature of work

contract has been found and disallowed. Further, the AO has also mentioned in the assessment order that the assessee is involved in work contract and performed as a contractor. Considering both the facts, coming out from the Hon'ble ITAT's order that the assessee has performed a mixed nature of work as a developer as well as contractor. It is also not misplaced to mention that each and every document/agreement of assessee contained 'Contractor' not developer.

6. The Explanation has been introduced in the Act to specify and explain the allowability of deduction u/s.80IA considering the nature of work performed by the assessee l.e. "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 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)."

Therefore, the particular deduction u/s. 80IA(4) is not allowable to the assessee who performed work contract. Further, there is no doubt that the assessee has performed work contract and claimed deduction u/s.80IA(4). The Hon'ble Bombay High Court in the case of ABG Heavy Industrial Ltd reported in 322 ITR 323 held in para no. 221 A harmonious reading of the provision in its entirety would lead to the conclusion that the deduction is available to an enterprise which (i) develops; or(ii) operates and maintains; or (iii) develops, maintains and operates that infrastructure facility. However, the commencement of the operation and maintenance of the infrastructure facility should be after 01-04-1995. The A.O categorically mentioned in the assessment order for the A.y.2006-07 in para no. 12 after considering the various agreements that the assessee is merely a contractor, who has been engaged in works contract for development of infrastructure facility by Government or Government Undertaking. The investment has been made by Government or Government Undertaking in such facility and the assessee been paid full for the contract value. No property of any kind has passed to the assessee in respect of development of the infrastructure facility. It means that the assessee has not fulfilled the requirements as held by Hon'ble Bombay High Court to get deduction u/s 80 IA. The essential components are completely missing in the agreements on which basis the enterprise can be eligible for deduction u/s 80IA albeit the true nature of agreement is composite contract through which the assessee claimed to have been developing infrastructure. The assessee has only performed according to the terms and condition of the contractual agreement

with Government or Government Undertaking. No developed infrastructure has been held by the assessee. The word 'develop used in the clause denotes an independent development for infrastructure. Here in this case the assessee is under contractual obligation to complete the contract with Government or Government Undertaking on pre-determined or prefixed cost. The assessee has been paid all cost once the work is completed and certified satisfactory completion by an authority, Government or Government Undertaking. This received cost not only for the completion of contract but having profit elements too. This is very crucial aspect to make distinction between developing and contracting.

7. There is no clause or the provision in the statue on which basis deduction is to be allowed u/s. 80IA where the assessee involved as contractor and developer as per the finding of Hon'ble ITAT for the A.Y.2006-07. The specific explanation introduced in the I. T. Act by Finance Act, 2007, to stop from taking benefit of deduction u/s.80IA by those persons who are indulged in performing work contract. There is no doubt that every agreement of the assessee company is a composite contract under various provisions of different Acts as well as judicial decisions. The supreme court in the case of Larsen & Toubro Limited & another Vs State of Karnataka & Another (2013) (9) TMI 853 held that the "dominant nature test" or "overwhelming component test" or "the degree of labour and service test are really not applicable. If a contract is a composite one which falls under the definition of work contracts as engrafted under clause (29A)(b) of article 366 of the constitution, the incidental part as regards labour and service pales into total insignificance for the purpose of determining the nature of the contract. There is no doubt in view of the assessee's submission as mentioned in para no. 11 of the assessment order that the assessee has entered into composite contract where the fundamental characteristics of work contract are found.

8. Another aspect has come up with the determination of quantum of deduction in this case. The quantum of deduction is required to be made u/s 80IA(5) of the Act which is a non-obstante clause. It has to be drawn considering the only eligible source of business. If we consider the finding of the Hon'ble ITAT where the assessee has involved as both contractor and developer then financial statement drawn under section 80IA(5) for the assessment year provides incorrect quantum of deduction because the whole project or contract completed with mixed budget/fund. This certainly led to a situation where complete and correct tax liability cannot be determined which is the essence of taxation.

Therefore, to clarify and make distinction for developer and contractor for getting deduction under section 80IA the legislature inserted an explanation in the Act by Financial Act, 2007. In the case of CIT vs Yokogawa India Ltd. Reported in 77 taxmann.com 41 [2017] Hon'ble supreme court in the par no8 stated that" The cardinal principles of interpretation of taxing statutes centres around the opinion of Rowlatt, J. in Cape Brandy Syndicate v. Inland Revenue Commissioner [1921] 1 KB 64 which has virtually become the locus classics. The above would dispense with the necessity of any further elaboration of the subject notwithstanding the numerous precedents available inasmuch as the evolution of all such principles are within the four corners of the following opinion of Rowlatt, J.

> *".....in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

It is clear that there is no provision of determination of proportionate quantum of deduction under section 80IA of the Act. Therefore, the assessee is not entitled for deduction u/s.80IA.

9. The fact found by the highest appellate authority clearly distinguished the set of facts involved in the impugned A.Y. 2006-07 and these crucial facts have not been taken into the account in the earlier decisions delivered by the appellate authority in various assessment years. I rely on the judgment of the Hon'ble Supreme Court in the case of Baroda Distilleries reported in 155 ITR 120 where the Hon'ble Court held that "to perpetuate an error is no heroism. To rectify it is the compulsion of the Judicial conscience."

10. In view of the above, the original order of the Hon'ble ITAT cannot be followed and the case may be decided considering the above facts and circumstance, on which basis the assessee is not entitled for deduction u/s 80IA."

6. On the other hand, Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal in assessee's own case for the A.Y.2005-06 in ITA

No.6605/MUM/2013 dated 18.11.2015 and Coordinate Bench has adjudicated the issue in favour of the assessee and against the department.

7. Considered the rival submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee in the A.Y.2006-07 and A.Y. 2005-06. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 3275/Mum/2014 dated 05.07.2016 for the A.Y. 2006-07 in the appeal against 143(3) proceedings held as under: - -

> *"2.2. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee is engaged in the business of engineering and construction of dams, tunnels and other infrastructure projects, declared income of Rs.4,71,43,487/- in its return filed on 30/11/2006, which was processed u/s 143(1) of the Act on 15/02/2008 and rectified u/s 154 on 21/02/2008 and 25/02/2008. The assessee filed revised return on 25/07/2008 at Rs.10,45,61,640/-, reducing the claim of deduction u/s 80IB in respect of Jogeshwari Project. In response to notices issued u/s143(2) and 142(1) of the Act, the assessee filed the details. The assessee claimed deduction u/s 80IA of the Act with respect to following projects:-*

Sl.No.	Name of the Project	Claimed deduction u/s 80IA (in Rs.)
1	Koyna -	14,26,34,200/-
2	Srisailam Weir Work	66,48,358/-
3	Santacruz Chembur Link Road	67,97,107/-

Sl.No.	Name of the Project	Claimed deduction u/s 80IA (in Rs.)
4	Teesta Lower Dam	18,67,06,053
5	Kalwakuny Lift Irrigation Project	10,95,49,321/-
6	MUTP	43,04,327/-
7	Bheema Lift Irrigation Project	9,36,75,299/-
8	Nattempeuu Lift Irrigation Project-I	1,19,24,067/-
9	Kamens II	3,14,73,950/-
10	.M24	32,12,411/-'
11	Halflong Tunnel-7	77,15,994/-
12	Kameng I	2,22,11,085/-
	Total	62,68,52,172/-

2.3. The assessee, during assessment proceedings,placed reliance upon the decision of the Tribunal in its owncase reported in 84 TTJ 646 for Assessment years 2000-01,2001-02 and 2002-03. The ld. Assessing Officer was of theview that the claimed deduction u/s 80IA of the Act is onlyadmissible when following conditions are fulfilled:-

> *"For the relevant assessment year, deduction isallowable u/s 80IA (4), to an enterprise regarding incomeearned, inter-alia, from the business of development ofan infrastructure facility if the following conditions arefulfilled.*
>
> *a) It is owned by a company registered in India or by aconsortium of such companies*
>
> *b) It has entered into an agreement with the CentralGovernment State Government or local authority or anyother statutory body for (i) developing or (ii) operatingand maintaining or (iii) developing, operating "andmaintaining a new infrastructure facility;*
>
> *c) It has started or starts operating and maintaining theinfrastructure facility on or after the 1st day ofApril,1995.*

Provided that where an infrastructure" facility istransferred on or after the 1st day of April, 1999 -by an enterprise which developed such infrastructure facility (hereafter referred to in this section as the transferor enterprise) to another enterprise(hereafter in this

section referred to as the trensferor 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" meansa)

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 or inland port;]"

2.4. The Ld. Assessing Officer discussed the respective projects of the assessee and concluded that, on the basis of agreements, the assessee is a merely a contractor, therefore, the deduction is not available to a works contractor. On appeal before the Ld. Commissioner of Income Tax (Appeal),the contention of the assessee was accepted and the Revenue is in appeal before this Tribunal.

2.5. So far as, the issue of deduction u/s 80IA(4) of the Act of Rs.49,84,51,567/-, out of total disallowance of Rs.101,54,94,544/-, made by the Assessing Officer is concerned (grounds nos. 1 to 3). We find that identically for Assessment year 2005-06 an elaborate discussion has been made by the Tribunal and after considering the totality of facts decided the issue in favour of the assessee. The relevant portion of the same is reproduced hereunder: -

"6. Rival contentions have been heard and record perused. The Revenue has challenged the decision of the CIT(A) granting deduction u/s 80IA(4) holding the assessee to be a developer of the infrastructure facilities (projects) and also that deduction is available to the assessee even when it has developed only a part of the project. We found that the CIT(A) has elaborately dealt with the contention of the AO at page 5 & 9 of his appellate order, as reproduced above. The

CIT(A) has gone through the terms and conditions of each and every contract and at page 19 para 6.6 of her order, the CIT(A) held that the contract documents show that the projects executed were highly technical and specialized and involved huge risk; the assessee has also deployed people, plant and machinery, technical expertise, knowhow and financial resources; moreover, all sums received till the final completion certificate is issued on completion of the defect liability period, are considered interim payments. While holding so the CIT(A) relied on the decisions of the Hon'ble Bombay High Court in ABG Heavy Industries Ltd. 322 ITR 323 (para 5 of that order), assessee's own case for AY 2000-01 reported in 94 ITD 411 (paras 46 and 47) and Bharat Udyog Ltd. 24 SOT 412 to hold that the assessee is a developer and not a contractor.

7. We had also gone through the tender document filed by the assessee which is placed on record, after analyzing the major clause of the agreement to determine the scope and nature of work undertaken, we found that assessee was a developer, therefore, eligible for claim of deduction u/s.80IA(4). After considering and deliberating on the meanings of the words "developer" and "contractor", scope of the work, responsibilities and risks undertaken by the assessee in each of the contracts on page 60 to 62 para 6.14 of her order, the CIT(A) recorded a finding to the effect that the assessee is not a contractor but a developer. In coming to the above finding, in para 6.15, the CIT{A} also considered the clarificatory amendment by way of Explanation below sub section (13) of section 80lA by the Finance Acts 2007 and 2009 and held, after considering various judicial pronouncements, that the amendment does not impact development contracts. On pages 63 to 66 paras 6.16 and 6.17, the ClT(A) noted that for the Koyna and Udhampur projects, the assessee has already been held to be a developer by the Hon'ble ITAT in its own case in the earlier years. Moreover, the Koyna project has also been held to be eligible for deduction in B.T. Patil& Sons Belgaum Construction Pvt. Ltd. After analyzing the terms of the contract, the CIT(A) reiterated that for all the projects, based on the investment, financial and technical risks undertaken by the contractor, the assessee is a developer of the respective projects. As regards the issue whether, to be eligible for deduction, the assessee has to develop the entire infrastructure facility and not only a part thereof, the CIT(A) relied on the CBDT circular no. 4/2010, the decisions of the

ITAT in the assessee's own case, B.T. Patil& Sons Belgaum Construction Ltd. 34 Taxmann.com 97 and the Hon'ble Bombay High Court in ABG Heavy Industries Ltd.

