IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD 'A' BENCH, HYDERABAD.

BEFORE SHRI RAMA KANTA PANDA, VICE PRESIDENT
AND
SHRI LALIET KUMAR, JUDICIAL MEMBER

ITA Nos.603 to 606/Hyd/2016 (Assessment Years : 2009-10 to 2012-13)		
Dy. Commissioner of Income Tax, Central Circle 2(1), Hyderabad.	Vs.	M/s. HES Infra Pvt. Ltd., Hyderabad. PAN AABCH 8954L
(Appellant)		(Respondent)
Appellant By :	Ms. T. Vijaya Lakshmi, CIT-DR	
Respondent By :	Shri A. Srinivas, C.A.	
Date of Hearing :	04.07.2023	
Date of Pronouncement :	31.07.2023	

O R D E R

PER BENCH :

These appeals filed by the Revenue are directed against two separate orders dt.16.03.2016 of the learned Commissioner of Income Tax (Appeals)-12, Hyderabad relating to Assessment Years 2009-10 to 2012-13, respectively.

2. Before us, at the outset, both parties submitted that the issues raised in all the appeals are identical. In view of the aforesaid submissions, we, for the sake of convenience, proceed to dispose of all the captioned appeals by a consolidated order but however, refer to the facts in ITA No.603/Hyd/2016.

3. As all the grounds raised by the Revenue are identical grounds in the above appeals, therefore, the grounds raised by the Revenue for the A.Y 2009-10 in ITA No.603/Hyd/2016 is taken as the lead case and the grounds raised therein are reproduced below:

> *" 1. On the facts and in the circumstances of the case, and in law, the CIT(A) erred in granting deduction u/s.80IA though the said claim was made for the first time in return filed in response to notice u /s. 153A.*
>
> *2. Without prejudice to ground No.1, on the facts and in the circumstances of the case, and in law, the CIT(A) erred in allowing deduction u/s.80IA without examining whether the assessee satisfies the parameters fixed by the ITAT in the case of Sushi Hitech (ITA No.269 & 1165/Hyd/2009 and ITA No.1171/Hyd/20 10, dated 16.03.2012) to determine whether the assessee is (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility.*
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> *3. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored."*

3.1 The brief facts of the case are that the assessee is a Private Limited Company engaged in the business of infrastructural activities, filed the Return of Income originally, declaring income of Rs.28,99,19,830 for the A.Y. 2009-10 and

assessment was completed u/s. 143(3) of the Act determining the total income at Rs.30,60,90,932/-. A search & seizure operation took place on 26.03.2012 in the case of assessee company and the assessee company in response to notice u/s. 153A of the Act, filed return of income declaring income at Rs.26,50,14,278/- after claiming deduction u/s. 80IA of the Act for Rs.2,50,55,348/- The Assessing Officer disallowed the claim of the assessee u/s. 80IA stating that the deduction was not claimed in the original return of income and the assessee is not the owner of infrastructure facility, so as to be eligible for claim u/s. 80IA of the Act. The relevant observation of the Assessing Officer in the body of the assessment order reads as under :

> *" Considering the facts of the case, and the legal positions made clear by the Hon'ble Courts the assessee's claim u/s. 80IA can't be allowed. Accordingly, Rs.12,26,58,353/- is added back to the total income.*
>
> *Without prejudice to the above, the assessee's claim u/s.80IA is required to be examined on merits.*
>
> *The assessee was executing the following works during the year 2010-11. Some of the works are as follows :*

Sl. No.	***Description of infrastructural facility***
1.	*Package No.42 : Construction of pick up weir and regulator near Kristipadu village, excavation and formation of Yadiki Canal system and excavation of Link Channel from Chagallu to Pendekallu reservoir with 2200 cusecs capacity including investigation, design, estimation to create a total IP of 28,600 acres and formation of flood banks on right side of Penna river from Buggaramalingaswamy temple to Peddapappur road 3000 mtrs. at Tadipatri town in Anantapur Dist.*

2.	*Modernisation of Mylavaram South Canal (Package-91) Earthwork Excavation, C.C.Lining including Mylavaram Head works and improvements to the reservoir South Canal from Km.0.000 to Km.44.440 and its Distribution system to irrigate an extent of 25,000 acres.*
3.	*Package No.48A/06-0 Additional investigation, Design, Preparation of estimates and earthwork excavation for widening of GNSS Flood Flow Canal -11 from Owk Reservoir to Gandikota Reservoir from Km.15.874/16.500 to 32.520/34.800 (Lengh 16.02 km) including construction of all CM & CD works enroute the can for a carrying capacity of 20,000 c/s in Kurnoor & Kadapa districts.*
4.	*HNSS Project-Phase 11 Works - Investigation, Preparation of HPs, design, excavation, construction of CM & CD works of HNSS main canal from Km.340.000 to Km.360.000 excluding Tunnel from Km.358.000 to 360.000 under HNSS Phase-II in Anantapur Dist. - Package No.9.*
5.	*Modernisation of Mylavaram South Canal (Package-91) Earthwork Excavation, C.C.Lining including Mylavaram Head works and improvements to the reservoir South Canal from Km 0.000 to Km.44.440 and its distributor system to brin under irrigation 25,000 acres.*
6.	*Telugu Ganga Project, Kadapa - Providing Lift-Irrigation facilities under lift scheme to left over lands within and nearby the general boundary of Pulivendula Branch canal on both sides from Km. 0.00 to 35.025 - Package 92A and Km.35.025 to 68.00 - Package 93A and formation of distributor system for new additional ayacut including formation of new tanks and improvements to existing tanks.*

7.	*Dr.B.R.Ambedkar Pranahita-Chevella Sujala Sravanthi Package No.24 : Investigation, Designs and execution of water conveyor system consisting of lined gravity canal, CM & CD works, lined tunnel and lift with a carrying capacity of 7920 cumecs from Rawulapally village to Hussainpur village from Km 11500 to Km.124.250 and Pargi main canal from Km. 0.00 to Km37 80 and distributor system for an Aaycut of 13,200 acres under Pargi main canal – Reach 5._*
8.	*Polavaram Project – Package 62 Indira Sagar Project.*

From the above details of the facilities executed by the assessee during the previous year, it is clear that the assessee was entrusted the work of "Construction, Modernisation, Excavation, preparation of estimates and investigation" of the particular facility. In all the cases, the contractees are Ch. Engineer/Project Director of the concerned Government Department. It is abundantly clear that the project is owned by the Government and the assessee was entrusted for a particular work of "Construction, Modernisation, Excavation, preparation of estimates and investigation".

The assessee in his submission dated.29/03/2014 has stated that the agreement entered into by the assessee with the Govt. authorities is not related to a part of the work and work was undertaken on turnkey basis. The site has been handed over to the assessee for carrying out the work as per req. and also operating system for certain period mentioned therein and completed the project at the end of above said period and as such assessee is the developer and also operating the system for certain period. The assessee developed infrastructure projects relating to water supply scheme by designing, erecting, testing and functioning of the project.