8. We also found that the CIT(A) has dealt in great detail the scope of the work, risk and responsibilities undertaken by the assessee and after applying the proposition of law laid down in the following decisions arrived at the conclusion that assessee was a developer and not only a contractor :-

i) Patel Engineering Ltd. v. OCIT 94 ITO 411;

ii) B.T. Patil & Sons Belgaum Constructions (P.) Ltd. v. ACIT, 34 taxmann.com 97;

iii) ACIT v. Patel KNR Joint Venture ITA 5230/M/2012;

iv) CIT v. ABG Heavy Industries Ltd. 322 ITR 323;

v) DCIT v. V.R.M. (India) Ltd. ITA 811/Del/2008;

vi) KCL BEL Tarmat JV v, ITO, ITA 111/Rjt/2010.

As regards the clarificatory Explanation inserted in section 80lA by the Finance Acts 2007 and 2009, we place our reliance on the following decisions:

i) B.T. Patil& Sons Belgaum Constructions (P.) Ltd. v. ACIT 34 taxmann.com 97;

ii) ACIT v. Pate I KNR Joint Venture ITA 5230/M/2012;

iii) DCIT v. V.R.M. (India) Ltd. ITA 811/Del/2008;

iv) KCL BEL Tarmat JV v, ITO ITA 111/Rjt/2010;

v) GVPR Engineers Ltd. v. ACIT 21 Taxmann.com 25 (Hyd);

vi) KMC Constructions Ltd. v. ACIT 21 Taxmann.com 138 (Hyd).

9. With regard to contention of ld. CITDIR that assessee is a contractor, insofar as assessee has been mentioned as contractor in all the agreements, we rely on the following decisions :-

i) In the assessee's own appeal for AY 2000-01, 94 ITD 411 (Mum);

ii) ACIT v. Pratibha Industries 28 Taxmann.com 246 (Mum), wherein Mahalaxmi Construction Corpn. Ltd. v. Asstt. CIT in ITA 433/Pn/2007 has been relied upon;

iii) ACIT v. Bharat Udyog Ltd. 24 SOT 412 (Mum)

As regards the CIT DR's argument that the decision of the larger Bench in B.T. Patil & Sons Belgaum Construction Pvt. Ltd. 126 TTJ 577 (Mum) is still good law, we rely on the confirmatory order [reported in 34 Taxmann.com 97) (Pune)] passed by the Pune Bench.

10. In view of the above discussion, we uphold the action of CIT(A) for allowing claim of deduction u/s.80IA(4) in respect of all the projects."

2.6. During hearing before us, both the parties and more specifically the Revenue has not brought any adverse material. It is also noted that the Tribunal in the aforesaid order has considered the decision of earlier Assessment years, terms and conditions of the agreement and then reached to a particular conclusion. The scope of work, risk and responsibilities, under taken by the assessee and after applying the proposition of law laid down in various cases including B.T. Patil & Sons, CIT vs ABG Heavy Industries Ltd. 322 ITR 323, etc and thereafter concluded that the assessee is a developer and not a contractor as has been held by the ld. Assessing Officer. The cases relied upon by the Revenue has also been dealt with. Since the facts are identical, following the earlier orders of the Tribunal and also from higher forums including Hon'ble High Court, we find no infirmity in the conclusion of the Ld. Commissioner of Income Tax (Appeal). The same is affirmed."

8. On a careful reading of the above order of the coordinate Bench, we observe that the Tribunal has followed the decision in assessee's own case for the A.Y. 2005-06 and affirmed the order of the Ld.CIT(A). Further, we observe that Ld.CIT(A) has partly allowed the ground raised

by the assessee by following the decision of the ITAT in assessee own case for the preceding assessment years. Since the issue is exactly similar and grounds as well as the facts are also identical, however, in assessment proceedings u/s 153C, the fact will not change and will remain same. The Assessing Officer may make addition only to the extent of incriminating material and cannot change or alter the concluded issues. With regard to issue of allowability of deduction u/s.80-IA is concerned it is already settled, hence, respectfully following the above decision in assessee's own case for the A.Y. 2005-06, we find no infirmity in the order passed by the Ld.CIT(A). Accordingly, we dismiss the ground raised by the revenue.

9. With regard to Ground No. 2 which is in respect of credit of TDS on advances, Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal in assessee's own case for the A.Y. 2005-06 in ITA No. 6605/MUM/2013 dated 18.11.2015 and Coordinate Bench has adjudicated the issue in favour of the assessee and against the department.

10. On the other hand, Ld. DR relied on the order of the Assessing Officer.

11. Considered the rival submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee in the A.Y.2005-06. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 6605/MUM/2013 dated 18.11.2015, held as under: - -

> *"30. The AO did not allow credit of TDS in respect of advances received.*
>
> *31. By the impugned order the CIT(A) confirmed the action of the AO after observing as under :-*
>
> > *11.1 On a consideration of this ground no relief can be afforded to the appellant since credit for TDS will be granted as and when the income is offered to tax. The appellant requires credit of Rs. 2,73,73,162/ - deducted from the advances received. It has been pointed out by the A.O that TDS on advance have regularly been disallowed in the earlier years and the appellant is on further appeal. Consistent with the stand taken in earlier years the A.O has not allowed credit with respect to the TDS on advances. However,. the A.O has himself agreed that the corresponding income for TDS advances amounting to Rs. 1,44,41,262/- has been offered as income during the current year. Hence to the said extent, appellant is eligible for grant of credit of TOS as per law. The A.O will grant credit, subject to the same not having been granted in the earlier years.*
>
> *32. We have considered rival contentions and found that in terms of the contract agreement, the assessee receives advances / loans*

on which the payer deducts tax at source. Such loans and advances can broadly be classified as (i) Site Mobilisation loan granted to enable the assessee to mobilise the work site i.e. create access roads, mobilise men, equipments, establish and set up site office, etc., (ii) Machinery Mobilisation loan granted to enable the assessee to purchase machineries and equipments needed to carry out the subsequent work on the site and (iii) Advance against work and material given to the assessee to help it in procuring material and against the work in progress on the site. Whereas in the first two cases, it is a capital receipt in the nature of loan not connected to any work carried out by the contractor, the third one is an advance in the revenue field. ln all the above cases, the Principal uniformly deducts tax at source u/s 194C of the Act. From the record we found that the AO has discussed this on pages 18-21 of the assessment order and citing section 199 has disallowed credit of TDS of Rs.1,29,31,900/- as the advances pertaining thereto are not credited to the profit and loss account during the year. The CIT(A), on page 73-74 para 11 of her order, concurred with the view of the AO. As per terms of various contract agreements under which Site Mobilisation Loan and the Machinery Mobilisation Loan / advances, mostly on interest ranging from @ 12% to 18% p.a., have been granted against bank guarantee. In the balance sheet, such contractee advance mobilisation loan is reflected as loan funds under the head Contractee advances as a liability. Such loan can never be the income of the assessee, neither in present or in future; deduction of such loan advance from running bills is only a practical and convenient way to recover the loan. Such mobilisation loan being a capital receipt, there was no legal obligation on the part of the contractee to deduct tax at source u/s 194C. If tax has been deducted at source, the credit for such TDS has to be allowed in the year of deduction itself. In ACIT v. Peddu Srinivas Rao ITA 324/Vizag/2009 mobilisation advance was received and on identical facts it was held that credit for such TDS should be given in the year of deduction of TDS itself. This decision was followed in Zelan Projects Pvt. Ltd. v. DCIT ITA 1361/Hyd/2013 Similarly, in Arvind Murjani Brands (P.) Ltd.v. ITO 21 Taxmann.com 131 (Mum) E , it was held that where tax is deducted at source on an amount which is not at all chargeable to tax, command of section 199 will have to be harmoniously and pragmatically read as providing for allowing credit for tax deducted at source in the year of receipt of amount, in which the tax was deducted at source.

33. In respect of advance against work and material, we found that the said advance is reflected as a reduction from construction work in progress, which itself is valued at contract rates i.e. selling price. In other words, the income pertaining to such advance is already

impregnated in the work in progress offered for tax during the impugned year itself. The Tribunal in ACIT v.Patel KNR Joint Venture ITA 5230/Mum/2012, on identical facts, following Toyo Engineering Ltd., decided in favour of the assessee. Respectfully following the decision of the coordinate bench in the case of associate concern of the assessee vis-à-vis other decisions referred above, we direct the AO to allow the credit for TDS in year of deduction itself. We direct accordingly."

12. Further in assessee's own case in ITA.No. 3275/Mum/2014 dated 05.07.2016 the Coordinate Bench appeal against 143(3) proceedings observed as under: -

"6. So far as, grant of credit of TDS, as claimed by the assessee on loan advances is concerned, the ld. Assessing Officer is directed to examine the claim of the assessee, considering the order of the Tribunal for AY 2005-06, thus, allowed for statistical purposes."

13. We observe that Ld.CIT(A) has allowed the ground raised by the assessee by following the decision of the ITAT in assessee own case for the preceding assessment years. Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 2005-06, we find no infirmity in the order passed by the Ld.CIT(A). Accordingly, we dismiss the ground raised by the revenue.

14. With regard to Ground No. 3 which is in respect of enhanced claim of deduction u/s. 80-IA (4) of the Act, Ld. AR of the assessee submitted that the issue raised by the department in this ground is not arising from the order passed by the Ld.CIT(A) and Ld. DR also agreed with the submissions of the Ld. Ld. AR. Accordingly, this grounds of appeal is dismissed.

15. With regard to Ground No. 4, which is in respect of TP adjustment-difference between the issue price and the book value of share, Ld. AR of the assessee submitted that the Ld.CIT(A) has followed the order of the Tribunal in assessee's own case for the A.Y. 2006-07 (144C r.w.s. 147 proceedings). Further, Ld. AR of the assessee brought to our notice Para No. 4 to 4.4 of the Tribunal order in ITA.No. 3037/Mum/2012 dated 13.01.2017 and submitted that the issue is decided in favour of the assessee and against the revenue.

16. On the other hand, Ld. DR relied on the order of the Assessing Officer.

17. Considered the rival submissions and material placed on record, we observe from the record that identical issue is decided in favour of

the assessee in the A.Y.2006-07 under 144C r.w.s. 147 proceedings. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 3037/MUM/2012 dated 13.01.2017, held as under: - -

> *"4. We have carefully considered the rival submissions. The factual matrix has been appropriately noticed by us in the earlier paras and is not being repeated for the sake of brevity. So however, the fact-situation which clearly stands out is that assessee company had invested in the equity shares of its subsidiary in USA in the past years and during the year under consideration, the subsidiary has undertaken redemption of share capital by buy-back of the equity shares held by the assessee. The investment by the assessee in the equity shares of the subsidiary was undertaken in the past @ US $20.35 per share and during the year under consideration the subsidiary has undertaken buy-back at the same rate i.e. uS $20.35 per shares. The nature of the said transaction has been disbelieved by the Transfer Pricing Officer, who has recharacterized it as provision of loan/fund by the assessee to its subsidiary on interest-free basis in the garb of investment in equity of the subsidiary. It is a trite law that the transfer pricing proceedings do not envisage empowering of the Transfer Pricing Officer to re-characterize the transactions on the basis of his own whims and fancies. In the present case, the CIT(A) has correctly brought out that the transactions of investment and buy-back of shares has been spread over more than one year and that there was no material to suggest that the stated transactions were unreal.*
>
> *4.1 Even with regard to the value at which the buy-back of shares has been undertaken by the investee subsidiary company, the CIT(A) noted that the valuation of shares has not been disputed by the Transfer Pricing Officer during the proceedings before him. In fact, the CIT(A) has categorically observed that the Transfer Pricing Officer in his order has observed the per share price of the shares as reflected in the Balance Sheet of the assessee for the various years. On this point, we also note that before the Transfer Pricing Officer, assessee had given justification of the buy-back price by pointing-up the NAV of the investee company on the date of buy-back, which was much lower than buyback price. We find nothing adverse on such assertions of the assessee. Therefore, under these circumstances, in our view, the CIT(A) has made no mistake in deleting the addition.*

4.2 On the issue of as to whether the Transfer Pricing Officer is competent to re-characterize a tested transaction, the Ld. Representative for the assessee had placed reliance on the judgment of Hon'ble Bombay High Court in the case of Besix Kier Dabhol SA(supra) The assessee before the Hon'ble Bombay High Court was a non-resident company, whose equity capital was jointly owned by the two joint venture partners in a certain ratio. Apart from receipt of capital, assessee company had also raised loans from the two equity holders on which interest was paid. The Revenue disallowed the payment of interest on the ground that such raising of loan was also to be viewed as raising of equity and, therefore, interest was disallowable. The Tribunal disagreed with the stand of the Revenue and noted that there was no provision under the Act by which equity could be re-characterized into debt and vice-versa. The Tribunal also noted that at the relevant point of time there were no rules with regard to thin capitalization so as to consider the debt as equity and that such a proposal was only part of Direct Taxes Code Bill of 2010 as a part of General Anti Avoidance Rules (GAAR) and that in the absence of any such statutory provision the stand of the Revenue could not be upheld. The aforesaid reasoning has been approved by the Hon'ble Bombay High Court. In our considered opinion , the ratio of the reasoning approved by the Hon'ble Bombay High Court in the case of Besix Kier Dabhol SA (supra) clearly militates against the action of the Transfer Pricing Officer in re-characterizing the transaction of investment in the equity shares of the subsidiary as a loan transaction in the instant case. To the similar effect are the decisions of the Mumbai Tribunal relied upon by the assessee before us. Therefore, in our view, the stand of the Transfer Pricing Officer has been rightly negated by the CIT(A).

4.3 Before parting, we refer to the argument set-up by the Ld. Departmental Representative that the matter of valuation of shares be examined afresh by the Transfer Pricing Officer as per the Discounted Cash Flow(DCF) method and in this context, he referred to the decision of the Chennai Bench of the Tribunal in the case of M/s. Ascendas (India) Pvt. Ltd. vs. DCIT, in ITA No.1460/Mds/2012 dated 12/03/2013, wherein reference to such a method has been made. In our considered opinion, the plea of the Ld. Departmental Representative is quite misconceived and if it is to be accepted, then it would result in unnecessary prolonging of litigation. We say so for the reason that at the stage of transfer pricing proceedings before the Transfer Pricing Officer, assessee has in a detailed manner furnished the justification of the value at which shares have been bought back by the investee company. In fact, the replies of the assessee have been reproduced by the Transfer

Pricing Officer in his order, wherein not-only the various methodologies of valuation have been pointed out but even the respective values have also been brought out. Further, none of the same have been controverted by the Transfer Pricing Officer in his order and in fact the CIT(A) has specifically concluded that the valuation of shares has not been disputed by the Transfer Pricing Officer "either at the time of acquisition by the appellant or at the time of sale." The CIT(A) has thereafter goes on to hold that "the TPO in the facts of the case has not disputed the ALP of this international transaction i.e. he has not disputed the valuation of the shares done by the appellant and submitted to the Transfer Pricing Officer"

4.4 In view of the aforesaid undisputed fact-position, remanding of the matter back to the Assessing Officer/Transfer Pricing Officer, as suggested by the Ld. Departmental Representative, will amount to travesty of justice and lead to prolonging the litigation, which ought to be avoided. Thus, we find no force in the argument of the Ld. Departmental Representative , which is hereby rejected."

18. We observe that Ld.CIT(A) has allowed the ground raised by the assessee by following the decision of the ITAT in assessee own case in the 144C(3) r.w.s. 147 proceedings for the A.Y. 2006-07. Thus, we find no infirmity in the order passed by the Ld.CIT(A). Accordingly, we dismiss the ground raised by the revenue.

19. With regard to Ground No. 5 which is in respect of disallowance u/s.14A of the Act while computing income under normal provisions, Ld.AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal in assessee's own case for the A.Y. 2005-06 in ITA No. 6605/MUM/2013 dated

18.11.2015 and Coordinate Bench has adjudicated the issue in favour of the assessee and against the department.

20. On the other hand, Ld. DR relied on the order of the Assessing Officer.

21. Considered the rival submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee in the A.Y.2005-06. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 6605/MUM/2013 dated 18.11.2015, held as under: - -

> *"11. Ground 2 is with regard to disallowance of a sum of Rs. 88,69,937/- under s.14A of the Income tax Act.*
>
> *12. With regard to disallowance u/s.14A, it was observed by the A.O that assessee has invested funds in joint ventures, the income from which does not form part of the total income. The A.O was therefore of the view that the proportionate interest allocable to such funds on pro-rata basis has to be disallowed. The assessee objected to the said proposal stating that no capital amount has been invested in the joint venture and that with regard to the partnership firm only Rs.25,000/- has been contributed towards capital which is out of own funds. It was also stated before the A.O that as regards the debit balance outstanding with them, the same are not in the nature of investment in capital but mainly due to the company's share of profit and machinery hire charges lying with them, which is already reflected as income in the P&L A/c. Without prejudice, it was further stated before the A.O that the current account transactions are carried out from bank where sale proceeds of the assessee are deposited and also that the dues from J.Vs and Partnership firm on current-account are out of company's own fund and not out of borrowed funds. The A.O rejected the said*

contention of the appellant stating that from a summary of the current account it could be observed that funds have flown out of the current account on which the assessee had paid interest. In these circumstances, the A.O disallowed the proportionate interest on the current account applying the interest rate of 12.5% as charged by the bank on CC Account. Accordingly, a sum of Rs.88,69,937/- has been disallowed and added back to the total income.

13. Before the CIT(A), the assessee submitted that the addition is not warranted since the same has been made on the basis of presumptions, conjectures and surmises. It is stated that the during the course of assessment the A.O had called for details of the balances in various joint ventures/ partnership firm wherein the assessee is the member/partner. It was explained that the debit balances in various JV /firm as on 31.03.2005 are as under

- *Pate I KNR JV Rs.9,01,67,275*
- *KNR Patel JV Rs. 7,49,10,863*
- *Patel Michigan JV Rs. 84,229*
- *AHCL PEL Rs. 6,03,90;870*

14. By the impugned order, the CIT(A) deleted the disallowance made u/s.14A after observing as under :-

> *"7.3 I have considered the matter. From the facts of the case it is apparent that the amounts treated by the A.O as loans and advances outstanding are in fact debit balances i.e. amounts receivable by the appellant either on account of hire charges in respect of machineries leased to JV or the share of profit of the appellant from the JV /firm. It has been amply demonstrated by the appellant through the copies of the various ledger account in respect of the Head Office/Capital account placed at pages 372 to 446 of paper book/volume II that the debit balances with the various JV /firm are not on account or funds transfer by the appellant but solely on account of the appellant's income and share of profit generated from such JV /firm. When no funds whatsoever, borrowed or otherwise, have been invested in JVs/firms, the applicability of section 14A does not arise. When there is no expenditure incurred in relation*

to income not includable in the total income, the applicability of section 14A is not warranted. Hence I am unable to sustain the disallowance as made by the A.O under s. 14A of the Act. The disallowance on a sum of Rs. 88,69,937/- is deleted.

15. Ld. DR relied on the order of AO. On the other hand, the contention of ld. AR was that at the time of the hearing it was specifically pointed out to the A.O that the entire debit balance as shown above comprises of either amounts receivable by the appellant on account of hire charges of machinery from the JV or the appellant's share of profit in the JV firm. Factually it is stated that in Patel KNR JV, the debit balance of Rs.9,01,67,275 as on 31.3.2005, comprises of machinery hire charges received / receivable of Rs.10,01,60,225 by the assessee from them and the share of profit of the appellant in the said JV aggregates to Rs.8,24,05,845; both, together, aggregating to Rs.l~,25,66,070. Hence the debit balance the said JV is not on account of any funds invested by the assessee in such JV. In KNR Patel JV the debit balance of Rs.7,49,10,863 as on 31.3.2005, comprise solely of machinery hire charges received / receivable of Rs.12,69,86,836 by the appellant from them and the share of profit of the assessee in the said JV aggregates to Rs.6,32,94,249; both, together, aggregating to Rs.19,02,81,084. Hence the debit balance in the said JV is not on account of funds invested by the assessee in such JV. In AHCL PEL, the debit balance of Rs.6,03,90,869, as on 31.3.2005, comprises of the share of profit of - the appellant in the firm for A.Y. 2004-05 of Rs.5,0 1,57,164.

16. The alternate contention of assessee was that the provisions of section 14A cannot be applied to the appellant since the share of profit received by the appellant from such integrated joint venture AOP is chargeable to tax in terms of provisions of section 167B r.w.s. 86 of the Act. A further without prejudice submission is that the company has substantial own funds by way of capital reserves aggregating Rs. 12,936 lacs which is more than 5.50 times of the balance in such JV / partnership firm. The sale proceeds of the appellant are deposited in the cash credit account and the debit balance are presumed to have been company's own funds and not from borrowed funds. The appellant relies on the following decisions:

- ACIT vs. Bombay Samachar Limited 74 ITR 723 (Born).

- Wimco Seedlings Ltd. vs. OCIT 107 ITO 267 (Del.)

It was further pointed out that the facts of following decisions are distinguishable from the facts of the appellant's case:

- ACIT v. Citicorp Finance (India) Ltd. 108 ITD 457
- Everplus Securities & Finance Ltd. v. DCIT 101 ITD 151
- DCIT v. SG Investments & industries Ltd. 89 ITD 44

17. We have considered rival contentions and found that a clear finding has been given by the CIT(A) to the effect that amount was receivable on account of hire charges on machinery from JV or on account of assessee's share in the JV firm. The question of disallowance of interest u/s.14A arises only when the funds have been given to JV/sister concern income from which is not liable to tax. The detailed finding recorded by CIT(A) at para 7.3 has not been controverted, accordingly, we do not find any reason to interfere in the order of CIT(A) for deleting the disallowance made u/s.14A amounting to Rs.88,68,937/-.

22. Further in assessee's own case in ITA.No. 3275/Mum/2014 dated 05.07.2016 the Coordinate Bench appeal against 143(3) proceedings observed as under: -

"5. So far as, directing the AO to disallow interest u/s 14A of the Act at the rate of 12.5% per annum on the debit balances in current account of joint venture is concerned, the AO is directed to follow the order of the Tribunal for Assessment year 2005-06 and thus this ground of the cross objection is sent to the file of the ld. Assessing Officer, thus, allowed for statistical purposes.

5.1. So far as, confirming the action of the AO in attributing certain expenses incurred by the assessee to the projects eligible for deduction u/s 80IA(4) is concerned, the ld. Assessing Officer is directed to decide in the light of decision of the Tribunal para 29, page 49, AY 2005-06, thus, allowed for statistical purposes.

23. We observe that Ld.CIT(A) has allowed the ground raised by the assessee by following the decision of the ITAT in assessee own case for the preceding assessment years. Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 2005-06, we find no infirmity in the order passed by the Ld.CIT(A). Accordingly, we dismiss the ground raised by the revenue.

24. With regard to Ground No. 6 which is in respect of disallowance u/s. 14A of the Act while computing income u/s. 115JB of the Act, Ld.AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal in assessee's own case for the A.Y. 2005-06 in ITA No. 6605/MUM/2013 dated 18.11.2015 and Coordinate Bench has adjudicated the issue in favour of the assessee and against the department.