It is pertinent to mention that, the deduction u/s.80IA(4) applies to:

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

(a) it is owned by a company registered in India or by a consortium of such companies [or by an authority or a board or a

corporation of any other body established or constituted under any Central or State Act);

[(b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing or (ii) operating or (iii) developing, operating and maintaining a new infrastructure facility;]

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

From the plain reading of the section as quoted above, it is clear that the assessee being an enterprise sharing of developing or operating and maintain or developing, operating, maintaining any infrastructure facility has to fulfill all the conditions as mentioned in the sub-clause a, b and c. As per clause-a, the basic eligibility is that the infrastructure facility should be owned by the assessee claiming deduction u/s.80IA(4). As has been discussed earlier, the assessee has awarded the contract of "Construction, Modernisation, Excavation, preparation of estimates and investigation" of facility by the concerned Govt. Dept. and the question of ownership of the infrastructure facility is totally out of place.

The Department's Circular No.717 14/8/1995 in respect of Sec.801A states as under:

" ... a ten year concession including a five year tax holiday has been allowed for any enterprise which develops, maintains and operates any new infrastructure facility such as roads, highways, expressways, bridges, airports and rail system or any other public facility of similar nature as may be notified by the Board on BOT or BOOT or Similar other basis (where there is an ultimate transfer of the facility to a government or a public authority ... The period within which the infrastructure facility has to be transferred needs to be stipulated in the agreement between the undertaking and the Government concerned".

In the case of the assessee, neither he has developed the facility on BOT/BOOT or Other Similar basis, as has been discussed earlier, the concerned Govt. department has given the contract to the assessee repairing and strengthening of facility and there is no question of the period within which the facility has to be transferred to the body. This is because, the assessee has never own the facility and hence, question of transfer does not come."

4. Aggrieved by the order of Assessing Officer, the assessee filed an appeal before the ld.CIT(A). The ld.CIT(A) after considering the submissions of the assessee, allowed the appeal of the assessee. Aggrieved by the order of ld.CIT(A), the Revenue is now in appeal before us.

5. The ld.DR submitted that the order passed by the ld.CIT(A) was wrong both on the legal grounds as well as on facts.

6. The ld.DR had submitted that the ld.CIT(A) has wrongly held that the assessee was entitled to file the revised return after receipt of the notices u/s 153A of the Act by making a new version. He had relied upon the following decisions :

1.	GMR Infrastructure Limited Vs. DCIT, - ITA 1036 of 2017
2.	Jai Steels (India) Jodhpur Vs. ACIT - 36 Taxmann.com 523
3.	Plastiblends India Ltd. Vs. Addl.CIT – 86 Taxmann.com
4.	Rachna Infrastructure (P.) Ltd. [2022] 138 taxmann.com 416 (Gujarat)
5.	NEC NCC Maytas JV Vs. DCIT – ITA Nos. 430 to 432/Hyd/2016 and others.
6.	Katira Construction Ltd. Vs. Union of India – (2013) 31 taxmann.com 250 Gujarat
7	PCIT and another Vs. M/s. Wipro Limited – Civil Appeal No.1449 of 2022 arising out of SLP (Civil) No.7620/2021

7. It was the contention of the ld.DR that the assessee cannot take the benefit of the proceedings u/s 153A of the Act, as the said proceedings are for the benefit of the Revenue. It was also the contention of the ld.DR that the Chapter dealing with search and seizure is a complete Code in itself and our attention was drawn to provisions of Section 153A of the Act which make

it abundantly clear that the provisions contained in sections 139, 147, 148, 149 and 153 would give way to the provisions of section 153A of the Act. It was submitted that once the assessee has not claimed the benefit of deduction u/s 80IA in the original return of income, then the same cannot be claimed while filing the return of income in pursuance to the notice issued u/s 153A. The Ld. DR also relied upon the provisions of section 80AC and 80A(5) in support of the case of the revenue.

7.1. Further, it was submitted by the ld. DR that the Assessing Officer was correct in disallowing the claim of 80IA as the assessee was not the owner of the infrastructural facilities laid / installed / created by it. In fact, the owner of the said infrastructural facilities were the Superintendent Engineer / Chief Engineer / Project Director of the concerned Government Department. He drew our attention to pages 3 to 5 of the assessment order and had also drawn support from the decision of ITAT, Mumbai Bench in the case of B.B. Patil Vs. ACIT and the decision of Co-ordinate Bench of the Tribunal in the case of NEC NCC Maytas JV (supra). He has specifically drawn our attention to Paras 8, 13 to 17 of the said decision.

8. On the other hand, the ld.AR submitted that the case of the assessee is covered in its favour by the decisions of the Hon'ble High Court and the Tribunal. He referred to and relied upon the following decisions in support of his claim that

assessee is permitted to file the return of income and can make new claim of deduction in response to the notice u/s 153A of the Act for the first time. The case laws relied upon by the assessee are as under :

1.	PCIT – 2 Vs. M/s. JSW Steel Ltd – ITA No.1934 of 2017 of Mumbai High Court.
2.	PCIT – 19 Vs. Shri Neeraj Jindal – ITA No.463 of 2016 of Delhi High Court
3.	ACIT Vs, M/s. Splendor Landbase Limited of ITA No.2461/Del/2016 and C.O.No.215/Del/2016.
4.	DCIT Vs. Megha Engineering and Infrastructure Limited, Hyderabad – ITA Nos.607 to 610/Hyd/2016 and others.
5.	M/s. KNR Constructions Vs. DCIT, Central Circle – 3 – ITA No.946/Hyd/2015 and others.
6	PCIT Vs. Vijay Infrastructure 402 ITR 363 (Allahabad)
7	Gopal Lal Bhadruka Vs. DCIT [2012] 27 taxmann.com 167 (Andhra Pradesh)/[2012] 346 ITR 10...
8	PCIT Vs. Abhisar Buildwell (P.) Ltd. Reported in [2023] 149 taxmann.com 399 (SC)

9. The ld.AR had submitted that the decisions relied upon by the ld.DR are distinguishable on facts and law. It was submitted that though there are decisions of Hon'ble Karnataka High Court and Rajasthan High Court against the assessee, however, there are decisions in favour of the assessee passed by the Hon'ble Bombay High Court and Delhi High Court. It was the contention of the learned counsel for the assessee that in case of availability of conflicting decisions, the decision in favour of the assessee is required to be applied. For the above proposition, he relied upon the decision of Hon'ble Supreme Court in the case of CIT Vs. Vegetable Products Ltd., [1973] 88 ITR 192 (SC).

9.1. Further, it was the contention of the ld.AR that the decision of Hon'ble Mumbai High Court in the case of EBR Enterprises (supra) related to section 264 of the Act whereby the Hon'ble Bombay High Court had held that the assessee cannot revise the return and claim the benefit of section 80IA. It was also submitted by the ld.AR that the Revenue has already challenged the order of Tribunal passed in the case of Megha Engineering and Infrastructure (supra) before the jurisdictional High Court and the same is pending for adjudication. It was submitted that no stay has been granted by the hon'ble jurisdictional High Court in the case of Megha Engineering and Infrastructure (supra) and KNR Constructions (supra). Therefore, the decisions of the co-ordinate Bench rendered in the case of Megha Engineering and Infrastructure (supra) and KNR Constructions (supra) are binding on the Tribunal.