25. On the other hand, Ld. DR relied on the order of the Assessing Officer.

26. Considered the rival submissions and material placed on record, we observe from the record that identical issue is decided in favour of

the assessee in the A.Y.2005-06. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 6605/MUM/2013 dated 18.11.2015, held as under: - -

> *"34. Next grievance of assessee is with regard to making adjustment of Rs.88,69,937/- to the book profit under s. 115JB on account of disallowance made under s.14A.*
>
> *35. Since the disallowance made by AO u/s.14A had been deleted by us, the ground taken by the assessee has become infructuous, therefore the same is dismissed.*

27. We observe that Ld.CIT(A) has allowed the ground raised by the assessee by following the decision of the ITAT in assessee own case for the preceding assessment years. Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 2005-06, we find no infirmity in the order passed by the Ld.CIT(A). Accordingly, we dismiss the ground raised by the revenue.

28. In the result, appeal filed by the revenue is dismissed.

C.O. NO. 265/MUM/2018 (A.Y. 2006-07)

29. Since we have dismissed the appeal filed by the Revenue, even though the ground raised by the assessee is jurisdictional issue on the

order u/s. 143(3) r.w.s. 153 of the Act passed by the Assessing Officer is bad in law in absence of any incriminating material during the search, Ld. AR also made a submissions in this regard, since the appeal filed by the revenue is already allowed in favour of the assessee adjudicating on the cross objection raised by the assessee is mere academic in nature. Accordingly, this grounds of appeal raised in cross objection are kept open at this stage.

30. In the result, cross objection filed by the assessee is dismissed.

ITA.NO. 2486/MUM/2017 (A.Y. 2007-08) – DEPARTMENT APPEAL

31. Revenue has raised following grounds in its appeal: -

> *1. "On the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding the assessee as a developer and not a contractor as the agreement entered into by the assessee with various government authorities is for contractual work and not to develop / operate and maintain any infrastructure facilities to which deduction u/s. 80IA(4)(i) is intended to and allowing the deduction u/s 80IA(4) of the IT Act, 1961 and failed to appreciate that the section 80IA(4) as amended by the Finance Act, 2007, retrospectively from AY- 2000-01 by inserting Explanation to section 80IA, which states that nothing contained in this section shall apply to a person who executes a work contract entered into with the undertaking or enterprises".*
>
> *2. "On the facts and in the circumstances of the case and in law, the CIT(A) was justified in deleting the disallowance u/s 14A ignoring the fact that the monthly summary of the joint venture capital account submitted by the assessee shows that in all the*

joint ventures, there is debit balance and further the investment have been made out of current account on which the assessee has paid interest."

3. "On the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding that the credit of TDS be allowed to the assessee in contravention to section 199(2) of the IT Act, 1961, since the advances pertaining thereto are not credited in the P & L A/C of the assessee in the FY under consideration".

4. "On the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding that the assessee is eligible for enhanced claim of deduction u/s BOIA(4), in respect of M/s Ambica Steel to the extent of unsubstantiated purchases without appreciating the fact that the additions were made on account of accommodation entries in the nature of bogus purchases and the bogus purchases were not supported by any documentary evidences and therefore they were mere book entries against which deduction u/s 80IA(4) cannot be allowed, as the purchases itself were not genuine and hence deduction u/s 80IA(4) cannot be allowed on the same.

5. "On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in allowing the deduction under sec. BOIA(4) of the Act as regards enhancement of profit on disallowance of bogus purchase, without appreciating that assessee is not at all eligible for deduction u/s. 80IA(4) as the agreement entered into by the assessee with various government authorities is for contractual work and not to develop/operate and maintain any infrastructure facilities to which deduction u/s. 80IA(4)(i) is intended to."

6. "On the facts and in the circumstances of the case and in law, the CIT(A) was justified in allowing the telescoping benefit of land development expenses of Rs. 1,92,65,105/- to the assessee to the extent of bogus purchases, without appreciating the fact that telescoping benefit will lead to double relief, as assessee had claimed deduction u/s. 80IA(4) of the Act".

7. "On the facts and in the circumstances of the case and in law, the CIT(A) was justified in deleting the adjustments made by the TPO ignoring the fact that the difference between the issue price and the book value of shares of the AES is nothing but loan in disguise."

8. "On the facts and in the circumstances of the case and in law, the CIT(A) is justified by holding that only if disallowance is

sustained u/s. 14A of the I.T.Act, then only income computed u/s. 115JB will be enhanced for the purpose of disallowance 14A otherwise nothing would naturally be computed to the book profit.

9. The appellant craves to leave, to add, to amend and / or to alter any of the ground of appeal, if need be.

10. The appellant, therefore, prays that on the grounds stated above, the order of the CIT(A)-51, Mumbai, may be set aside and that of the Assessing Officer restored."

32. We proceed to dispose of this appeal by adjudicating the issues raised by the revenue ground wise.

33. With regard to Ground No. 1 which is in respect of deduction u/s.80-IA(4) of the Act, this ground is similar to Ground No. 1 of grounds of appeal raised by the revenue for the A.Y. 2006-07 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y. 2007-08. We order accordingly.

34. With regard to Ground No. 2 which is in respect of disallowance u/s.14A of the Act while computing the income under normal provisions,this ground is similar to Ground No. 5 of grounds of appeal raised by the revenue for the A.Y. 2006-07 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y. 2007-08. We order accordingly.

35. With regard to Ground No. 3 which is in respect of credit of TDS on advances, this ground is similar to Ground No. 2 of grounds of appeal raised by the revenue for the A.Y. 2006-07 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y. 2007-08. We order accordingly.

36. With regard to Ground Nos. 4 and 5 which is in respect of enhanced claim of deduction u/s. 80-IA(4) relating to unsubstantiated purchases, Ld. AR of the assessee brought to our notice that the issue in appeal has been considered by the Co-ordinate Bench of this Tribunal in assessee's own case for the A.Y. 2008-09 and 2009-10 in ITA.No. 2575 & 2758/Mum/2017 dated 31.10.2022 and Coordinate Bench has adjudicated the issue in favour of the assessee and against the department.

37. On the other hand, Ld. DR relied on the order of the Assessing Officer.

38. Considered the rival submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee in the A.Y.2008-09. While deciding the issue, the

Coordinate Bench of the Tribunal in ITA.No. 2757 & 2758/Mum/2017 dated 31.10.2022, held as under: - -

> *"17. With regard to Ground No. 3 and 4 which are in respect of Enhanced claim of deduction u/s. 80IA(4) to the extent of unsubstantiated purchases, Ld.AR of the assessee reiterated the submissions made before Ld.CIT(A) and supported the order of the Ld.CIT(A). Ld. AR relied upon the CBDT Circular No. 37/2016 dated 2.11.2016. Copy of the circular is placed on record.*
>
> *18. Ld.DR relied on the order of the Assessing Officer and prayed that the order of the Ld.CIT(A) be set-aside.*
>
> *19. Considered the rival submissions and material placed on record, we observe that the assessee has purchased from D.S.P Enterprises, ShivanGiri Steel and Ambika Steel aggregating to Rs.657,17,517/- and it was found to be bogus and non genuine, this was admitted as such in the statement u/s 132(4) of the Act. This being the case, now assessee is claiming that this should be allowed as deduction by relying on the CBDT circular and certain decisions to claim that the disallowance of the purchases will increase the income which are eligible to get exemption u/s 80IA(4) of the Act. After careful consideration, we observe from the submissions that any expenditure disallowed will certainly increase the gross profit which is chargeable to tax, such gross profit are eligible for deduction u/s.80IB(4) of the Act. Therefore, this view is held to be inline with the CBDT circular issued on this aspect, hence we are inclined to accept the submissions made by the Ld AR, therefore, we dismiss the ground raised by the revenue."*

39. Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 2008-09, we dismiss the ground raised by the revenue.

40. With regard to Ground No. 6 which is in respect of telescoping benefit of land development expenses, at the time of hearing, Ld. AR submitted that the ground raised by the revenue is infructuous considering the fact that Ld.CIT(A) has already passed rectification order u/s. 154 of the Act. He brought to our notice order passed u/s. 154 of the Act by the Ld.CIT(A) and he submitted that against the above said order assessee is in appeal. We shall deal with the assessee's appeal against the rectification order passed u/s. 154 of the Act separately elsewhere in this order. Accordingly, Ground No. 6 is dismissed.

41. With regard to Ground No. 7 which is in respect of TP adjustment-difference between the issue price and the book value of share, this ground is similar to Ground No. 4 of grounds of appeal raised by the revenue for the A.Y. 2006-07 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y. 2007-08. We order accordingly.

42. With regard to Ground No. 8 which is in respect of disallowance u/s.14A of the Act while computing income u/s. 115JB of the Act, this ground is similar to Ground No. 6 of grounds of appeal raised by the

revenue for the A.Y. 2006-07 and the decision taken therein shall apply mutatis-mutandis to the appeal for the A.Y. 2007-08. We order accordingly.

43. In the result, appeal filed by the revenue is dismissed.

C.O. NO. 355/MUM/2018 (A.Y. 2007-08)

44. At the time of hearing, Ld. AR of the assessee submitted that the cross objection is not pressed. Accordingly, the cross objection filed by the assessee is dismissed as not pressed.

45. In the result, cross objection filed by the assessee is dismissed.

ITA.NO. 7260/MUM/2018 (A.Y. 2007-08) – ASSESSEE APPEAL

46. Assessee has raised following grounds in its appeal: -

> *"1. On the facts and circumstances of the case and in law, the rectification order passed by the AO u/s 154 of the Act is bad in law.*
>
> *2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing the Assessing Office to grant telescoping benefit, provided the amount of Rs.1,92,65,105/- in respect of the alleged bogus purchases is not considered for enhanced deduction u/s 80IA(4) of the Act."*

47. At the outset, we observe that the present appeal is filed by the assessee with a delay of 598 days and assessee also filed an affidavit in this regard and prayed for condonation of delay. Assessee filed an affidavit dated 22.02.2023 and submitted as under: -

> *"1. That the order of the Ld. CIT (A) 57 in the Assessee's appeal against the assessment order u/s 143(3) r.w.s. 153A of the Income Tax Act, 1961 (the Act). for AY 2007-08, was passed on 30.12.2016 and received by the Assessee on 09.02.2017, wherein the benefit of telescoping on account of alleged bogus purchases of Rs. 1,92,65,507/- was directed to be allowed against certain other expenses incurred.*
>
> *2. That subsequently, vide order u/s 154 of the Act, dated 17.02.2017, received by the Assessee on 28.02.2017, the Ld.CIT(A) stated that some portion of the decision in the order dated 30.12.2016 has inadvertently been missed out to be reproduced.*
>
> *3. That as the said order merely inserted the missed out portion, the Assessee was under a bona fide belief that the said order was not independently appealable.*
>
> *4. That against the appellate order dated 30.12.2016, the Revenue authorities filed an appeal before the Hon'ble Income Tax Appellate Tribunal on 6.4.2017, wherein one of the grounds agitated is that the Ld. CIT (A) erred in granting the telescoping benefit of land development expenses of Rs. 1,92,65,105/- to the Assessee to the extent of bogus purchases without appreciating the fact that the telescoping benefit will lead to double relief as the Assessee has claimed deduction u/s 801A(4) of the Act.*
>
> *5. That a copy of Form no. 36 so filed by the Revenue Authorities was served on the Assessee on 23.07.2018.*

6. That the said appeal matter was handed over to the counsel for the purpose ofrepresenting the Assessee before the Hon'ble Tribunal; subsequently, theappeal was transferred from the Hon'ble 'C' bench to 'J' bench and the hearingwas fixed for 10.12.2018.

7. That a conference was held with the counsel on 08.12.2018, and in the saidmeeting and during the course of discussion, the Assessee was advised that an appeal should be filed challenging the validity of the order of the Ld. CIT(A) u/s 154 and hence, an appeal was filed against the said section 154 order on 18.12.2018.

8. I say that the delay of 598 days in filing the appeal was not due to any mala fide intention but due to a bonafide valid belief that no appeal needs to be preferred against the order of the Ld. CIT (A) u/s 154 of the Act.