9.2. The ld.AR further referred to the following written submissions and submitted that assessee is entitled to relief u/s 80IA(5) of the Act for the following reasons :

> *"The Assessee Company is engaged in the business of Contracts for Civil Works and development of Infrastructure Projects. During the Financial Year 2008-2009 relevant to Asst. Year 2009-2010, some of the major projects executed and developed by the Company are:*
>
> *1. Package No.42: Construction of pick up weir and regulator near Kristipadu village, excavation and formation of Yadiki Canal system and excavation of Link Channel from chagallu to Pendekallu reservoir with 2200 cusecs capacity including investigation, design, estimation to create a total IP of 28,600 acres and formation of flood banks on right side of Penna river*

from Buggaramalingaswamy temple to Peddapappur road (3000 mtrs.) at Tadipatri town in Anantapur Dist.

2. Modernization of Mylavaram South Canal (Packagr-91) Earthwork Excavation, C.C. Lining including Mylavaram Head works and improvements of the reservoir South Canal from Km.0.000 to Km.44,440 and its Distributary system to irrigate an extent of 25000 acres.

3. Package No.48A/06-0 Additional investigation, Design, Preparation of estimates and earthwork excavation for widening of GNSS Flood Flow Canal-II from Owk Reservoir to Gandikota Reservoir from km.15.874/16,500 to 32.520/34.800 (Length:16.02km) including construction of all CM & CD works enroute the can for a carrying capacity of 20,000/- c/s in Kurnool & Kadapa Districts.

4. HNSS Project-Phase II works-Investigation, Preparation of HPs, design, excavation, construction of CM & CD of HNSS main canal from km.340.000 to km.360.000 excluding tunnel from km.358.000 to 360.000 under HNSS Phase-II in Anantapur Dist.-Package No.9.

5. Modernization of Mylavaram South Canal (Package – 91) Earthwork Excavation, C.C.Lining including Mylavaram Head works and improvements to the reservoir South Central Canal from Km.0.000 to Km.44.440 and its distributor system to bring under irrigation 25,000 acres.

6. Telugu Ganga Project, Kadapa-Providing Lift-irrigation facilities under lift scheme of left over lands within and nearby the general boundary of pulivendula Branch Canal on both sides from km.0.00 to 35.025 – package 92A and km.35.025 to 68.00 – Package 93A and formation of distributor system for new additional ayacut including formation of new tanks and improvements to existing tanks.

7. Dr.B.R. Ambedkar Pranahita-Chevella Sujala Sravanthi Package No.24: investigation, Design and execution of water conveyor system consisting of lined gravity canal, CM & CD works, lined tunnel and lift with a carrying capacity of 79.20 cumecs from Rawulapally village to Hussainpur village.

9.3. The ld.AR submitted that Assessee is carrying on the business of developing, operating and maintaining infrastructure facilities and is entitled for deduction u/s.80IA(4) of the Income Tax Act, 1961. It was the contention of the ld.AR

that the Assessee had entered into agreement with the Govt. Authorities and the work of the assessee is not confined to "a part of the work" but the work was undertaken on turnkey basis. The entire site has been handed over to the Assessee for carrying out the work as per requirements and also operating system for certain period mentioned therein and completed the project at the end of above said period and as such Assessee is the developer and also operating the system for certain period. The Assessee developed infrastructure projects relating to water supply scheme by designing, erecting, testing and functioning of the project. The ld.AR had drawn our attention to section 80IA(4) as the assessee fulfilled the essential conditions laid down by the said section. The Assessee submits the above projects being developed, operated, and maintained by the Assessee are covered under the definition of infrastructure facility. Therefore, there cannot be any dispute with regard to the fact that the Assessee herein is engaged in the activity of developing infrastructure facility.

9.4 The ld.AR submitted that from the plain reading of the section, it is clear that the Assessee is an enterprise for developing or operating and maintain or developing, operating, maintaining any infrastructure facility has to fulfill all the conditions as mentioned in the sub-clause a, b and c of the section. It was submitted that the Assessee was awarded the contract of "Construction, Modernization, Excavation, preparation of estimates and investigation" of facility by the

concerned Govt. Dept. The Assessee has fulfilled all the conditions as mentioned under the provisions of Section 80IA(4) and in denying the claim of the Assessee, the Assessing Officer wrongly construed that the Assessee is a "contractor" and not carried out any development activities. It is also submitted by the ld.AR that though the expression 'works contract" has not been defined in the Act but various judicial pronouncements examined the issue and held that the term has wider meaning so as to state that if the activities carried out by the Assessee involve development of project, engagement of various agencies, undertaking risk element and during the construction of project, the Assessee has to make all the arrangements and is liable for procurement of water, electricity, all materials, skilled, semi-skilled staff, laborers, plant & machinery, equipment's & tools, and also wellbeing of the staff/laborers. It was also argued that the Assessee is always burdened with financial risk to carry out the project work at own cost with the fixed rate specified in the tender. The payment would be made by the competent authority every after a period upon completion of certain work. The construction and development of infrastructure projects is highly technical and required special skill, adherence to quality etc. Moreso, the Assessee is not compensated for increase in prices of materials, cost of laborers, overhead expenses etc. Therefore the Assessee is not merely a works contractor, but was engaged in development of project as a whole, and therefore, entitled for claim of deduction under section 80IA(4) of the Act, though not being the owner of the facility. It was contended that

the primary condition was that the enterprise must carry on the work of "developing" an infrastructure facility. As mentioned above, Explanation under sub-Section (13) of Section 80-IA clarifies that this section will not apply to any business which is in the nature of a "works contract". In other words, the essence of this section is that, the benefit of Section 80-IA(4) would be available to a developer and not to a contractor simpliciter.

10. He submitted that the Assessing Officer has denied the benefit of Section 80IA(4), on the assumption that the Assessee is engaged in executing merely a work contract and it is not carrying on the business of developing an infrastructure facility. The Assessee has undertaken entirely and exclusively the projects awarded by the government authorities, as it is evident from the details of contracts given above. The difference between a "developer" and a "contractor" has to be properly analyzed and understood after relying various case laws, various Appellate Fora have laid down the following parameters when to treat an Assessee as a developer or contractor. The Assessee does not have to develop the entire infrastructure facility to qualify for deduction u/s.80IA(4) and if only a part of the infrastructure facility is developed, the Assessee would be eligible for deduction. The three requirements of section 80IA(4) viz. development, operation and maintenance are not cumulative. Thus, an enterprise which only develops facility would also be entitled to the benefit of section 80IA(4). Merely because the

Assessee is referred to as a contractor in the agreement, it would not debar it from claiming deduction. It was emphasized that the direct agreement between the Assessee and the specified authority was not a mandatory requirement u/s.80IA(4) of the I.T. Act. He referred to the decisions in the case of PCIT Vs. Vijay Infrastructure (supra), wherein it was held as under :

> *"5. Sri Manish Misra, the learned counsel for the appellant contended that the return under section 153A is not a revised return but it is a original return. If that be so, then in our view, deduction under section 80IA, if otherwise admissible, always could have been claimed and we are not shown any authority otherwise to take a different view. Therefore, in both ways, deduction under section 80IA, if otherwise admissible, could have been claimed by the assessee. Hence, we answer both the aforesaid questions in favour of the assessee and against the Revenue affirming the view taken by the Tribunal."*

11. The ld. AR for the assessee submitted that the Assessing Officer had misrepresented the clause (a) of Section 80IA(4). He further submitted that Clause (1) of Section 80IA(4) speaks about the ownership of the enterprise undertaking the development, operation and maintenance of the infrastructure facility. He further submitted that the word "ownership" is attributable only to the enterprise carrying on the business which would mean that only companies are eligible for deduction under section 80IA(4) of the Act and not any other person like individual, HUF, Firm etc.