9. I state that whatever stated herein above is true to the best of my knowledge and belief."

48. At the time of hearing, Ld. AR of the assessee submitted that there is delay of 598 days in filing the appeal before the Tribunal. The assessee has filed an application for condonation of delay (copy on record) explaining in detail, the reason for delay. It is submitted that the appeal was filed as per the advice of counsel and delay was not due to any malafide or deliberate intention on the part of assessee. The assessee has also filed an affidavit of Mr. Rupen Patel, Managing Director of the assessee company affirming the reasons for condonation of delay. Reliance is placed on the following judicial pronouncements:

i. *Collector Land Acquisition v. Mst. Katiji and Other [167 ITR 471 (SC) –*

ii. *Baburao DeoraoWankhede v. SewaSahakariSanstha and Ors (Bombay High Court)-*

iii. *M/s DBS Bank Ltd v. Dy. DIT in CO No. 189/Mum/2013 dated 15.06.2016*

49. In view of the above submissions, Ld. AR of the assessee prayed that the delay in filing the appeal before the Tribunal may kindly be condoned and appeal be decided on merits.

50. On the other hand, Ld. DR objected for the condonation of delay and filed its written submissions, for the sake of clarity it is reproduced below: -

"1. For the A.Y. 2007-08, the assessee has submitted vide submission dated 03.03.2023 that there is delay of 598 days in filing of appeal before the Hon'ble Tribunal. The assessee has filed an application for condonation of delay. Further, it is submitted that the appeal was filed as per the advice of Counsel and delay not due to malafide or deliberate initiation on the part of the assessee. The assessee has also filed an affidavit of Shri Rupen Patel affirming the reasons for condonation of delay. It is noted from the records that the assessee has filed cross objection vide CO No.355/M/18 for A.Y. 2007-08 on 10.12.2018 in the appeal ITA No.2486/M/2017. Further, the assessee also filed cross appeals for A.Y.2007-08 arising out from the Id. CIT(A)-57, Mumbai's order dated 17.02.2018. The application of condonation of delay duly signed by Shri Rupen Patel, Managing Director, has been submitted application dated 10.12.2018, which contained following submission:-

> *"4. A conference was held with the counsel on 8.12.2018 regarding the Revenue's appeal and in the said meeting and during the course of discussion with*

the counsel it transpired that vide order u/s 154 of the Act dated 17.7.2017, the Ld. CIT(A) stated that some portion of the decision has inadvertently been missed out and he directed the A.O. that the benefit of telescoping of the said amount be allowed provided the said amount is not already considered for enhanced deduction u/s.80IA(4). The said order was received by the Assessee on 28.02.2017.

5. It was advised by the counsel that this objection could not be pressed before the Hon'ble Tribunal in absence of cross objection. In view of the same, it was suggested by the counsel that a cross objection should be filed. As per the advise of the counsel and upon realization of the unintentional mistake, steps were taken for preparation and filing of the Cross Objection in Form No.36A which is being filed simultaneously.

6. We repeat and reiterate that the delay of 110 days in filing the captioned Cross objection as not due to any deliberate lapse or negligence on our part but due to circumstances. beyond our control. Accordingly, we humbly pray that this Hon'ble Tribunal may be pleased to condone the delay and to admit the Cross Objections for adjudication and disposal in the Interests of justice and equity. In this connection, we place reliance upon the following decisions with the relevant findings therefrom"

1.1. Further, the assessee has submitted an affidavit vide letter dated 23.02.2023 for condonation of delay in 598 days in filing appeal. The affidavit is dated 22.02.2023.

1.2. It is noted that the assessee has not filed any affidavit for condonation of delay in filing of cross objection. The affidavit filed dated 23.02.2023, is for delay in filing of cross appeal. There are several lacuna noted in the affidavit filed. The verification in sworn affidavit is not in accordance with the provisions of law. It is to note that there is no verifcation appended on the affidavit and there is also no mention as to which of the paras are true to the knowledge of the deponent and which of the paras of the affidavit are true to the belief of the deponent. The Hon'ble Supreme Court

in the case of Amar Singh v. Union of India and Others Writ Petition Civil No.39 of 2006 has summed up the law relating to the requirement of verification clause in the affidavit and the importance of affidavits requiring the same to be strictly confirming to the requirements of Order XIX Rule 3 of the Code of Civil Procedure. The relevant extract of the judgment is reproduced below:

> *12. The provision of Order XIX of Code of Civil Procedure, deals with affidavit. Rule 3 (1) of Order XIX which deals with matters to which the affidavit shall be confined provides as follows:*
>
> *"Matters to which affidavits shall be confined. (1) affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted; provided that the grounds thereof are stated."*
>
> *13. Order XI of the Supreme Court Rules 1966 deals with affidavits. Rule 5 of Order XI is a virtual replica of Order XIX Rule 3 (1). Order XI Rule 5 of the Supreme Court Rules is therefore set out: "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated."*
>
> *14. In this connection Rule 13 of Order XI of the aforesaid Rules are also relevant and is set out below:*
>
> *"13. In this Order, affidavit includes a petition or other document required to be sworn or verified; and 'sworn' includes affirmed. In the verification of petitions, pleadings or other proceedings, statements based on personal knowledge shall be distinguished from statements based on information and belief. In the case of statements based on information, the deponent shall disclose the source of this information."*

15. The importance of affidavits strictly conforming to the requirements of Order XIX Rule 3 of the Code has been laid down by the Calcutta High Court as early as in 1910 in the case of PadmabatiDasi v. Rasik Lal Dhar [(1910) Indian Law Reporter 37 Calcutta 259]. An erudite Bench, comprising Chief Justice Lawrence H. Jenkins and Woodroffe, J. laid down:

We desire to impress on those who propose to rely on affidavits that, in future, the provisions of Order XIX, Rule 3, must be strictly observed, and every affidavit should clearly express how much is a statement of the deponent's knowledge and how much is a statement of his belief, and the grounds of belief must be stated with sufficient particularity to enable the Court to judge whether it would be sage to act on the deponent's belief."

16. This position was subsequently affirmed by Constitution Bench of this Court in State of Bombay v. Purushottam Jog Naik, AIR 1952 SC 317. Vivian Bose, J. speaking for the Court, held:

"We wish, however, to observe that the verification of the affidavits produced here is defective. The body of the affidavit discloses that certain matters were known to the Secretary who made the affidavit personally. The verification however states that everything was true to the best of his information and belief. We point this out as slipshod verifications of this type might well in a given case lead to a rejection of the affidavit. Verification should invariably be modelled on the lines of Order 19, Rule 3, of the Civil Procedure Code, whether the Code applies in terms or not. And when the matter deposed to is not based on personal knowledge the sources of information should be clearly disclosed. We draw attention to the remarks of Jenkins, C. J. and Woodroffe, J. in PadmabatiDasi vs. Rasik Lal Dhar 37 Cal 259 and endorse the learned Judges' observations."

17. In Barium Chemicals Limited and another v. Company Law Board and others, AIR 1967 SC 295, another Constitution Bench of this Court upheld the same principle:

"The question then is: What were the materials placed by the appellants in support of this case which the respondents had to answer? According to Paragraph 27 of the petition, the proximate cause for the issuance of the order was the discussion that the two friends of the 2nd respondent had with him, the petition which they filed at his instance and the direction which the 2nd respondent gave to respondent No. 7. But these allegations are not grounded on any knowledge but only on reasons to believe. Even for their reasons to believe, the appellants do not disclose any information on which they were founded. No particulars as to the alleged discussion with the 2nd respondent, or of the petition which the said two friends were said to have made, such as its contents, its time or to which authority it was made are forthcoming. It is true that in a case of this kind it would be difficult for a petitioner to have personal knowledge in regard to an averment of mala fides, but then were such knowledge is wanting he has to disclose his source of information so that the other side gets a fair chance to verify it and make an effective answer. In such a situation, this Court had to observe in 1952 SCR 674: AIR 1952 SC 317, that as slipshod verifications of affidavits might lead to their rejection, they should be modelled on the lines of O. XIX, R. 3 of the Civil Procedure Code and that where an averment is not based on personal knowledge, the source of information should be clearly deposed. In making these observations this Court endorse the remarks as regards verification made in the Calcutta decision in PadmabatiDasi v. Rasik Lal Dhar, (1910) ILR 37 Cal 259."

18. Another Constitution Bench of this Court in A. K. K. Nambiar v. Union of India and another, AIR 1970 SC 652, held as follows:

"The appellant filed an affidavit in support of the petition. Neither the petition nor the affidavit was verified. The affidavits which were filed in answer to the appellant's petition were also not verified. The reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival parties. Allegations may be true to knowledge or allegations may be true to information received from persons or allegations may be based on records. The importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegations. In essence verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In the present case, the affidavits of all the parties suffer from the mischief of lack of proper verification with the result that the affidavits should not be admissible in evidence."

19. In the case of Virendra Kumar Saklecha v. Jagjiwan and others, [(1972) 1 SCC 826], this Court while dealing with an election petition dealt with the importance of disclosure of source of information in an affidavit. This Court held that non-disclosure will indicate that the election petitioner did not come forward with the source of information at the first opportunity. The importance of disclosing such source is to give the other side notice of the same and also to give an opportunity to the other side to test the veracity and genuineness of the source of information. The same principle also applies to the petitioner in this petition under Article 32 which is based on allegations of political motivation against some political parties in causing alleged interception of his telephone. The absence of such disclosure in the affidavit, which was filed along with the petition, raises a prima facie impression that the writ petition was based on unreliable facts.

20. In case of M/s Sukhwinder Pal Bipan Kumar and others v. State of Punjab and others, [(1982) 1 SCC 31],

a three Judge Bench of this Court in dealing with petitions under Article 32 of the Constitution held that under Order XIX Rule 3 of the Code it was incumbent upon the deponent to disclose the nature and source of his knowledge with sufficient particulars. In a case where allegations in the petition are not affirmed, as aforesaid, it cannot be treated as supported by an affidavit as required by law. (See para 12 page 38)

It is evident from the above that the Hon'ble Supreme court in the above said Judgment citing various authorities has discussed about the defects in the verification of the affidavit. But in the case in hand, there is no verification at all, The proper verification is required for a valid affidavit.

1.3. It may also be noted that the said affidavit cannot be said to be a duly sworn affidavit as required under Rule 10 of the ITAT Rules 1963. For the sake of convenience, Rule 10 is reproduced as under:

"Filing of affidavits."

10. Where a fact which cannot be borne out by, or is contrary to, the record is alleged, it shall be stated clearly and concisely and supported by a duly sworn affidavit.

It may be observed that the said affidavit has not been properly endorsed by the notary regarding the oath of affirmation before him by the executants of the affidavit. We may observe that the notary has put his signatures under his name seal but there is no mention whether the oath was administered to the signatory or if done so, when and where it was administered. Even words "Sworn before me" are missing.

The function of swearing of oath is different from the function of simple attestation of an instrument. Under The Notaries Act, 1952 the definition of instrument has been given as under:

(b) "instrument" includes every document by which any right or liability is, or purports to be, created,

transferred, modified, limited, extended, suspended, extinguished or recorded;"

The functions of notaries have been mentioned u/s 8 of the Act. It can be seen that an affidavit does not fall in the definition of an instrument as described under the Notaries Act. It may be further observed that the function of attestation of an instrument is different from the function of administration of oath as former has been described under clause (a) of section 8 and later under clause (e) of the said section. The notary while administering oath to the signatory of the affidavit is required to make an endorsement to the effect that the assessee has sworn or affirmed the contents of affidavit before him. The place and date of administration of oath is also required to be mentioned. The procedure to administer the oath and making of endorsement has been described in Chapter XXVII of Maharashtra Civil Court Manual. Rule 510 & 511 of the said manual are relevant, which for the sake of convenience are reproduced here under:

510. "The Officer, authorised to administer oaths shall before certifying the affidavit, him personally or identified before him by a person whom he personally knows, or whose identity is duly established to the satisfaction of the Officer by any of the following documents, namely Passport, Driving License, Voters identity Card, PAN Card, or photo Identity Card issued by State/Central Government. The manner in which the identification is so made shall be certified by the officer administering the oath"

Every Officer administering an oath in such a case shall add the following words after the words, "Solemnly affirmed before me," namely, "by"..." who is identified before me by"... or "whom I personally know."