11.1 Ld. AR for the assessee further submitted that according to sub-clause (a) of sub-section (4) of Section 80-IA, the word "it" denotes the enterprise carrying on the business. The word "it" cannot be related to the infrastructure facility, particularly in view of the fact that infrastructure facility includes Rail Systems, Highway Project etc, which cannot be owned by anyone. Even otherwise, the word "it" denotes an enterprise. In view of the above, he contended that there is no requirement that the assessee should have been the owner of the infrastructure facility.

11.2 Referring to the decision in the case of Abhisar Buildwell Pvt. Ltd (supra), he drew our attention to the same wherein it is held as under :

> *"14. In view of the above and for the reasons stated above, it is concluded as under:*
>
> *(i) that in case of search under section 132 or requisition under section 132A, the AO assumes the jurisdiction for block assessment under section 153A;*
>
> *(ii) all pending assessments/reassessments shall stand abated;*
>
> *(iii) in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns; and*
>
> *(iv) in case no incriminating material is unearthed during the search, the AO cannot assess or reassess taking into consideration the other material in respect of completed assessments/unabated assessments. Meaning thereby, in respect of completed/unabated assessments, no addition can be made by the AO in absence of any incriminating material found during the course of search under section 132 or requisition under section 132A of the Act, 1961. However, the completed/unabated assessments can be re-opened by the AO in exercise of powers under sections 147/148 of the Act, subject to fulfilment of the conditions as envisaged/mentioned under sections 147/148 of the Act and those powers are saved."*

12. Referring to the decision in the case of Gopal Lal Bhadruka (supra), he drew our attention to the same wherein it is held as under :

> *"17. By virtue of section 158BI of the Act, the various provisions of Chapter XIV-B of the Act are made inapplicable to proceedings under section 153A/153C of the Act. The effect of this is that while the provisions of Chapter XIV-B of the Act limit the inquiry by the Assessing Officer to those materials found during the search and seizure operation, no such limitation is found in so far as section 153A/153C of the Act are concerned. Therefore, it follows that for the purposes of section 153A/153C of the Act the Assessing Officer can take into consideration material other than what was available during the search and seizure operation for making an assessment of the undisclosed income of the assessee."*

13. The ld.DR for the Revenue rebutted the submissions made by the assessee. He submitted that the decision of the Hon'ble Bombay High Court in the case of Jai Steels (supra) was not applicable to the facts of the present case as it was the case of an abated assessment. Further, the decision of Hon'ble Delhi High Court in the case of Neeraj Jindal (supra) is also not applicable to the facts of the case as the said decision was under section u/s 271(1)(c) of the Act. Further, he submitted that the recent decision of the Tribunal in the case of NEC NCC Maytas JV (supra) had elaborately discussed various aspects of the matter and thereafter, had decided the issue in favour of the Revenue.

14. We have heard the rival submissions and perused the material available on record. The ld. AR for assessee had made elaborate submissions on the eligibility of assessee to claim deduction on facts and law, for which he relied on various

decisions of Hon'ble High Court and Hon'ble Supreme Court. More particularly, the ld. AR for the assessee had relied upon the decision of hon'ble Karnataka High Court in the case of PCIT Vs. Menzies Aviation Bobba (Bangalore) Pvt. Ltd. (2021) 133 Taxmann.458, against which SLP had been filed by the department and the same was dismissed. Though, the assessee may be having a case on merit but before examine the eligibility of the assessee under Section 80-IA of the Act, assessee is required to cross the first hurdle i.e., whether the assessee can be permitted to make a fresh claim in the return of income filed pursuant to notice u/s 153A of the Act.

14.1. For the above-said controversy, it is necessary to look into the provisions of Section 153A, 80AC, 80IA and 139 of the Act. From the bare reading of the provision of section 153A of the Act, it is clear that the assessee was required to file the return of income after receipt of notice in the search assessment for all the six assessment years. However, clause (a) of section 153A provides that the return of income so filed shall be filed " *in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;"*

15. It is essential for the assessee to file the return of income in the manner provided under section 139 and further, it is essential for the assessee to furnish such other particulars as may be required to be filed in accordance with law. The statute has used the word "such other particulars" in clause (a) of section 153A of Income Tax Act 1961. The word "such other particulars" should not be given a restrictive meaning as the assessee was duty-bound not only to disclose the income, expenditure but also the deduction and exemption in accordance with provisions of the Income Tax Act, which cast duty on the assessee to mention and provide all the details. In case, the assessee failed to provide the necessary information, which are beneficial to the Revenue and detrimental to the assessee, the Assessing Officer is empowered to make the additions as and when such information comes to the notice of the Assessing Officer.

16. However, if the assessee claims a deduction or exemption in response to notice u/s 153A, which is not claimed at the time of original return of income, **whether the Assessing Officer should entertain the fresh claim of deduction made for the first time in the assessment proceedings under section 153A or not.** For the purposes of examining this proposition, it is necessary to look into the provisions section 80AC of the Act. The section 80AC of the Act provides as under :

*"80AC. Where in computing the total income of an assessee of the previous year relevant to the assessment year commencing on the 1st day of April, 2006 or any subsequent assessment year, any deduction is admissible under section 80-IA or section 80-IAB or section 80-IB or section 80-IC [or section 80-ID or section 80-IE], no such deduction shall be allowed to him unless **he furnishes a return of his income for such assessment year on or before the due date specified under sub-section (1) of section 139.]"***

17. The assessee is only entitled to claim the deduction under section 80IA, if he furnished the return of income for the assessment year, on or before the due date of filing the return of income as per section 139(1) of the Act.

18. Section 139(1) of the Act relevant to the assessment year provides as under :

139. 98[(1) Every person99,—

(a) being a company 1[or a firm]; or

*(b) being a person other than a company 1[or a firm], if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax, shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year**, in the prescribed form** and **verified in the prescribed manner and setting forth such other particulars as may be prescribed :***

Provided that a person referred to in clause (b), who is not required to furnish a return under this sub-section and residing in such area as may be specified by the Board in this behalf by notification3 in the Official Gazette, and who 4[during the previous year incurs an expenditure of fifty thousand rupees or more towards consumption of electricity or] at any time during the previous year fulfils any one of the following conditions, namely :—

(i) is in occupation of an immovable property exceeding a specified floor area, whether by way of ownership, tenancy or otherwise, as may be specified5 by the Board in this behalf; or

(ii) is the owner or the lessee of a motor vehicle other than a two-wheeled motor vehicle, whether having any detachable side car having extra wheel attached to such two-wheeled motor vehicle or not; or

(iii) 6[***]

(iv) has incurred expenditure for himself or any other person on travel to any foreign country; or

(v) is the holder of a credit card7, not being an "add-on" card, issued by any bank or institution; or

(vi) is a member of a club where entrance fee charged is twenty-five thousand rupees or more,

shall furnish a return, of his income 8[during any previous year ending before the 1st day of April, 2005], on or before the due date in the prescribed form9 and verified in the prescribed manner and setting forth such other particulars as may be prescribed :

Provided further that the Central Government may, by notification10 in the Official Gazette, specify the class or classes of persons to whom the provisions of the first proviso shall not apply:

Provided also that every company 11[or a firm] shall furnish on or before the due date the return in respect of its income or loss in every previous year :

11[Provided also that every person, being an individual or a Hindu undivided family or an association of persons or a body of individuals, whether incorporated or not, or an artificial juridical person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year, without giving effect to the provisions of section 10A or section 10B or section 10BA or Chapter VI-A exceeded the maximum amount which is not chargeable to income-tax, shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed.]