511. (1) Every affidavit to be used in a Court shall be entitled "In the Court of.....

(2) Every affidavit shall bear the number of the proceeding in which it is proposed to be filed and shall set out the names of the parties to the proceedings.

(3) Every affidavit containing any statement of facts shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be, shall be confined to a distinct portion of the subject.

(4) The declarant shall state what paragraphs or portions of his affidavit he swears of solemnly affirms to from his own knowledge and what paragraphs or portions he swears or solemnly affirms to on his belief, stating the grounds of such belief.

(5) (a) The officer administering the oath or affirmation for the purpose of affidavits shall satisfy himself that the language in which the affidavit is sought to be made is known to the declarant.

(b) If the language is not known or understood by the declarant, the Officer administering the oath or affirmation shall, where the party is represented by a lawyer, require the said lawyer to certify in writing below the affidavit that the contents of the affidavit have been interpreted to the declarant in a language known to him and that the declarant has fully understood them.

(c) Where the declarant is not represented by a lawyer, the Officer Administering the oath or affirmation shall, when necessary, cause the affidavit to be interpreted to the declarant by any person appointed by him as an Interpreter. The person interpreting the document shall certify below the document that its contents have been interpreted to the declarant in a language known to him.

(d) When the Officer administering the oath or affirmation is satisfied that the language of the document as known or understood by the declarant, or when the lawyer or the interpreter certifies that the

contents have been interpreted to the declarant in a language known to him, the oath shall be administered and the affidavit completed by the signature of the declarant below the declaration on oath in the presence of the Officer and the certification by the officer of the administration of the oath.

Rule 199 and Rule 200 of the Bombay High Court Original Side Rules are also relevant, which for the sake of convenience are reproduced as under:

"199. Place of administering oats to be state when oath administered outside Court House. The officer authorized to administer an oath or affirmation shall state at the foot of the affidavit the place where he has administered the oath or affirmation in the event of the same being administered elsewhere than in the Court House.

200. Affidavit not to be filed unless properly endorsed. No affidavit shall be filed in the several offices of the Court unless properly endorsed, giving the names of the deponents, the date on which it is sworn, and stating by whom or whose behalf it is filed."

1.4. The Hon'ble Allahabad High Court in Kashi Prasad Saksena vs State Government of U.P., Lucknow AIR 1969 All 195 has observed that if oath has been administered or an affidavit has been taken by a Notary unless that fact is certified or endorsed on the affidavit the affidavit remains a waste paper.

1.5. It cannot be said that there was any affirmation of oath as per law. As discussed above, the affidavit produced does not conform to the requirements of a valid affidavit under law and cannot be said to be a 'duly sworn' valid affidavit as required under Rule 10 of the Income Tax Appellate Rules 1963. Therefore, it can be said that the assessee does not have any sufficient cause for delay. Both the appeals either cross objection or cross appeal for the respective assessment years have been delayed filed. The reasons given for late filing of appeal does not show sufficient cause on behalf of the Managing Director of the assessee company. The reason provided for the delayed filing does contain in action or negligence on the part of the Managing Director because it is a Public Limited

Company with set of professionals and affidavit submitted does not have evidentiary value in the eye of law. Thus, there is no merit in the reasons produced by the assessee company. Therefore, the condonation of delay is not liable to be accepted."

51. Considered the submissions of both parties, it is fact on record that assessee has failed to file the appeal in time. We found from the reasons brought on record by the assessee, that delay in filing of appeal is not due to any malafide or deliberate intention of the assessee. We take into account of the elaborate submissions of the Ld DR, however, it is fact on record that the appeal required to be filed against the rectification order is separate proceedings and assessee had failed to file the relevant appeal. There may be several reasons for the delay but what is relevant is the circumstance or situation, which had prevented the assessee to comply with the proceedings. Whether the delay is negligence or carelessness. Hence, for the sake of overall justice, the Hon'ble Supreme Court in the case of Collector, Land Acquisition *v.* MST. Katiju and others, [1987]167 ITR 471, held as under:

"3. *The legislature has conferred the power to condone delay by enacting s. 5 of the Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice—that being the life-purpose of the existence of the institution of Courts. It is common knowledge that this Court has*

been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy.

4. *And such a liberal approach is adopted on principle as it is realized that:*

1. Ordinarily, a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense and pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

6. It must be grasped that the judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

52. Respectfully following the ratio laid down in the above judgment, we condone the delay in filing the appeal and decide the appeal on merits.

53. Brief facts of the case are, assessee is engaged in the business of development of dams, tunnels, industrial complexes, buildings and roads. A search was conducted u/s. 132 of the Act on 16.12.2010 in the group. The assessee was covered in the search operations. During the course of search, certain papers were found which reflected cash expenditure of ₹.7,77,49.145/- incurred for patient of land development for the relevant year. The same was offered in the return of income filed in response to notice issued u/s 153A of the Act. Subsequently, a survey u/s 133A of the Act was conducted on 24.01.2013 in the premises of assessee wherein it was found that the assessee has entered into non-genuine purchase transactions of ₹. 1,92,65,507/- during the relevant year. The same were disallowed by the Assessing Officer in the order passed u/s 143(3) r.w.s. 144C r.w.s. 153A of the Act dated 25.03.2013. The assessee had requested the Assessing Officer to grant telescoping benefit in respect of expenses incurred for land development against the

disallowance made on account of bogus purchase of ₹.1.92,65,507/-. The Assessing Officer did not discuss this issue in the order.

54. The assessee filed an appeal before the Ld.CIT(A) challenging the above issues and various other disallowances / additions made in the assessment order and submitted before the Ld.CIT(A) that the purchases are genuine. It was also submitted that the said purchases were pertaining to the project on which deduction u/s. 80-IA(4) of the Act has been claimed by the assessee. It was submitted that as per the CBDT circular No. 37/2016 dated 02.11.2016, the assessee is eligible for enhanced deduction u/s 80IA-(4) of the Act in respect of disallowance made on account of alleged non-genuine purchases. The Ld.CIT(A), following the CBDT Circular, directed the Assessing Officer to grant enhanced claim of deduction u/s 80-IA(4) of the Act to the extent of purchases of ₹.1,92,65,507/- since the same pertains to the project on which assessee is eligible to claim deduction u/s. 80-IA(4) of the Act.

55. Before the Ld.CIT(A), the assessee also challenged the action of the Assessing Officer in not granting telescoping benefit in respect of expenditure incurred for land development against the addition made on

account of bogus purchases. The Ld.CIT(A) held that surplus income by way of bogus purchase admitted by assessee as its income has to be telescoped with the expenditure on land development. The Ld.CIT(A), vide order dated 30.12.2016, directed the Assessing Officer to allow telescoping benefit on land development expenses to the extent of bogus purchase of ₹.1,92,65,105/-

56. Subsequently, Ld.CIT(A) passed rectification order u/s 154 of the Act dated 17.02.2017. The Ld.CIT(A), pursuant to the order dated 30.12.2016, passed an order u/s 154 of the Act dated 17.02.2017. In the said order, the Ld.CIT(A) stated that on Page No. 21 of the order dated 30.12.2016, while deciding ground no. 4.5 of the appeal, some portion of the decision has inadvertently been missed out. Hence, the same is rectified u/s. 154 of the Act.

57. In the impugned order, the Ld.CIT(A) reproduced the decision portion from the dated 30.12.2016 wherein he had held that the assessee should be allowed telescoping benefit on land development expenses to the extent of bogus purchase of ₹.1,92,65,105/-. The Ld.CIT(A), in the impugned order passed u/s. 154 of the Act, further

held that if the amount of bogus purchase of ₹.1,92,65,105/- is considered for enhanced deduction u/s. 80-IA(4), then in that case, the same is not available for telescoping as the assessee has already claimed deduction, and, if allowed it amounts to double deduction.

58. Against the said order passed by Ld.CIT(A), the assessee has filed the present appeal before the Tribunal wherein the assessee has challenged the order passed u/s. 154 of the Act dated 17.02.2017 by Ld.CIT(A) on legal issue as well as on merits.

59. At the time of hearing, Ld. AR of the assessee filed his written submissions and relied on the same. For the sake of clarity, it is reproduced below: -

> *Ground Nos 1 and 2*
>
> *13) The present appeal is filed challenging the order passed u/s 154 of the Act by the CIT(A). The relevant portion of S. 154 of the Act is reproduced as under:*
>
> > *"(1) With a view to rectifying any mistake apparent from the record an income-tax authority referred to in section 116 may- (a) amend any order passed by it under the provisions of this Act.....*
> >
> > *(emphasis supplied)*
>
> *It is evident from the above that order can be rectified u/s 154 of the Act only if there is 'mistake apparent from record.*

14) It is submitted, at the outset, that in present case, there is no justification for invoking the provisions of S. 154 of the Act as there is no mistake apparent from record. It is, therefore, submitted that the order passed u/s 154 of the Act is bad in law. In order to substantiate the above plea, it would be relevant to recapitulate the facts of the case.

15) As stated above, the CIT(A), in his order dated 30.12.2016, held that the assessee is eligible for enhanced deduction u/s 80-1A(4) of the Act in respect of bogus purchase of Rs. 1,92,65,105/-. The CIT(A) had granted benefit of telescoping towards expenses incurred on land development to the extent of bogus purchase of Rs. 1,92,65,105/- in the order dated 30.12.2016

16) Subsequently, he passed the order u/s 154 of the Act dated 17.02.2017 wherein he amended his earlier decision and held that benefit of telescoping would be restricted to the amount which was not claimed as enhanced deduction u/s 80-IA(4) of the Act i.e. if the amount of Rs. 1,92,65,105/- is considered for enhanced deduction then the same would not be available for telescoping as the same would amount to double deduction.

17) It is submitted that the CIT(A) has erred in holding that granting enhanced deduction u/s 80-IA(4) of the Act and allowing benefit of telescoping would amount to double deduction. It is submitted that the benefit of telescoping is application/utilization of funds available with the assessee and is not a claim of deduction.

18) It is submitted that the deduction u/s 80-IA(4) of the Act and telescoping operate in two different fields. The provisions of S. 80-IA(4) enables the assessee to claim deduction of income under Chapter VI-A of the Act on fulfillment of certain conditions whereas telescoping benefit is granted on unaccounted payments made by assessee to the extent the source of such payments is established Eg: If the assessee has sales of Rs. 100, from an undertaking eligible to claim deduction under Chapter VI-A, and expenditure of Rs. 80, it would earn profit of Rs. 20. The assessee would be eligible to claim deduction on the profit of Rs. 20 since the same is generated from eligible undertaking. Later, it is found that the expenditure of Rs. 10 was bogus. Hence, the profit of the assessee would increase to Rs. 30. Since, undertaking is eligible to claim deduction, the assessee will now get deduction of Rs. 30 i.e. Rs. 10 which was bogus expenditure would also be eligible for deduction since the expenditure pertains to eligible undertaking. The bogus expenditure of Rs. 10 would have come back in cash to the assessee. The said cash is available with the assessee and would

increase its cash flow. The assessee has also made certain unaccounted payments. The assessee would get telescoping benefit on unaccounted payments to the extent of Rs. 10 as the said cash was available with the assessee and the same would be utilized by assessee for making unaccounted payments. It is submitted that telescoping benefit is granted on the premise that unaccounted cash payments were made from the cash that was available with the assessee hence the source of unaccounted payment, to the extent of cash available, is established. Hence, telescoping benefit is granted on the expenditure incurred by assessee and has got no relation to deduction from income.

19) In the present case, the assessee has booked bogus purchase of Rs. 1,92,65,105/-. The said amount was received back in cash which was available with the assessee. Subsequently, the assessee has made unaccounted payments for land development expenses. It is submitted that the source of unaccounted payments is the cash available with the assessee that was generated on account of bogus purchase. Hence, it is submitted that the assessee should be allowed telescoping benefit on land development expenses to the extent of cash available with it i.e. Rs. 1,92,65,105/- It is reiterated that telescoping benefit is granted on the unaccounted expenditure incurred by assessee since the source of such expenditure is established and it is not a deduction claimed by the assessee.

20) Reliance is placed on the decision of the Hon'ble Bombay High Court in the case of CIT v. Jawaharlal Nehru Port Trust (383 ITR 339) (copy enclosed as Annexure A). In the said case, the assessee claimed depreciation of fixed assets. In the year in which the assessee purchased the fixed assets, the entire amount attributable to purchase was shown as application of income and claimed as exempt u/s 11 of the Act. Subsequently, the assessee claimed depreciation on fixed assets which was disallowed by the Assessing Officer as it would amount to double deduction. The Hon'ble Bombay High Court held that it is not a case of double deduction as the amount spent on acquiring the fixed asset was application of income and depreciation on the same amount i.e. value of fixed asset is for the use of the asset.

21) Reliance is also placed on the decision of the Hon'ble Karnataka High Court in the case of CIT v. Infosys Technologies Ltd (360 ITR 714) (copy enclosed as Annexure B). In the said case, the assessee paid donation out of the unit eligible to claim exemption u/s. 10A of the Act. The donation was disallowed while computing income from of the unit but as the entire income was exempt the

same was not brought to tax. The assessee claimed deduction u/s 80G of the Act in respect of the said donation from the total income excluding the income of eligible unit. The Hon'ble High Court held that it is not a case of double deduction in respect of same item since donation disallowed is eligible for exemption whereas the same donation claimed u/s. 80G of the Act is a deduction.

22) It is submitted that the Hon'ble Tribunal in the case of HGP Community (P) Ltd v. ITO [170 ITD 18 (Mum)] (copy enclosed as Annexure C) held that assessee is eligible to claim deduction of interest u/s 24(b) of the Act as well as u/s 48 of the Act. The Hon'ble Tribunal held that both the sections are for claiming deduction under different heads of income and hence, the same is allowable. It is submitted that the facts of the present case are much better than that before the Hon'ble Tribunal. In the present case, the assessee is not claiming double deduction as explained hereinabove.

23) In view of the above, it is submitted that the assessee should be granted telescoping benefit on land development expenses to the extent of bogus purchase which was considered as enhanced deduction u/s 80-IA(4) of the Act as the same would not amount to double deduction.

Mistake sought to be rectified is not 'mistake apparent from record'

24) It is submitted that the CIT(A) would have jurisdiction to rectify the order u/s 154 of the Act only if the 'mistake is apparent from record'. It is submitted that the question to be decided is whether the action of the CIT(A) in withdrawing the benefit of telescoping already granted to assessee on the ground that it would amount to double deduction would constitute a 'mistake apparent from record' or not. It is submitted that the term 'mistake apparent from record' was deliberated in the judgment of the Hon'ble Supreme Court in the case of T.S. Balram, ITO v. Volkart brothers and Othrs (82 ITR 50) (copy placed at Pgnos 17-20 of case law paper book). The relevant findings of the Hon'ble Supreme Court are as under:-

> *".....It was not open to the Income-tax Officer to go into the true scope of the relevant provisions of the Act in a proceeding under section 154 of the Income-tax Act, 1961. A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two*

> *opinion..... A decision on a debatable point of law is not a mistake apparent from the record-see SidhramappaAndannappaManvi v. Commissioner of Income-tax [1952] 21 ITR 333 (Bom.). The power of the officers mentioned in section 154 of the Income-tax Act, 1961, to correct "any mistake apparent from the record" is undoubtedly not more than that of the High Court to entertain a writ petition on the basis of an "error apparent on the face of the record." In this case it is not necessary for us to spell out the distinction between the expressions "error apparent on the face of the record" and "mistake apparent from the record" But suffice it to say that the Income-tax Officer was wholly wrong in holding that there was a mistake apparent from the record of the assessments of the first respondent"*
>
> *(emphasis supplied)*

It is evident from the above that the Hon'ble Supreme Court has held where the issue involved is such where there may conceivably be two opinions, it is not a 'mistake apparent from record'. It is submitted that, in the present case, the issue on which rectification is sought there are certainly two possible opinions which would require deliberation; hence there is no apparent mistake for rectification u/s. 154 of the Act.

25) Reliance is also placed on the decision of the Hon'ble Delhi High Court in the case of Hotz Hotels (P) Ltd v. CIT (248 ITR 647) (copy enclosed as Annexure D). In the said case, the Assessing Officer was of the view that deduction u/s. 80M of the Act had been wrongly computed while making assessment and therefore, passed order under S. 154 and revised the computation of income. The AAC held that interpretation of S. 80M of the Act raised controversial issues and whether relief allowable under section 80M was computed correctly or not was not an issue which could be treated as mistake apparent from the record. The Hon'ble Tribunal set aside the order passed by the AAC and restored that of the Assessing Officer. The Hon'ble High Court did not agree with the order passed by Hon'ble Tribunal and decided the issue in favour of assessee. The relevant observations of the Hon'ble Court are as under:

> *"5. A bare look at section 154 makes it clear that a mistake apparent from the record is rectifiable. In order*

to attract the application of section 154, the mistake must exist and the same must be apparent from the record. The power to rectify the mistake, however, does not cover cases where a revision or review of the order is intended. 'Mistake' means to take or understand wrongly or inaccurately, to make an error in interpreting, it is an error, a fault, a misunderstanding. a misconception. 'Apparent means visible, capable of being seen, obvious, plain. It means open to view, visible, evident, appears, appearing as real and true, conspicuous, manifest, obvious, seeming A mistake which can be rectified under section 154 is one which is patent, which is obvious and whose discovery is not dependent on argument or elaboration. In our view amendment of an order does not mean obliteration of the order originally passed and its substitution by a new order. What the revenue intends to do in the present case is precisely the substitution of the order which, according to us, is not permissible under the provisions of section 154 and therefore, the Tribunal was not justified in holding that there was mistake apparent on the face of the record. In order to bring in application under section 154, the mistake must be 'apparent' from the record. Section 154 does not enable an order to be reversed by revision or by review, but permits only some error which is apparent on the face of the record to be corrected. Where an error is far from self-evident, it ceases to be an apparent error. It is, no doubt, true that a mistake capable of being rectified under section 154 is not confined to clerical or arithmetical mistakes. On the other hand, it does not cover any mistake which may be discovered by a complicated process of investigation, argument or proof. As observed by the Apex Court in Master Construction Co. (P) Ltd. v. State of Orissa [1966] 17 STC 360, an error which is apparent from record should be one which is not an error which depends for its discovery on elaborate arguments on questions of fact or law... See T.S. Balaram ITO v. Volkart Bros. [1971] 82 ITR 50 (SC) Mistake' is an ordinary word but in taxation laws, it has a special

significance. It is not an arithmetical error which, after a judicious probe into the record from which it is supposed to emanate is discerned. The word 'mistake' is inherently indefinite in scope, as to what may be a mistake for one may not be one for another. It is mostly subjective and the dividing line in border areas is thin and indiscernible. It is something which a duly and judiciously instructed mind can find out from the record. In order to attract the power to rectifying under section 154, it is not sufficient if there is merely a mistake in the order sought to be rectified. The mistake to be rectified must be one apparent from the record. A decision on a debatable point of law or a disputed question of fact is not a mistake apparent from the record. The plain meaning of the word 'apparent' is that it must be something which appears to be so ex facie and it is incapable of argument or debate. It therefore, follows that a decision on a debatable point of law or fact or failure to apply the law to a set of facts which remains to be investigated cannot be corrected by way of rectifications"

(emphasis supplied)

26) It is evident from the above that re-computing a particular deduction/relief granted to the assessee would involve some argument or debate hence, the same does not fall within the term 'mistake apparent from record. Similarly, in the present case, the CIT(A), in the impugned order, has withdrawn the benefit of telescoping granted to the assessee on the ground that it would amount to double deduction. It is submitted that whether the same would amount to double deduction or not is certainly a debatable point of law and would require deliberation. Hence, it is not an apparent mistake for rectification u/s 154 of the Act.

Rectification of mistake does not permit review of earlier order

27) It is submitted that the power to rectify a 'mistake apparent from record does not permit review of earlier order. It does not permit the revenue to substitute the earlier order. In order to support the said contentions reliance is placed on the following judicial pronouncements

i) CIT v. United Mercantile Co. (Pvt.) Ltd [158 ITR 41 (Raj)] wherein it was held as under: (Head note) (copy placed at Pgnos 24 to 30 of case law paper book).

> *".....The Appellate Tribunal found that at the time of original assessment, the Income-tax officer had before him both the decisions of the Supreme Court and full facts, that the assessee and also the Income-tax officer followed the decision in Emerald & Co that by applying the decision in Dalmia Investment Co.'s case, the successor Income-tax officer merely sought to revise or review the earlier order which section 154 did not contemplate, that the question raised by the assessee was highly debatable and hence there was no mistake apparent from the record which could be rectified under section 154....."*

(emphasis supplied)

ii) Hotz Hotels (P) Ltd v. CIT [248 ITR 647 (Del)] (copy enclosed as Annexure D)

In the said case, the Assessing Officer rectified the order passed u/s 154 of the Act on the ground that deduction u/s. 80M of the Act had been wrongly computed while making original assessment. The AAC held that interpretation of S. 80M of the Act raised controversial issues and whether relief allowable under section 80M was computed correctly or not was not an issue which could be treated as mistake apparent from the record. The relevant observations of the Hon'ble Court are as under:

> *"5. A bare look at section 154 makes it clear that a mistake apparent from the record is rectifiable. In order to attract the application of section 154, the mistake must exist and the same must be apparent from the record. The power to rectify the mistake, however, does not cover cases where a revision or review of the order is intended 'Mistake' means to take or understand wrongly or inaccurately, to make an error in interpreting, it is an error, a fault, a misunderstanding, a misconception. Apparent means visible, capable of being seen, obvious, plain. It means open to view, visible. evident, appears, appearing as real and true,*

conspicuous, manifest, obvious, seeming. A mistake which can be rectified under section 154 is one which is patent, which is obvious and whose discovery is not dependent on argument or elaboration. In our view amendment of an order does not mean obliteration of the order originally passed and its substitution by a new order. What the revenue intends to do in the present case is precisely the substitution of the order which, according to us, is not permissible under the provisions of section 154 and, therefore, the Tribunal was not justified in holding that there was mistake apparent on the face of the record. In order to bring in application under section 154, the mistake must be 'apparent from the record. Section 154 does not enable an order to be reversed by revision or by review, but permits only some error which is apparent on the face of the record to be corrected….."

(emphasis supplied)

In the present case also, the CIT(A), while passing the impugned order is seeking substitution of the order to the extent of decision taken in respect of Ground No 4.5 of the order dated 30 12 2016 which is not permissible. It is submitted that CIT(A) is seeking to review his earlier decision which is not permitted u/s 154 of the Act since there is no apparent mistake for rectification.

28) It would be relevant to mention that the CIT(A), in the impugned order, has stated that he is rectifying the order as some portion of the decision in respect of Ground No. 4.5 in the earlier order dated 30.12.2016 was inadvertently missed out. In this regard, it is submitted that the impugned order has been passed u/s 154 of the Act. Hence, merely by stating that some portion of the decision has inadvertently been missed out would not grant the power to CIT(A) to rectify the same u/s. 154 of the Act, if the same does not constitute 'mistake apparent from record'. It is submitted that the portion of the decision which has now been rectified has changed the outcome of the decision earlier granted by CIT(A). It is further submitted that, as stated above, the issue whether granting of telescoping benefit and enhanced deduction u/s 80-IA(4) of the Act would amount to double deduction or not would require deliberation of law and is highly debatable on which certainly two views are possible.