19. The Rule 12 provides as under :

12. (1) The return of income required to be furnished under sub-section (1) or sub-section (3) or sub-section (4A) or sub-section (4B) or sub-section (4C) or sub-section (4D) 35[or sub-section (4E)] 36[or sub-section (4F)] of section 139 or clause (i) of sub-

section (1) of section 142 36a[or section 148] or section 153A 37[***] relating to the assessment year commencing 38[on the 1st day of April, 39[2023]] shall,—

12(f) in the case of a company not being a company to which clause (g) applies, be in Form No. ITR-6 and be verified in the manner indicated therein;

(g) in the case of a person including a company whether or not registered under section 25 of the Companies Act, 1956 (1 of 1956)66, required to file a return under sub-section (4A) or sub-section (4B) or sub-section (4C) or sub-section (4D) 67[***] of section 139, be in Form No. ITR-7 and be verified in the manner indicated therein;

69*[(2) The return of income required to be furnished in Form SAHAJ (ITR-1) or Form No. ITR-2 or Form No. ITR-3 or* 70*[Form SUGAM (ITR-4)] or Form No. ITR-5 or Form No. ITR-6* 71*[or Form No. ITR-7] shall not be accompanied by a statement showing the computation of the tax payable on the basis of the return, or proof of the tax, if any, claimed to have been deducted or collected at source or the advance tax or tax on self-assessment, if any, claimed to have been paid or any document or copy of any account or form or report of audit required to be attached with the return of income under any of the provisions of the Act:]*

72*[Provided that where an assessee is required to furnish a report of audit specified under sub-clause (iv), (v), (vi) or (via) of clause (23C) of section 10, section 10A* 73*[, section 10AA], clause (b) of sub-section (1) of section 12A, section 44AB* 73*[, section 44DA, section 50B], section 80-IA, section 80-IB, section 80-IC, section 80-ID, section 80JJAA, section 80LA, section 92E,* 74*[section 115JB* 75*[, section 115JC] or section 115VW]* 76*[or to give a notice under clause (a) of sub-section (2) of section 11] of the Act, he shall furnish the same electronically.]*

20. The Rule 18BBB provides as under :

[Form of audit report for claiming deduction under section 80-I or 80-IA or 74[80-IB or section 80-IC].

18BBB. (1) The report of the audit of the accounts of an assessee, which is required to be furnished under sub-section (7) of section 80-IA or sub-section (7) of section 80-I, except in the cases of multiplex theatres as defined in sub-section (7A) of section 80-IB or convention centres as defined in sub-section (7B) of section 80-IB 75[or hospitals in rural areas as defined in sub-section (11B) of section 80-IB], shall be in Form No. 10CCB.

(2) A separate report is to be furnished by each undertaking or enterprise of the assessee claiming deduction under section 80-I or 80-IA or 80-IB 75[or 80-IC] and shall be accompanied by the Profit and Loss Account and Balance Sheet of the

undertaking or enterprise as if the undertaking or the enterprise were a distinct entity.

(3) In the case of an enterprise carrying on the business of developing or operating and maintaining or developing, operating and maintaining an infrastructure facility, the form shall be accompanied by a copy of the agreement of the enterprise with the Central Government or the State Government or the local authority for carrying on the business of developing or operating and maintaining or developing, operating and maintaining the infrastructure facility.

(4) In any other case, the form shall be accompanied by a copy of the agreement, approval or permission, as the case may be, to carry on the activity signed or issued by the Central Government or the State Government or the local authority for carrying on the eligible business.]"

21. From the conjoint reading of section 139(1) read with section 80AC and Rules 12 and 18BBB, it is abundantly clear that for the purpose of claiming deduction under section 80IA, it is essential for the assessee to file the return of income before the due date of filing return of income so provided under section 139(1) of the Act and claim the deduction therein. Along with the return of income, the assessee is duty bound in filing the audit report along with the agreement, approval or permission for carrying out the activities under section 80IA of the Act from the approved Government Authority. In the present case, neither the deduction was claimed by the assessee nor the agreement / approval etc. were filed along with the original return as required as per Rule 18BBB r.w Form 10 CCB in this regard. In our view, the filing of the audit report and claiming the deduction in the return of income before filing the original return of income is mandatory. As the assessee failed to file the required audit report claiming the deduction under the

prescribed Rules 12 and 18BBB r.w Form 10 CCB in the return of income filed on 30.09.2009, hence, the assessee in our opinion would not be entitled to claim any deduction.

22. In the present case, as per the assessment order, the assessee has not claimed any deduction in the original return of income filed on 30.09.2009. The assessee has not claimed such deduction under section 80IA during the assessment proceedings for the said assessment year, though order was passed under section 143(3) of the Act.

23. The assessee has claimed deduction for the first time in the return of income filed in response to notice under section 153A of the Act. The paper return was filed by the assessee on 09.10.2013, whereas the assessee was required to file electronic return. The assessee had filed the electronic return on 28.03.2014, claiming the deduction under section 80IA for an amount of Rs.2,50,55,348/-.

24. For the purpose of claiming the deduction, it was essential to claim the deduction before or on the date of filing the return under section 139(1) of the Act. Admittedly, the assessee has neither claimed the deduction in the original return of income filed on 30.09.2009 nor had claimed the deduction during the original assessment proceedings for A.Y. 2009-10

passed u/s 143(3) of the Act. The Assessing Officer had passed the assessment order on 22.12.2011 determining the total income of assessee at Rs.30,60,90,932/-. For all purposes, the assessment order, had attained finality in respect to the issues and matters which were subject matter of the assessment proceedings.

25. The assessee also filed copies of return of income for A.Y.s 2009-10 to 2012-13, the copies of Tax Audit reports for the same assessment years. Besides that the assessee had also filed copies of return of income from A.Y.s 2009-10 to 2012-13 u/s 153A of the Act. The summary of the above said documents clearly show that in the return of income filed for A.Y. 2009-10 dt.30.09.2009, the assessee has not claimed any deduction u/s 80IA of the Act which is clear from page 6 of the paper book. Similarly, for A.Y. 2012-13 also income tax return was filed on 30.09.2012 and in that also no deduction u/s 80IA of the Act was claimed. In form No.3CD also at Page 14, under Sl.No.26, nothing was mentioned.

26. Similarly, at page 23, at Sl.No.26 it was mentioned as "N.A". Then at page 35 of the paper book, assessee had filed the return of income u/s 153A of the Act for A.Y. 2009-10 on 19.03.2014 and at page 36, the assessee had claimed 80IA deduction for the first time at Rs.2,49,05,348/-. For A.Y. 2010-11 also the assessee had filed return of income on 27.03.2014

and claimed deduction of Rs.12,26,58,353/- under section 80IA of the Act at Page 38 of the paper book. Similarly, the assessee had claimed deduction of Rs.3,13,58,465/- under section 80IA at page 40 of the paper book. Assessee filed return of income for A.Y. 2012-13 on 28.03.2014 and claimed deduction of Rs.9,15,51,728/- under section 80IA of the Act at page 42 of the paper book.

27. Thereafter, in Form 10CCB was also filed along with the return of income and at page 47, at Sl.Nos.26, 27 and 30, it was mentioned as under :

26	For claim of deduction under section 80-IA(4)(ii) and (iv)/80-IB(3), (4), (5), (7) and (11)/80-IC please indicate :	Yes	No
	(a) Whether the undertaking or enterprise has been formed by the splitting up or the reconstruction of a business already in existence		✓
	(b) If yes, whether the circumstances and the period specified in section 33B is applicable (please give details)		
	(c) Has the undertaking or enterprise received any machinery or plant on transfer which was previously used for any purpose		✓
	(d) If yes, please specify value of machinery or plant received on transfer		
	(e) Total value of machinery or plant used in business	Rs.27,71,93,962/-	
27	Total Sales of the undertaking	Rs.406,09,16,733/-	
30	Deduction under section 80-I/80-IA/80-IB/80-IC (strike out whichever is not applicable)	Rs.2,49,05,348/-	

27.1. Similarly, at page 53 for the A.Y. 2010-11 at Sl.Nos.26, 27 and 30, it was mentioned as under :

26	For claim of deduction under section 80-IA(4)(ii) and (iv)/80-IB(3), (4), (5), (7) and (11)/80-IC please indicate :	Yes	No
	(a) Whether the undertaking or enterprise has been formed by the splitting up or the reconstruction of a business already in existence		✓
	(b) If yes, whether the circumstances and the period specified in section 33B is applicable (please give details)		
	(c) Has the undertaking or enterprise received any machinery or plant on transfer which was previously used for any purpose		✓
	(d) If yes, please specify value of machinery or plant received on transfer		
	(e) Total value of machinery or plant used in business		
27	Total Sales of the undertaking	Rs.470,85,65,424/-	
30	Deduction under section 80-I/80-IA/80-IB/80-IC (strike out whichever is not applicable)	Rs.12,26,58,353/-	

27.2. Thereafter, at page 59 for the A.Y. 2011-12 at Sl.Nos.26, 27 and 30, it was mentioned as under :

26	For claim of deduction under section 80-IA(4)(ii) and (iv)/80-IB(3), (4), (5), (7) and (11)/80-IC please indicate :	Yes	No
	(a) Whether the undertaking or enterprise has been formed by the splitting up or the reconstruction of a business already in existence		✓
	(b) If yes, whether the circumstances and the period specified in section 33B is applicable (please give details)		
	(c) Has the undertaking or enterprise received any machinery or plant on transfer which was previously used for any purpose		✓
	(d) If yes, please specify value of machinery or plant received on transfer		
	(e) Total value of machinery or plant used in business	Rs.25,14,66,543/-	
27	Total Sales of the undertaking	Rs.502,88,62,039/-	
30	Deduction under section 80-I/80-IA/80-IB/80-IC (strike out whichever is not applicable)	Rs.3,13,58,465/-	

27.3. Thereafter, at page 63 for the A.Y. 2012-13 at Sl.Nos.26, 27 and 30, it was mentioned as under :

26	For claim of deduction under section 80-IA(4)(ii) and (iv)/80-IB(3), (4), (5), (7) and (11)/80-IC please indicate :	Yes	No
	(a) Whether the undertaking or enterprise has been formed by the splitting up or the reconstruction of a business already in existence		✓
	(b) If yes, whether the circumstances and the period specified in section 33B is applicable (please give details)		
	(c) Has the undertaking or enterprise received any machinery or plant on transfer which was previously used for any purpose		✓
	(d) If yes, please specify value of machinery or plant received on transfer		
	(e) Total value of machinery or plant used in business		
27	Total Sales of the undertaking	Rs.5,10,14,32,623/-	
30	Deduction under section 80-I/80-IA/80-IB/80-IC (strike out whichever is not applicable)	Rs.17,16,76,560/-	

28. On the basis of the above, it is clear that the assessee has not claimed deduction under section 80IA of the Act in the original proceedings and also have not filed the audit report however, at the time of filing of return of income under section 153A of the Act, the assessee had filed the audit reports and claimed deduction under section 80IA of the Act.

29. A perusal of the assessment order passed under section 143(3) r.w. section 153A dated 31.03.2014, shows that the Assessing Officer has accepted the income determined as per the assessment order under section 143(3) dt.22.12.2011 for Rs.30,60,90,932/-. Thus, no addition was made by the

Assessing Officer during the assessment proceedings under section 143(3) r.w. section 153A of the Act. In our view, the Assessing Officer was right in denying the claim of deduction u/s 80IA to the assessee as no addition was made in the hands of the assessee during the assessment proceedings on account of any incriminating material. Further, the issues which have attained finality, in an unabated assessment are required to be restricted having a live link with the incriminating material.

30. The Revenue relied upon three decisions in support of the legal claim that the assessee cannot be permitted to file the revised return of income u/s 153A of the Act and claim the deductions which were not otherwise claimed in the regular return of income. The first decision relied upon by the Revenue was GMR Infrastructure Limited Vs. DCIT in ITA 1036 of 2017, wherein the Hon'ble Karnataka High Court, relying upon the decision in the case of Jai Steels (India) Jodhpur Vs. ACIT reported in 36 Taxmann.com 523, had held in Para 6 as under :

> *"6. We have considered the submissions made on both sides and have perused the record. The Tribunal, by placing reliance on the decision of JAI STEELS, supra, has held that the assessment or re-assessment made in pursuance to Section 153A of the Act, is not a de novo assessment and therefore, it was not open to the assessee to claim and be allowed such deduction or allowance of expenditure which it had not claimed in the original assessment proceedings which in the case of the assessee stood completed vide order dated 15.01.2009 passed under Section 143(1) of the Act. The Tribunal, in our opinion, has followed the decision of Rajasthan High Court and we confer the view taken by Rajasthan High Court in JAI STEELS, supra."*

31. On the other hand, the ld.AR had relied upon the decision of Hon'ble Bombay High Court in the case of PCIT Vs. M/s. JSW Steel Ltd (ITA No.1934 of 2017), the decisions of Hon'ble Delhi High Court in the case of PCIT Vs. Shri Neeraj Jindal (ITA No.463 of 2016) and ACIT Vs, M/s. Splendor Landbase Limited (ITA No.2461/Del/2016 and C.O.No.215/Del/ 2016), the decisions passed by Co-ordinate Bench of the Tribunal, Hyderabad in the case of DCIT Vs. Megha Engineering and Infrastructure Limited (ITA Nos.607 to 610/Hyd/2016 and others) and M/s. KNR Constructions Vs. DCIT, Central Circle – 3. (ITA No.946/Hyd/2015 and others).

32. We are of the opinion that re-assessment proceedings u/s 153A is not a denovo re-assessment as the re-assessment can only be made with respect to the incriminating material found during the course of search. The above said finding is based on the finding recorded by the Hon'ble High Courts in the cases of (1) GMR Infrastructure Limited Vs. DCIT (ITA 1036 of 2017 of Hon'ble Karnataka High Court), (2) Jai Steels (India) Jodhpur Vs. ACIT reported in 36 taxmann.com 523 (Bombay High Court) and (3) Rachana Infrastructure (P) Ltd., (2022) 138 taxmann.com 416 (Gujarat High Court). For the above said purposes, we are reproducing the finding portion of the Hon'ble Gujarat High Court in the case of Rachana Infrastructure which in turn had relied upon other decisions and which is as under :

"7. *So far as the first relief which is sought for by the writ applicant as regards the challenge to the impugned order dated 19-6-2020 passed by the Principal Commissioner of Income Tax-3, Ahmedabad is concerned, in our view, the same is squarely covered by the decision of the Bombay High Court in the case of EBR Enterprises v. Union of India [2019] 107 taxmann.com 220/ 266 Taxman 15 (Mag.)/ 415 ITR 139. The question for consideration which arose before the Bombay High Court in the aforesaid case was that whether the Commissioner was justified in exercise of powers conferred under section 264 of the Act in rejecting the revision application more particularly, when the assessee had failed to raise the claim of deduction under section 80-IB(10) and subsequently being raised before the Commissioner for the first time in revision. It appears that the attention of the Court was drawn to section 80A(5) of the Act and similar contention was raised by the assessee therein. The Bombay High Court after considering the submissions of the assessee therein as well as taking note of sub section (5) which was inserted in section 80A of the Act by Finance(2) Act, 2009 with retrospective effect from 1-4-2003, ultimately held as under:*

'5. As per this provision, where the assessee fails to make a claim in his return of income for any deduction under section 10A or section 10AA or section 10B or section 10BA or under any provision of the said Chapter - VI A under the heading "C.-Deduction in respect of certain incomes", no deduction would be allowed to him under the said provision. In plain terms, this sub-section (5) of section 80A of the Act imposes an additional condition for claim of deduction in relation to income under any of the provisions mentioned therein. Apart from the requirement of fulfillment of individual set of respective conditions for the purpose of claiming the concerned deduction, this plenary condition requires that the claim ought to have made in the return of income by the assessee and if the assessee fails to make such claim in the return of income, such deduction shall not allowed to him under the relevant provision. Admittedly, in the present case, the Petitioners had not raised any such claim in the return of income. In plain terms, the claim of the Petitioners under section 80-IB (10) of the Act would be hit by sub-section (5) of section 80A of the act.

6. We are conscious that in absence of the provision contained in section 80A (5) of the Act, the Petitioners could have maintained the claim of deduction even before the CIT for the first time in Revision Application, though no such claim was made before the Assessing Officer, if from the facts on record, the Petitioners could sustain the said claim in law. This is very clear from the series of Judgments of various High Courts. Reference can be made to the decision of High Court of Gujarat in case of C. Parikh & Co. v. CIT [1980] 4 Taxman 224/ 122 ITR 610. In the said decision, the Court held that:

"it is clear that under section 264, the CIT is empowered to exercise revisional powers in favour of the assessee. In exercise of this power, the CIT may, either of his own motion or on an application by the assessee, call for the record of any proceeding under the Act and pass such order thereon not being an order prejudicial to the assessee, as the thinks fit.

Sub - ss. (2) and (3) of section 264 provide for limitation of one year for the exercise of this revisional power, whether suo motu, or at the instance of the assessee. Power is also conferred on the CIT to condone delay in case he is satisfied that the assessee was prevented by sufficient cause from making the application within the prescribed period. Sub-s. (4) provides that the CIT has no power to revise any order under s. 264(1) : (i) while an appeal against the order is pending before the AAC, and (ii) when the order has been subject to an appeal to the Tribunal. Subject to the above limitation, the revisional powers conferred on the CIT under s. 264 are very wide. He has the discretion to grant or refuse relief and the power to pass such order in revision as he may think fit. The discretion which the CIT has to exercise is undoubtedly to be exercised judicially and not arbitrarily according to his fancy. Therefore, subject to the limitation prescribed in S. 264, the CIT in exercise of his revisional power under the said section may pass such order as he thinks fit which is not prejudicial to the assessee. There is nothing in s. 264 which places any restriction on the CIT's revisional power to give relief to the assessee in a case where the assessee detects mistakes on account of which he was over assessed after the assessment was completed. We do not read any such embargo in the CIT's power as read by the CIT in the present case. It is open to the CIT to entertain even a new ground not urged before the lower authorities while exercising revisional powers. Therefore, though the Petitioner had not raised the grounds regarding under-totalling of purchases before the ITO, it was within the power of the CIT to admit such a ground in revision. The CIT was also not right in holding that the over-assessment did not arise from the order the assessment. Once the Petitioner was able to satisfy that there was a mistake in totaling purchases and that there was under- totalling of purchases to the tune of Rs. 20,000, it is obvious that there was over-assessment. In other words, the assessment of the total income of the assessee is not correctly made in the assessment order and it has resulted in over-assessment. The CIT would not be acting de hors the IT Act, if he gives relief to the assessee in a case where it is proved to his satisfaction that there is over-assessment, whether such over-assessment is due to a mistake detected by the assessee after completion of assessment or otherwise. In our opinion, the CIT has misconstrued the words "subject to the provisions of this Act" in s. 264(1) and read a restriction on his revisional power which does not exist. The CIT was, therefore, not right in holding that it was not open to him to give relief to the Petitioner on account of the Petitioner's own mistake which it detected after the assessment was completed. Once it is found that there was a mistake in making an assessment, the CIT had power to correct it under s. 264(1). In our opinion, therefore, the CIT was wrong in not giving relief to the Petitioner in respect of over-assessment as a result of under-totalling of the purchases to the extent of Rs. 20,000."

7. This was reiterated in case of Ramdev Exports v. CIT [2002] 120 Taxman 315/[2001] 251 ITR 873 (Guj.). This Court also in case of Danny Denzongpa v. CIT [2010] 7 taxmann.com 81/194 Taxman 415 [2012] 344 ITR 166, has taken a similar view.

8. However, the Petitioners are faced with the statutory provision contained in sub-section (5) of section 80A of the Act. The Petitioners' claim cannot therefore be accepted de hors the said statutory provision and ordinary principle of the wide powers of the CIT exercising revisional jurisdiction under section 264 of the Act cannot be imported. What sub-section (5) of section 80A of the Act mandates is that, if the assessee fails to make a claim in his return of income for any deduction under the provisions specified therein, the same would not be granted to the assessee. This condition or restriction is not relatable to the Assessing Officer or the Income-tax Authority. This condition attaches to the claim of the assessee and has to be implemented by the Assessing Officer, CIT or the Appellate Tribunal as the case may be. There is no indication in sub-section (5) of section 80A of the Act as to why the restriction contained therein amounts to limiting the power of Assessing Officer but not that of Commissioner.

9. This issue can be looked from slightly different angle. In absence of the provision contained in sub-section (5) of section 80A of the Act has held by various decisions of the High Courts noted above, the CIT could entertain a fresh claim in Revision Application even if the claim was not made previously before the Assessing Officer. Provision contained in sub-section (5) of section 80A is a statutory interdict which would prevent the CIT from granting any such claim in exercise of his revisional jurisdiction under section 264 of the Act. As is often times stated, even High Court in exercise of Writ jurisdiction under article 226 of the Constitution of India would not issue directions contrary to statutory provisions. Width of the powers of the CIT under section 264 of the Act would not permit him to ignore the requirement of section 80A(5) of the Act or allow the claim of an assessee in breach of the condition contained therein. We are therefore not in agreement that the expression given by the Income-tax Tribunal in case of Madhav Construction (supra) holding that the restriction contained in sub-section (5) of section 80A of the Act is to restrict the power of Assessing Officer and not higher Income Tax Authorities.

10. The Petitioners having given up the challenge to the constitutionality of the retrospectivity to section 80A(5) of the Act, cannot bring in the concept of the reading down of the provision in order to save if from unconstitutionally. In plain terms, our duty would be to enforce the provision contained in sub-section (5) of section 80A of the Act, as it is stands in the statue book. The decision in case of Goetze (India) Limited (supra) was rendered in different background. The Supreme Court did not have any occasion to interpret the provision of section 80A (5) of the Act in the context of the power of the CIT or the Appellate Tribunal.

11. In the result, we do not find any merit in the Writ Petition, the same is therefore dismissed."

33. In view of the above, we are of the opinion that the assessee cannot be permitted to make a fresh claim of deduction in the re-assessment proceedings u/s 153A of the Act. The above said finding is not only based on the interpretation of the provision of section 153A read with section 139(1) of the Act, but also based on the mandatory provisions which require the assessee to file the audit report along with the original return of income for claiming the deduction under Chapter VI of the Act.

33.1. So far as the decisions relied upon by the learned counsel for the assessee in the case of PCIT – 2 Vs. M/s. JSW Steel Ltd., (ITA No.1934 of 2017 of Mumbai High Court), PCIT Vs. Shri Neeraj Jindal (supra), DCIT Vs. Megha Engineering and Infrastructure Ltd., Hyderabad (supra), ACIT Vs. M/s. Splendor Landbase Limited (supra), M/s. KNR Constructions Vs. DCIT (supra), PCIT Vs. Vijay Infrastructure (supra), Gopal Lal Bhadruka Vs. DCIT (supra) and PCIT Vs. Abhisar Buildwell (P) Ltd. (supra) are concerned, the same in our opinion are not applicable to the facts of the case and are clearly distinguishable.

34. The decision relied upon by the assessee in the case of Vijay Infrastructure(supra) is not applicable and is clearly distinguishable. Firstly, the said decision was not applicable as it has mentioned that "the time for filing the revised return has not expired." In the present case, the original return of income

was filed on 30.09.2009 and the return u/s 153A of the Act was filed on 28.03.2014. Thus, the return by the assessee on 28.03.2014 cannot be said to be a revised return or a return filed within the period provided for filing the revised return. Secondly, in the said judgment, it was mentioned that the claim of 80IA would otherwise be admissible in law. As mentioned hereinabove, for claiming the deduction under 80IA, it is essential for the assessee to claim deduction on or before the due date of filing the return of income under section 139(1) of the Act in the prescribed form. As per the prescribed form, the assessee is required to claim deduction and also file the audit report in the form and manner provided under Rule 18BBB. In the present case, the assessee failed on all counts. Lastly, the Hon'ble High Court has mentioned the no other authority has been brought to the notice of the Court. Admittedly, the decision of Jai Steel (supra) is of 2013 by the Hon'ble Rajasthan High Court and the decision in the case of Vijay Infrastructure (supra) was rendered without even referring to the decision in the case of Jai Steel (supra). For the above said reasons, the decision in the case of Vijay Infrastructure (supra) is not applicable. The Judgment in the case of JSW (supra) is also not applicable as the said judgment was rendered by the hon'ble Bombay High Court in the case of an abated assessment and not in the case of an unabated assessment.

35. The hon'ble Delhi High Court in the case of Neeraj Jindal (supra) had explained the concept and held that for all purposes, the return of income filed by the assessee in response to the notice under section 153A would be a return of income filed under section 139 of Income Tax Act 1961. In other words, the earlier return of income filed by the assessee, would stand withdrawn from the record for all practical purposes and would be replaced / substituted by the subsequent return of income filed by the assessee in response to the notice under Section 153A of the Act. First of all, the said decision was not rendered in context of penalty provisions of Section 271(1)(c) of the Act. Further, in our understanding, the Hon'ble High Court has not decided the issue with respect to the time frame provided for claiming the deduction as per section 80AC r.w. section 139(1) and Rule 18BBB and Form 10CCB of the Act. In our considered opinion, the assessee can take the benefit of the re-assessment proceedings in an unabated assessment only with respect to the material or additions which are relatable to the incriminating material. Hence, the judgment of Hon'ble Delhi High Court in our opinion is also not applicable.

36. The reliance of the assessee on the decision of Hon'ble Supreme Court in the case of Abhisar Buildwell Pvt. Ltd. (supra), is of no help to the assessee as the Hon'ble Supreme Court in the said case has held that on what basis, the Assessing Officer can make the additions in the reassessment proceedings under

section 153A of the Act. The Hon'ble Supreme Court has held as under :

> *"14(iii) in case any incriminating material is found/unearthed, even, in case of unabated/completed assessments, the AO would assume the jurisdiction to assess or reassess the 'total income' taking into consideration the incriminating material unearthed during the search and the other material available with the AO including the income declared in the returns;".*

37. In our opinion, the Hon'ble Supreme Court had only interpreted the scope and ambit of the power of the Assessing Officer to determine the total income, based on incriminating material or other material available with the assessee. Admittedly, the Hon'ble Supreme Court has not given a right to the assessee to claim a fresh deduction which was not claimed earlier even during the original assessment proceedings. Once the assessment proceedings have attained finality, then the additions can only be made in the hands of the assessee based on the incriminating material unearthed during the search. The Assessing Officer has no reason to entertain any fresh claim, which was not raised in the original return of income. Hence, we are of the considered opinion that the assessee is not entitled to file fresh return of income under Section 153A of the Act, with respect to claiming the deductions which had not been claimed by the assessee earlier in the original return of income.

38. Hence, respectfully relying upon the above said decisions, we are of the opinion that the legal ground raised by the Revenue regarding the claim of fresh deduction u/s 80IA at the time of filing the return of income u/s 153A of the Act is sustainable.

39. In the light of the above discussions, we are of the considered opinion that the findings of the ld.CIT(A) is not in accordance with law and the assessee cannot be permitted to make a fresh claim of deduction for the first time in the return filed in response to notice u/s 153A of the Act. Thus, the legal ground is decided in favour of the Revenue and against the assessee.

40. As we have decided the legal ground against the assessee and in favour of the Revenue, therefore, there is no question of granting the deduction to the assessee. In view of the above, the remaining grounds of the Revenue are allowed. Thus, the order of ld.CIT(A) is reversed and that of the Assessing Officer is restored.

41. In the result, the appeal of Revenue in ITA No.603/Hyd/2016 is allowed.

42. As the facts and issues are identical in all the appeals, therefore, following our decision given in lead appeal ITA 603/Hyd/2016, the remaining captioned appeals i.e., ITA Nos.604 to 606/Hyd/2016 are also allowed.

43. To sum up, all the appeals of Revenue are allowed. A copy of this order may be placed in all the respective files.

Order pronounced in the open court on 31st July, 2023.

Sd/-	Sd/-
(RAMA KANTA PANDA)	**(LALIET KUMAR)**
Vice President	Judicial Member

Hyderabad, Dt. 31.07.2023.

TYNM/SPS

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1.	M/s. HES Infra Pvt. Ltd., Plot No.43, B N Reddy Colony, Road No.14, Banjara Hills, Hyderabad.
2.	DCIT, Central Circle2(1), Hyderabad.
3.	Pr. C I T (Central), Hyderabad.
4.	DR, ITAT, Hyderabad.
5.	Guard File.

By Order