29) In view of the above, it is humbly prayed that the order passed by CIT(A) u/s. 154 of the Act is invalid on legal issue as well as on merits."

60. In support of the above propositions and contentions, Ld. AR of the assessee relied on the following case laws: -

i. *CIT v. Jawaharlal Nehru Port Trust [2017] 79 taxmann.com 358 (Bombay)*
ii. *CIT v. Infosys Techologies Ltd [2014] 360 ITR 714 (Karnataka)*
iii. *HGP Community (P.) Ltd., v. Income Tax Officer [2018] 91 taxmann.com 464 (Mumbai – Tribunal)*
iv. *Hotz Hotels (P.). Ltd.,* v. *CIT [2001] 118 taxman 94 (Delhi)*

61. In view of the above submissions, Ld. AR of the assessee prayed for set-aside/quash the rectification order passed by the Ld.CIT(A).

62. On the other hand, Ld. DR relied on the order of the lower authorities. Ld. DR filed his written submissions objecting the submissions of the assessee, for the sake of clarity it is reproduced below: -

"2. The assessee mainly submitted that there was no jurisdiction for invoking the provision of 154 of the Act as there is no mistake apparent from the record and the assessee is entitled to get benefit of telescopic adjustment on account of enhanced profit due to disallowance of bogus purchase under section 80IA(4).

2.1. The two grounds of appeal of the assessee company are as under:

a*) "On the facts and circumstances of the case and in law, the rectification order passed by the AO u/s. 154 of the Act is bad in law.*

b) On the facts and circumstances of the case and in law, the ld. CIT(A) erred in directing the AD to grant telescoping benefit provided the amount of Rs. 1,92,65,507/- in respect of the alleged bogus purchases is not considered for enhanced deduction u/s.80IA(4) of the Act."

The Id. CIT(A) has passed order u/s.154 dated 17.02.2017 in which he categorically stated that the order u/s.30.12.2016 on page No.21 in decision on ground No.4.5, some portion of the decision has inadvertently been missed out. Therefore, it must be seen that whether any inadvertently omission due to typographical error constitutes mistake apparent from records. This is the case where the same officer has passed appeal order and rectification order under section 154. It is also a crucial fact that CIT(A) has suo moto taken up the record and passed rectification order under section 154. The CIT(A) while going through the records noted that some portion had been left out. This was nothing but typographical error while passing the order. This typographical error constitutes mistake apparent from the records and attract rectification provision under I.T. Act under the fact and circumstances of the case. The Id. CIT(A) has rectified his order in which typographical omission was noticed, making a mistake apparent from the record. In a decision Hon'ble ITAT Delhi bench in the case of Manjush Kumar Vs ACIT, ITA No.7676/DEL/2019 (A.Y.2016-17) held that in case of any typographical error section 154 can be invoked. Therefore, the CIT(A) has correctly invoked section 154 to correct the original order which was inadvertently missed out due to typographical error.

In the case of Blue Star Engineering Co.(Bombay)(p.) Itd vs CIT reported in 73 ITR 283 Hon'ble Bombay High Court held that " The word "amend" with reference to legal documents means correct an error and the expression" amend the order" would mean correct the error in the order. Under section154powe to rectify the error is to be exercised by correction the error in the order and the correction must, therefore, extend to the elimination of the error. What the effect of the elimination of the error will be on the original order will depend upon each case. It may be that the elimination of the error may affect only a part of the order. It may also be that the error may be such as may go to the root of the

order and its elimination may result in the whole order falling to the ground."

3. In this particular case, the assessee wanted to take a telescopic benefit of Rs.1,92,65,105/- on account of cash payment for land development. The assessee claimed that this amount of Rs.1,92,65,105/- arose out from the disallowance of bogus purchases which was part of the sec.80IA computation. Provision of section 80IA(1), which is as under:-

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

380-IA. [(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.]

3.1. In such cases, where assessee claims deduction u/s.80IA, the assessee's income does not include in the total income being allowable deduction u/s.80IA. It means that in a case where an amount qualified for deduction u/s 80IA and claimed in computation, the total income being taxable income is reduced by the same quantum and therefore no tax is required to be paid. The effect of disallowance does increase the quantum of deduction for computation of total taxable income and therefore no tax has been paid. In this case, the assessee claimed the enhanced quantum of deduction on account of disallowed bogus purchase. Does this enhanced profit legally fall into the concept of legitimate real income which could be further claimed for telescopic benefit?

3.2. It is, therefore, gone through the concept of telescopic adjustment. There is no provision of 'Telescoping' in the Income Tax Act. The theory accepted judicially after court's decision in order to avoid taxing the same income twice -once on earning and then on utilizing/expending it. It is the well established under taxation law that same income cannot be taxed twice. This means that once tax has been paid on an amount or receipts or income, the same amount would be available for telescoping. There is another aspect of that, tax must be paid at least once for describing a part of real income to be lawfully generated fund.

Further, in the case of CIT vs Devi Prasad Vishwanath Prasad (1969) 72ITR 194 (SC) the apex court held that it is for the assessee to prove that even if the cash credit represents income it is income from a source which has already been taxed."

3.3. Further, in the case of AnantharamVeerasinghaiah& Co. vs CIT reported in 123 ITR 453, Hon'ble supreme court held as under:-

> *"There can be no escape from the proposition that the secret profits or undisclosed income of an assessee earned in an earlier assessment year may constitute a fund, even though concealed, from which the assessee may draw subsequently for meeting expenditure or introducing amounts in his account books. But it is quite another thing to say that any part of that fund must necessarily be regarded as the source of unexplained expenditure incurred or of cash credits recorded during a subsequent assessment year. The mere availability of such a fund cannot, in all cases, imply that the assessee has not earned further secret profits during the relevant assessment year. Neither law nor human experience guarantees that an assessee who has been dishonest in one assessment year is bound to be honest in a subsequent assessment year. It is a matter for consideration by the taxing authority in each case whether the unexplained cash deficits and the cash credits can be reasonably attributed to a pre-existing fund of concealed profits or they are reasonably explained by reference to concealed income earned in that very year. In each case, the true nature of the cash deficit and the cash credit must be ascertained from an overall consideration of the particular facts and circumstances of the case. Evidence may exist to show that reliance cannot be placed completely on the availability of a previously earned undisclosed income.....*

3.4. It is evident from the submission that the assessee has claimed to have invested generated cash fund through bogus purchase in land development. It is an important fact that the generated cash fund was never be part of total income. No tax has been paid on the generated concealed fund claimed by the

assessee. Once any amount which is not a part of the total income and no taxes has been paid cannot be entitled for telescopic benefit. To clearly put my words, it can be said that unless or until being a part of the total income and taxes been paid, no legitimate income be generated and, therefore, telescopic benefit on that income cannot be allowed. In such telescopic benefit, the scope and extent of the adjustment is purely dependent on the fact and circumstances of the case.

4. Whether under the facts and circumstances the amount of Rs. 1,92,65,105/- can be said to be legitimate fund or income in the hands of assessee and therefore eligible for telescopic benefit for further investment in land. The Id. CIT(A) after giving an opportunity of being heard to the assessee, rectified the order where he missed that an amount of Rs.1,92,65,105/- to the extent of bogus purchases resulted in enhancement of deduction u/s.80IA is not available for telescoping as the assessee has already claimed deduction, and, if allowed it amounts to double deduction. The assessee has argued that there is no question of double deduction arising because at one place it is deduction u/s.80IA and at the other place, it is application of such income. It is clear from the order of the Id. CIT(A) that this double deduction has been used for the purpose of reduced tax liability on the same amount twice by enhancing the profit u/s.80IA(4), the assessee has further entitled to get the benefit of the tax component on Rs.1,92,65,105/-and in the second place, when the telescopic benefit has to be provided, the assessee again escaped from the tax component on that amount. This means that the assessee has not paid any tax on the amount of Rs.1,92,65,105/-.. Hence this amount remains outside of the total taxable income thus getting double tax benefit.

4.1. Although the assessee has claimed that this is a disallowance of bogus purchase but the record shows otherwise. It is imperative to mention that the Managing Director, Shri Rupen Patel has recorded a statement u/s.131 of the I. T. Act on 05.02.2013 where he has withdrawn the claim of purchases from M/s. Ambika Steel of Rs.1,92,65,507/-. Therefore, this is not a case where the AO has disallowed the amount but it is a case where the assessee himself withdrew the claim. Once the claim is withdrawn before passing

and computing the tax liability, it cannot be case of disallowance. Withdrawal of expenditure claimed as good as no claim to the extent made. Therefore, various case laws relied upon by the assessee do not have any persuasive effect in this case.

4.2. On analysis of statement given under oath under section 131 of 1. T. Act, Shri Rupen Patel has stated that purchases are genuine and bonafide and payments were made by crossed account payee cheques from regular bank of accounts against bills raised by suppliers. However, to be safer side and out of abundant caution and to buy peace and to avoid litigation, had withdrawn the claim of said purchase from Ambika Steel. If it assumed that statement has been truthfully made, then it is beyond imagination that once the bill payment is genuinely paid for genuine purchase, then how the assessee generated cash out of such transaction. It is difficult to accept that both claims are true and exist together. In fact, both claims are contrary to each other.

4.3. It is also recorded that during the search, certain papers were found which reflected certain expenditure and payment for land development. These payments were made in cash. If we consider the facts and circumstances of the case and the claim of the assessee, there is no ambiguity that the assessee generated black money. kept it with themselves and booked non-genuine purchases to adjust the later paid in cash. The assessee has not shown any link between the generations of cash through non-genuine purchase in books and later genuinely paid tax on this concealed or undisclosed income. Thus, this income cannot be treated as legitimate real income in the hands of the assessee for taking a telescopic benefit. This is also an important fact that how cash can be generated through unlawful means be eligible for a lawful payment under any scenario. Considering the whole facts and circumstances, it can be said the assessee wilfully involved in a fraudulent activity and falsification of financial statement of books of accounts. Therefore, the assessee is not entitled for telescoping benefit.

5. Without prejudice to the above, under these circumstances, if the claim of the assessee is found to be lawful and accepted then the AO may be allowed to examine the possibility of imposing

penalty and initiating prosecution under various sections; 277, 277A and 278 etc. under the I.T. Act."

63. By relying on the above submissions, Ld.DR requested for dismissal of appeal.

64. Considered the rival submissions and material placed on record, we observe from the record that the assessee has claimed deduction u/s.80IA and also it is admitted fact that the assessee has booked bogus purchases in the earlier year and incurred certain expenses on land filling purpose in the current assessment year, it claimed that the admitted income from the bogus purchases have to be allowed against the land filling expenses. One hand, the assessee claims the benefits u/s 80IA and also if there is any disallowance made that also will be allowed since the increased profit after disallowance is eligible to be claimed deduction u/s 80IA. Further, the assessee also claims the telescopic benefit on cash expenses incurred on land filling against the cash available from the admission of bogus purchases. From the record, in our view, it is a mistake apparent on record. Therefore, the above mistake was rectified by the CIT(A). In our considered view, the mistake was apparent on record. Therefore, the rectification made by

the Ld CIT(A) is proper and as per law. Therefore, we are inclined to dismiss the ground raised by the assessee.

65. In the result, appeal filed by the assessee is dismissed.

66. To sum-up, appeals filed by the revenue and cross objections filed by the assessee are dismissed. Appeal filed by the assessee for the A.Y. 2007-08 is also dismissed.

Order pronounced in the open court on 07th July, 2023

Sd/-	Sd/-
(ABY T. VARKEY)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 07/07/2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum