

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I": NEW DELHI**

BEFORE

**SHRI M BALAGANESH, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 2283/Del/2022
Asstt. Year: 2017-18

BSC C&C Joint Venture, 74, Hemkunt Colony, New Delhi-110 048 PAN AADFB8115G	Vs.	DCIT, Circle-61(1), New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Tarandeep Singh, CA Shri Sandeep Yadav, Advocate
Department by:	Shri Rajesh Kumar, CIT(DR) Shri Manu Chaurasia, Sr. DR
Date of Hearing:	20.07.2013 20.10.2023
Date of pronouncement:	03.11.2023

ORDER

PER ASTHA CHANDRA, JM

The appeal filed by the assessee is directed against the order of the Ld. Dy. Commissioner of Income Tax Circle- 61(1), New Delhi (**"AO"**) dated 29.07.2022 passed under section 143(3)/92CA/144C of the Income Tax Act, 1961 (**the "Act"**) pertaining to Assessment year (**"AY"**) 2017-18.

2. The assessee has raised the following grounds:

"1. That on the facts and in law Ld. Deputy Commissioner of Income-tax, Circle-61(1), New Delhi (hereinafter referred to as the "AO") has erred in assessing the total income of the appellant at Rs. 45,93,89,452/- as against a returned total loss of Rs. 114,22,89,453/- as

filed by the appellant vide Revised Computation during assessment proceedings on 04.09.2021

2. That on the facts and in law in the final order of assessment, the AO has erred in computing the Gross Total Income after taking into effect loss of Rs. 13,65,60,299/- as declared by the appellant in the Revised Computation of Income (filed during assessment proceedings on 03.09.2021) instead of loss of Rs. 14,22,89,453/- as declared by the appellant in the Revised Computation of Income (filed during assessment proceedings on 04.09.2021), despite the fact that in the final assessment order Ld. AD has admitted that the assessee has filed revised computation of income at loss of Rs.14,22,89,453/- and Hon'ble DRP has also confirmed the same.

3. That on the facts and in law the AO / DRP have erred in disallowing deduction of Rs. 226,31,98,158/-u/s 801A(4)(i) claimed by the appellant in the return of income.

3.1. That on the facts and in law the AO/DRP have erred in holding that:

(a) Contractees, who have allotted work of infrastructural facility to the appellant, are not recognised u/s 80IA(4)(1)(b), and

(b) Appellant is merely a contractor and not a "developer".

4. That on the facts and in law the AO has erred in making a disallowance of Rs.38,34,16,688/- on account of deduction of expenses u/s 40(a)(ia) disallowed in earlier years on the ground that the assessee has not submitted supporting evidences in this regard without appreciating the fact that complete documents and explanations were submitted by the appellant during faceless assessment of the case and also before Hon'ble DRP, Delhi-1.

5. That on the facts and in law the AO has erred in making a disallowance of Rs.57,29,154/- on account of deduction of Education Cess paid by the assessee.

6. That on the facts and in law the TPO / DRP have erred in making / upholding Transfer Pricing Adjustment under Chapter X of the Act while making an adjustment of Rs. 41,22,717/- on account of alleged interest receivable on advance given to M/s BSC C&C JV Nepal Pvt Ltd

6.1. That on the facts and in law the TPO / DRP has erred in not appreciating that there is no advance given by the appellant to M/s BSC JV Nepal Pvt. Ltd. and hence there is no "transaction" for receiving interest from the AE.

6,2. That on the facts and in law the TPO / DRP have erred in holding / upholding that "transaction" for interest receivable / payable is a separate "transaction" requiring independent benchmarking

7. That on the facts and circumstances of the case, and in law, the Ld. AO/DRP has erred while making an addition of Rs. 18,84,08,295/- on account of retention money retained by the employer on the ground that the retention money is receivable by the assessee and hence, no deduction is allowable to the assessee.

8. The Ld. AO further erred, without prejudice to the above ground of appeal, while not reducing the amount taxed by the applicant on account of retention money of Rs. 7,23,59,198/- and Rs. 66,38,438/- released to the applicant during the year under consideration if deduction on account of retention money retained by the employer is not allowed to the assessee.

9. That on the facts and in law the AO/DRP has erred in making a disallowance of Rs. 1,42,72,894/- on account of late deposit of EPF Contribution of employees without appreciating the fact that the same was deposited by the appellant before the due date of filing the Income-tax Return.

10. That on the facts and in law the AO has erred in allowing credit of TDS of Rs. 10,64,37,556/- only instead of credit of TDS of Rs. 12,40,95,837/- allowable to the assessee according to the income offered for taxation without passing a speaking order in this regard.

11. That on the facts and in law the AO has erred while making an addition of income-tax refund of Rs. 5,83,17,340/- issued to the assessee u/s 143(1) to the total demand of income-tax of Rs. 19,96,00,193/- raised after making above said additions without appreciating the fact that if refunds already issued have been added back, the assessee should be allowed credit of total taxes paid of Rs. 12,40,95,837/-“

3. Briefly stated, the assessee firm is a joint venture (JV) between two infrastructure companies, namely BSCPL Infrastructure Ltd. and C&C Construction Ltd. It is engaged in construction of roads, toll roads, highways and urban infrastructure including water, sanitation and sewage, power/ telecom transmission towers, commercial buildings, etc. For AY 2017-18, the assessee filed original return on 30.11.2017 declaring total income at Rs. NIL and deemed total income of Rs. 33,32,44,673/- under section 115JC of the Act. Its case was picked up for complete scrutiny through CASS. The assessee filed a revised return on 31.03.2018 declaring total income at Rs. NIL and deemed total income of Rs. 24,68,56,389/- under section 115JC of the Act. Statutory notice(s) along with questionnaire were issued/ served upon the assessee through ITBA. The Ld. AO found that during the year the assessee entered into specified domestic transactions as defined under section 92BA of the Act. He, therefore, made reference under section 92CA of the Act to the Transfer Pricing Officer (“**TPO**”) who vide his order dated 29.01.2021 proposed adjustment of Rs. 1,14,41,802/- on account of interest on advance given to BSC C&C JV Nepal Ltd. The Ld. Assessing Officer, National Faceless Assessment Centre, Delhi (“**FAO**”)

proceeded to frame draft order under section 144C of the Act. He computed the total income of the assessee at Rs. 46,09,79,380/- as under:-

Total income as per return	Rs. 24,68,56,389/-
Add: Adjustment as per order under section 92CA(3) of the TPO	Rs. 1,14,41,802/-
Add: Claim of deduction of retention money retained by the contractee	Rs. 18,84,08,295/-
Disallowance under section 36(1)(va) r.w. section 2(24)(x)	Rs. 1,42,72,897/-
Total assessed income	Rs. 46,09,79,383/-
Rounded off to-	Rs. 46,09,79,380/-

3.2 The Ld. FAO negated the claim of deduction under section 801A(4) of the Act. Accordingly, the assessment was completed by Ld. FAO on 18.09.2021 under section 143(3) of the Act.

3.3 The assessee filed objections before the Ld. Dispute Resolution Panel-1, Delhi ("**DRP**") against the draft assessment order of the Ld. FAO. Pursuant to the directions of the Ld. DRP dated 31.05.2022 and adjudication of the Ld. AO/FAO/TPO on the same, the income of the assessee has been re-computed as under:-

Particulars	Amount
Total income as per revised computation filed by the assessee	Rs. (-) 13,65,60,299/-
Add:	
• Disallowance of expenses under section 40(a)(ia) and Education Cess (Rs. 38,34,16,688/- + Rs. 57,29,154/-)	Rs. 38,91,45,842/-
• Adjustment, after giving effect to direction of Ld. DRP to the order of TPO	Rs. 41,72,717/-

• Claim of deduction of retention money retained by the contractee	Rs. 18,84,08,295/-
• Disallowance under section 36(1)(va) r.w.s. 2(24)(x)	Rs. 1,42,72,897/-
Total Assessed Income	Rs. 45,93,89,452/-

3.2 The claim of deduction under section 80IA(4) was denied and taken as 'NIL'. Accordingly, the final assessment was completed on 29.07.2022 by the Ld. AO under section 143(3)/ 92CA/ 144C(13) of the Act.

4. Aggrieved thereby, the assessee is in appeal before the Tribunal and all the grounds relate thereto.

5. Ground No. 1 is general in nature not requiring adjudication. Ground No. 5 relating to disallowance of Rs. 57,29,154/- on account of deduction of education cess has not been pressed. It is, therefore dismissed as not pressed.

6. Now, we proceed to adjudicate the remaining grounds. We have heard the Ld. Representative of the parties, considered their respective arguments and perused the records.

7. Ground No. 2 relates to non-consideration by the Ld. AO of the revised computation of income filed during assessment proceedings on 04.09.2021 declaring loss of Rs. 14,22,89,453/-. The Ld. AR submitted that before Ld. DRP a specific grievance was raised in this regard on which the Ld. DRP directed the Ld. AO to make necessary verification and pass a speaking order. This has not been done. The Ld. CIT-DR concedes to this factual position. We, therefore direct the Ld. AO to look into the assessee's grievance and take remedial action as per law after due verification and allowing the reasonable opportunity of hearing to the assessee.

8. Ground No.3 relates to disallowance of deduction of Rs. 2,26,31,98,158/- under section 80IA(4)(i) of the Act claimed by the assessee

in its revised return furnished on 31.03.2018. The Ld. AO has discussed this issue in para 7 and after obtaining justification for the said claim from the assessee recorded his findings in para 7.2 to 7.7 of his order. The Ld. AO found that during the year the assessee has undertaken various projects including one in Afghanistan and has submitted auditor's report in Form 10CCB as required under section 801A(7) of the Act. In para 7.3 the Ld. AO gave details of 9 projects containing therein name of the project, employer, nature of project and the amount of deduction claimed under section 80IA of the Act. According to the Ld. AO two of the contractee companies, namely Power Grid Corporation of India Ltd. and Ircon International Ltd. are neither Central Govt. nor State Govt. nor a Local Authority nor any other statutory body. Therefore basic condition for claiming deduction under section 80IA(4) is not satisfied in respect of their 5 projects viz. Danapur ROB, Subansari, Ganga Bridge Digha, Ganga Bridge Sonpur and Muzzafarpur ROB. In para 7.4 the Ld. AO observed that the assessee JV is the contractor of Mokama-Munger Project by virtue of EPC Agreement entered on 10.12.2010 between M/s. Mokama-Munger Highway Limited (Project Company) and the assessee (EPC Contractor). It is the Project Company which has been awarded the contract by NHAI. The Project Company entered into an agreement with the assessee as EPC contractor for carrying out the contract work awarded by NHAI to the Project Company. Thus the basic condition of section 80IA(4) of the Act is not fulfilled. In para 7.5 the Ld. AO enumerated certain attributes of a developer and on examination of some of the clauses of the agreement between the Chief Engineer PWD (Roads) Meghalaya Shillong and the assessee concluded that the assessee is a Contractor and not a Developer. Rejecting the assessee's explanation in support of its claim, the Ld. AO/DRP disallowed the claim of deduction of the assessee under section 80IA(4) made in its revised return against which the assessee is in appeal before us.

8.1 The Ld. AR at the very outset submitted that the issue is covered in favour of the assessee by the decision of the Tribunal in assessee's own case for AY 2016-17 in ITA No. 705/Del/2021 rendered on 31.11.2022. Our attention was drawn to para 21 to 26 thereof wherein the Tribunal recorded

its findings on the points raised by the Ld. AO to negate the assessee's claim which are identical in the year under consideration. He pointed out that in the preceding year also the contractee companies were formed under various Ministries of Govt. of India. The Ld. AR submitted that the allegation of the Ld. AO that the assessee is only an EPC contractor for carrying out work awarded by NHAI to Mokama-Munger Highway Ltd. has also been refuted by the Tribunal in para 23 of its decision (supra). The last allegation levelled by the Ld. AO is that the assessee is not a developer but only a contractor. The Ld. AR stated that it has also not been accepted by the Tribunal by recording a finding in para 25 of its decision (supra) that the assessee is not a simplicitor contractor, rather the assessee is a developer of the project and that the contention of the Ld. AO in this regard is misconceived.

8.2 The Ld. AR further submitted that the details of contracts on which benefit of section 80IA is claimed by the assessee in AY 2017-18 appear at pages 66-67 of the Ld. DRP's directions and similar details of the preceding year 2016-17 may be seen at pages 449-450 of the Paper Book forming part of Ld. DRP's directions at pages 54-55. The Ld. AR pointed out that except Soanbarsa Project and SH-83 Project which are new projects, all contracts are same as those of the preceding year. According to him, the Ld. AO has not disputed that these two new projects have also been executed in a like manner and that there is parity of facts.

8.3 The Ld. AR contended that in para 4.5.3 of directions the Ld. DRP has accepted that the Ld. AO has gone through the details of the contract agreement for each of the 9 projects undertaken by the assessee in the year under consideration during the course of assessment proceedings. There is thus no dispute on facts.

9. The Ld. CIT-DR defended the order of the Ld. AO/DRP. He stated in his written submission that the assessee did not claim deduction under section 80IA in its original return filed on 30.11.2017. Deduction was claimed by filing revised return which is not in accordance with law.

9.1 The Ld. CIT-DR refuted the contention of the Ld. AR that the issue is covered by the decision of the Tribunal for AY 2016-17. The Ld. CIT-DR submitted that deduction for two projects, namely Soanbarsa and SH-83 has been claimed in AY 2017-18 for the first time, hence it cannot be said that even for these two projects the issue is covered by the decision of the Tribunal for AY 2016-17.

9.2 The Ld. CIT-DR reiterated the argument advanced in the preceding year as well by the Revenue that the assessee is a contractor and not a developer. He placed reliance on the decision of larger bench of Mumbai ITAT in B.T. Patil & Sons, Belgaum Construction (P) Ltd. vs. ACIT, Circle-2 Kolhapur [2010] 35 SOT 171'(Mum) and the decision of Hon'ble Karnataka High Court in Yojaka Marine (P) Ltd. vs. ACIT, Circle 1(1) (2013) 354 ITR 530 (Kar.).

10. In his rejoinder, the Ld. AR submitted that the assessee claimed deduction of Rs. 233,25,03,582/- under section 80IA which is evident from the copy of acknowledgment for filing original return on 30.11.2017 along with computation of total income appearing at pages 616-620 of the Paper Book . This fact is also corroborated by the audit report dated 29.11.2017 filed under section 44AB in Form No. 3CB (copy of which is at pages 675-679 of Paper Book). Thereafter a revised return was filed on 31.03.2018 (copy of acknowledgement is at pages 621-625 of Paper Book) wherein the claim for deduction under section 80IA was revised to Rs. 226,31,98,158/-. It is also submitted that the original return was filed within the due date prescribed under section 139(1) and even the revised return has been filed within time allowed under section 139(5) of the Act. Both the returns are valid in the eye of law. The Ld. AR drew our attention to para 7 of Ld. AO's order at page 20 wherein the Ld. AO made incorrect observation to the effect that a perusal of the original return of income dated 30.11.2017 shows that the assessee had not claimed deduction under section 80IA of the Act. The Ld. CIT-DR's argument of not claiming deduction under section 80IA in the original return is the result of the above incorrect observation of the Ld. AO.

10.1 The Ld. AR took us to the Ld. AO's order for AY 2016-17 wherein at para 9.2 the Ld. AO states that during the year under consideration the assessee has undertaken 16 projects including one in Afghanistan. However, the assessee has submitted auditor's report in Form 10CCB as required under section 80IA(7) of the Act only in respect of 15 projects. However, out of 15 projects, deduction under section 80IA was claimed in respect of 8 projects only. Out of the 8 projects the Ld. AO analysed the terms and conditions of the agreement between Chief Engineer PWD Meghalaya Shillong and the assessee (1st project) only and did not dispute the statement of the assessee that terms and conditions of all other contracts are akin to that of agreement in project case of Meghalaya Shillong. The Ld. AR contended that the Tribunal in its order for AY 2016-17 noted in para 21 that all the agreements are on record of the Ld. AO and that the grounds for denial of deduction under section 80IA are also same in AY 2016-17. The Tribunal considered all the grounds taken by the Ld. AO/DRP for denial of deduction under section 80IA of the Act and recorded its finding rejecting all of them. Therefore, it cannot be said, as argued by Ld. CIT-DR that the same issue in AY 2017-18 is not covered by the decision of the Tribunal for AY 2016-17. The Ld. AR clarified that both the Ld. AO and Ld. DRP had taken Shillong Project as a lead case for arriving at the conclusion that the assessee is not a developer. However, the Tribunal recorded its findings thereon in its decision in AY 2016-17.

10.2 The Ld. AR further clarified that in AY 2017-18 copies of all the project agreements were filed before the Ld. AO during the course of assessment proceedings including Sonbarsa Project and SH-83 Project which is obvious from the written submission dated 8.3.2021 filed before the Ld. AO in response to notice under section 142(1) of the Act containing justification for claiming deduction under section 80IA of the Act (pages 581-615 of Paper Book).

10.3 It is also submitted by the Ld. AR that it was the contention of the assessee before the Ld. AO/DRP that all projects have been executed in a

like manner and there is parity of facts. None of them cast any doubt either in AY 2016-17 or in AY 2017-18. The Ld. AR emphasized that parity of facts for two new projects has not been doubted either by the Ld. AO or Ld. DRP.

11. We have given our careful thought to the rival submissions and perused the records. We place on record the strenuous efforts put in by the Ld. Representative of the parties with a view to assist us in adjudicating and coming to a decision on the issue involved in this ground of assessee's appeal.

12. The record speaks for itself. There is ample evidence in the records to demonstrate that for the AY 2017-18 the assessee claimed deduction of Rs. 233,25,03,582/- under section 80IA of the Act in the original return of income filed on 30.11.2017 which claim was revised to Rs. 226,31,98,158/- in the revised return filed on 31.03.2018. There is no inkling in the order of the Ld. AO and / or of the Ld. DRP that the original or revised return so filed by the assessee was not within the prescribed time limit or in any way vitiated. The argument advanced by the Ld. CIT-DR that the assessee did not put in its claim of deduction under section 80IA in the original return with its attendant legal consequences seems to have stemmed from the incorrect appreciation of facts available in the records. Even the Ld. AO in para 7 of his assessment order at page 20 incorrectly observed that perusal of original return dated 30.11.2017 showed that no claim of deduction under section 80IA of the Act was made by the assessee which is contrary to the facts on record. We therefore reject this argument of the Ld. CIT-DR which will have no legal consequences in determining the admissibility of the assessee's claim of deduction under section 80IA of the Act.

13. We have no iota of doubt in our mind that the issue is covered in favour of the assessee by the decision of the Tribunal in assessee's own case in ITA No. 705/Del/2021 rendered on 30.11.2022 (copy placed at pages 361-423 of the Paper Book). Disagreement of Ld. CIT-DR is based on the only premise that during the year under consideration deduction under section 80IA has been claimed for two projects viz. Sonbarsa and SH-83 for

the first time. This is not at all a valid reason. We have perused the reply filed by the assessee in response to Ld. AO's notice under section 142(1) of the Act (copy at pages 581-615 of Paper Book) during assessment proceedings. The assessee submitted that it is engaged in the business of development of infrastructure facility and that it has claimed deduction under section 80IA of the Act and gave justification therefor. For ease of understanding we reproduce the same hereunder:-

"1. Point No. 6 (Deduction u/s 80-1A):

With regard to deduction claimed u/s 80-IA, we have state that the assessee is engaged in the business of development of Infrastructure Facility and has claimed deduction u/s 80-IA.

With regard to the deduction u/s 80-LA, we have to submit as follows:

Section 80-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.

(2) The deduction -----

(2A) Notwithstanding -----

(3) This section applies to an undertaking referred to in clause (ii) or clause (iv) or clause (vi) of sub-section (4) which fulfils all the following conditions -----

(4) This section applies to-

(i) any enterprise carrying on the business of (1) developing or

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

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

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

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

Provided that-----

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

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

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

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

(d) a port, airport, inland waterway, inland port or navigational channel in the sea;

(ii) any undertaking-

(iii) any undertaking

(iv) an undertaking which,-

(vi) any undertaking carrying

(5) Notwithstanding anything contained

(6) Notwithstanding anything

(7) The deduction under sub-section (1) from profits and gains derived from an undertaking shall not be admissible unless the accounts of the undertaking for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant, as defined in the Explanation below sub- section (2) of section 288, and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant.

(8) -----

(9) -----

(10) -----

(11) -----

(12) -----

(12A) -----

(13) -----

Explanation. For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works

contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub-section (1).

It is submitted that the above provisions of Section 80IA provides that deduction as per clause (4) to Section 80IA of the Act is available to an enterprise:

- a> which is developing, operating and maintaining or developing, operating and maintaining any infrastructure facility.
- b> has entered into an agreement with Central Government, State Government and or local authority or Statutory body on or after 01.04.1995. for developing a new infrastructure facility,
- c> "infrastructure facility" means a road, toll road, bridge, rail system etc.,
- d> Further, the explanation to the said section also states that nothing contained in this section shall apply in relation to a business referred to in sub- section (4) which is in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub- section (1) 80IA of the Act.

The assessee has claimed deduction of Rs.226,31,98,158/- (as per revised return) under section 80IA on the following projects:

S. No.	Name of the Project	Employer	Nature of the Project	Deduction claimed u/s 80IA (Rs.)
1.	Meghalaya Project	Office of the Chief Engineers PWD (Roads), Meghalaya, Shillong	2 lining of Nongstoin-Shillong section of NH-44 and Nongstoin- Rongjeng-Tura Road, in the state of Meghalaya under Phase-'A' of SARDP-NE-Job No. SARDP-NE- NI-44 & SR-MG-PWD-2010-11- 172	142,99,02,902
2.	Mokama- Munger	NHAI (Through Project Company Mokama-Munger	Two lining with paved shoulder of Mokama Munger Section of NH-Bo	2.43.46,365

		<i>Highway Ltd.</i>		
3.	<i>Danapur ROB</i>	<i>Ircon International Ltd.</i>	<i>Construction of Road over Bridge both railway span and adjacent approaches including Reinforced Earth Wall/Retaining Wall between section Phulwarishrif- Danapur on EC Railway, Bihar</i>	72,30,449
4.	<i>Subansari</i>	<i>Power Grid Corporation of India Ltd.</i>	<i>Piling foundation package for lower Subansari Chariyal, Balipara, Bongaigaon, Biswanath Chariyal, Tanla-Kokrajhar, Bararbisa Assam Border</i>	32,44,863
5.	<i>Ganga Bridge, Digha</i>	<i>Ircon International Ltd.</i>	<i>Casting RCC Road deck on erected steel truss of rail-cum-road bridge across river Ganga at Patna</i>	9,96,421
6.	<i>Ganga Bridge, Sonpur</i>	<i>Ircon International Ltd.</i>	<i>Casting RCC Road deck on erected steel truss of rail-cum-road bridge across river Ganga at Patna</i>	74.07.761
7.	<i>Muzaffarpur ROB</i>	<i>Ircon International Ltd.</i>	<i>Construction of Road over Bridge both railway span and adjacent approaches span including reinforced earth wall/retaining wall</i>	1,14,58,821
8.	<i>Soanbarsa</i>	<i>NHAI (Through Project Company North Bihar Highway Ltd.</i>	<i>Augmenting the existing road from km 2.8 to km 89 on Muzaffarpur- Sonbarsa Section of National Highway No.-77 in the State of Bihar by Two-Laning on design, built, finance, operate and transfer.</i>	68,95,11,290
9.	<i>SH-83</i>	<i>Bihar State Road</i>	<i>Two laning of Baghi-Bardiha- Barbigha Road (SH-83) from 0.000 to</i>	8,90,99,286

		<i>Development Corporation Ltd.</i>	37.646 km.	
			Total	226,31,98,158

The assessee complies with all the conditions to claim deduction u/s 80IA as enumerated above. The same has been explained as below:

A> AWARD OF WORK BY CENTRAL GOVERNMENT. STATE GOVERNMENT AND OR LOCAL AUTHORITY OR STATUTORY BODY:

Your goodself would observe from the above said details of all the projects that projects have either been awarded by State Government (Shillong Project), Statutory Body or by the corporations including PSUS/PSES established by Centre or State Governments. The assessee has entered into contracts in the case of Mokama-Munger Project (at Sr. No.-2) and Sonbarsa Project (at Sr. No.-8) with separate companies. These two projects were awarded by NHAI to the assessee company. As a pre-condition of NHAI, these separate companies were incorporated. NHAI has entered into a contract with these companies and in turn these companies have entered into a contract with the assessee for developing the infrastructure facilities.

Award of Contracts by PSUS/PSES:

It is submitted that the Employers of the assessee such as DFCC, PGCIL etc. are public sector undertakings. A State-owned corporation in India is declared as public sector undertaking (PSU) or a public sector enterprise. These corporations are controlled by the union government of India, or one of the several state or regional governments, or both. Public Sector Enterprise is a part of Public Sector Undertakings. The assessee is eligible for deduction u/s 80IA on the contracts awarded by these Corporations.

IRCON is under the Ministry of Railways and Bihar State Road Development Corporation Limited is under Bihar State Government.

Organisational Structure of Ministry of Railways:

We are submitting herewith relevant pages of the Annual Report for the FY 2015-16 of Indian Railways. It explains complete Organisation Structure of Ministry of Railways. Your Honour would observe that Ministry of Railways has four major parts - Zonal Railways (Open Lines), Production Units, Other Units and CPSE/CORP. CPSE/CORP includes IRCON. Your Honour would further observe the purpose of incorporating the above said two companies as detailed below:

Ircon International Limited (IRCON)

Ircon International Limited (formally known as Indian Railway Construction Company Limited), a Mini Ratna and Schedule 'A' PSU, was incorporated on 28th April, 1976, mainly for the purpose of **construction and development of Railway infrastructure in India and abroad** with Indian Railways' expertise. The company diversified in other areas and

considering its major share of business I from projects abroad, its name was changed to "Irrcon International Limited" w.e.f. 17th October 1995.

Your Honours may also observe from the copy of the agreement with IRCON International (submitted separately) that the Tender Documents were issued by the Ministry of Railways. IRCON International has executed the contracts under the Ministry of Railways.

Organisational Structure of Ministry of Power:

We are also submitting herewith relevant pages of the Annual Report for the FY 2015-16 of Ministry of Power. It explains complete Organisation Structure of Ministry of Power. Your Honour would observe that Power Grid Corporation of India Ltd. is a part of Ministry of Power as depicted in the Organisation Structure. Your Honour would further observe the purpose of incorporating the above said PGCIL as detailed below:

Power Grid Corporation of India Limited (PGCIL)

Power Grid Corporation of India Limited (POWERGRID) was incorporated on October 23, 1989 & has been the notified Central Transmission Utility since 1998. The Corporation is responsible for integrated development of inter-state transmission system in the country for evacuation of power from central sector projects, system strengthening scheme etc., and for implementation of transmission projects assigned to it. Power System Operation Corporation Limited (POSOCO), a full owned subsidiary of POWERGRID, is responsible for Grid management through Regional & National Load Despatch Centre.

Your Honours would observe that the above said companies (PSUs & PSES) are incorporated by Central/ State Governments as Special Purpose Vehicle to undertake specific jobs of respective Ministries. Purposes of incorporating these PSUS/PSES are the specific purposes. These are incorporated for better management, control and progress and to undertake diverse activities with maximum control and maximum output. Particular Ministry and its Officers cannot look after whole of operations in India as India is a vast country. All jobs of a particular Ministry are divided into parts and are assigned to separate Units/ Enterprises. These separate Units/ Enterprises have total control over specific activity and work for the maximum output and benefit. Hence, these cannot be treated as separate entity from Centre/ State Governments as these are the special purpose entity incorporated by Centre/State Government.

Moreover, it is submitted the provisions of section 80IA incentivise rapid development of infrastructural projects in India. A liberal interpretation has to be accorded to the condition stipulated in section 80-IA(4)(i). Higher courts have repeatedly held that a strict construction of requirements stipulated in section 80-IA(4)(i) will yield manifestly absurd results.

*In this regard, kind reference of your goodself is invited to the decision of Hon'ble **Gujrat High Court in case of CIT vs Ranjit Projects (P) Ltd reported in (2018) 94 taxmann.com 320 (Guj)**. In this case it has been held by Hon'ble High Court as under:*

*"13. The above statutory provisions and the relevant facts arising in the present case and noted above would leave little doubt in one's mind that **GSRDC was a nodal agency constituted by the State Government for the purpose of executing road development***

*projects through private participation and was a Government agency as defined in section 2(e) of the Act of 1999. Significant factors in the present case are that the road widening project was cleared by the Government, land for such purpose was allotted by the Government. The concession agreement which GSRDC executed was approved by the Government. It was under the Government Resolution that the assessee would collect toll upon completion of such project. Upon the completion of the project period, the entire infrastructure so developed would vest in the Government. Signatory to the applicant may be GSRDC for all practical purposes and in essence, it was the agreement between the assessee and the State Government. **We are conscious that condition (b) of subsection (4) of section 80IA requires the assessee to have entered into agreement with the Central Government or a State Government or a local authority or any other statutory authority. However, rigid interpretation of this provision as canvassed by the Revenue would only result into the assessee involved in genuine infrastructure development projects for and on behalf of the Government or local authorities would be denied the deduction merely on the ground that the State Government had created a nodal agency for working out the finer details and nitty-gritty of such infrastructure development. The purpose of creating such nodal agencies as well as the legislative intent of granting deduction to the assessee engaged in developing, maintaining or operating any infrastructure projects for Central or State Government authorities would frustrate.***

It is relevant to note that above decision of Hon'ble Gujrat High Court has also been upheld by the Hon'ble Apex Court vide order dated 05th March 2019 in 263 Taxman 3(SC). Similar findings have also been given by Hon'ble Madras High Court in following cases:

- *CTT vs Chettinad Lignite Transport Services (P) Limited reported in 107 TAXMANN.COM 362 (Mad), and*

Board's Circular No.: 733

*Further, we would also like to draw Your Honour's kind attention to **Circular No.: 733 dated 3rd January, 1996 of CBDT**. In the said Circular, Hon'ble CBDT had stated that projects awarded by Indian Railways under BOLT (Build-Own-Leased-Transfer) in addition to the projects awarded under BOT & BOOT system will also qualify for deduction u/s 80-LA of the Act: Text of the said Circular is as follows:*

"Whether Build-Own-Lease-Transfer (BOLT) Scheme of Indian Railways shall be eligible for benefit under section 80-IA, since it is not legally possible for any enterprise other than Indian Railways to maintain and operate Railway System

1. The Finance Act, 1995 has introduced sub-section (4A) in section 80- IA of the Income-tax Act, 1961 providing for a five-year tax holiday and a deduction of 30 per cent in the subsequent five years within a period of twelve assessment years beginning with the assessment year in which an enterprise (which may be owned by a company or a Consortium of companies) begins operating and maintaining an infrastructure facility on Build-Operate-Transfer (BOT) or on Build- Own-Operate-Transfer (BOOT) basis, subject to certain conditions specified in that sub-section.

One of the conditions to be fulfilled by the enterprise is that it should develop, maintain and operate a new infrastructure facility which shall be transferred to the Central Government, etc., within the period stipulated in the agreement. The definition of infrastructure as per sub-section (12) of section 80-IA includes a rail system also.

2. The Indian Railways have formulated a Build-Own-Lease-Transfer (BOLT) Scheme, whereunder a private enterprise will provide the necessary and crucial components of a Railway system, own them for a stipulated period but will not maintain or operate the same. Instead, the enterprise will lease the asset (only necessary and crucial components of a Railway System) back to Indian Railways for maintenance and operation, and shall ultimately transfer it to Indian Railways.

3. This is to clarify that, the said (BOLT) Scheme of the Indian Railways shall be eligible for the benefit of section 80-IA of the Income-tax Act, 1961, since it is not legally possible for any enterprise other than the Indian Railways to maintain and operate a Railway System. However, this concession shall be applicable only to an infrastructure facility meant for development of Rail System and not to any other infrastructure facility including Rolling Stocks."

Circular: No. 733, dated 3-1-1996.

Your Honour would observe from the above that Hon'ble CBDT has allowed deduction u/s 80-IA on the projects awarded by Indian Railway under BOLT System other than BOT & BOOT Systems.

This clearly shows the intent of the legislature that projects awarded by PSUs / PSEs duly qualify for deduction u/s 80-IA as these PSUs & PSEs are incorporated by Central/ State Governments for carrying out the projects of the Government. Central/ State Governments or Statutory Bodies do not award any contract directly in India. They award the contracts through these Corporations only.

Legal matrix:

We are also enclosing herewith following further case laws, where the contracts were awarded by PSU/PSE and the deduction u/s 80IA of the Act was allowed:

- 1. ITAT Ahmedabad in the case of **Welspun Projects Vs. ITO (ITA No. 1864/Ahd/2013 & 225/Ahd/2014)** for name of employers - M. P. Rajya Setu Nirman Nigam Limited.*
- 2. ITAT Mumbai in the case of **ACIT Vs. Patel Engineering Ltd. (ITA No. 6605/Mum/2013)** for name of employers National Hydroelectric Power Corporation Limited for Teesta Lower Dam Project.*

(Only relevant 2 pages of the above said case law are attached as the file size with full judgement is of 52 MB which cannot be uploaded.)

Hence, it is submitted that the assessee company duly qualifies for deduction u/s 80-1A of the Act on the projects awarded by these Corporation such as PGCIL, DFCC & IRCON and may kindly be regarded as the contracts awarded by Central Government, State Government etc.

B> NEW INFRASTRUCTURE FACILITY:

The assessee is developing a new infrastructure facility. Your goodself would observe from all the agreements that the assessee has either been engaged for construction of a new infrastructure facility such as Rail Over- Bridge, widening of existing carriageway, improvement/upgradation of roads etc.

In this regard, we need to point out that the Central Board of Direct Taxes in its Circular No.4/2010 issued on 18.05.2010 has clarified that the work of widening of an existing road by constructing additional lanes as a part of Highway project would be recorded as a new infrastructure facility for the purpose of Section 80-IA(4)(i) of the Act. The said Circular is reproduced below for the sake of convenience:

"CIRCULAR NO.4 OF 2010 DT, 18TH MAY, 2010

Widening of existing road-Definition of a new infrastructure facility- Clarification regarding 18/05/2010

DEDUCTIONS SECTION 80-IA(4)

References have been received by the Board as to whether widening of existing roads constitutes creation of new infrastructure facility for the purpose of section 80-IA(4)(i) of the Income-tax Act, 1961.

Section 80-IA(4)(i) provides for a deduction to an undertaking engaged in developing, or operating and maintaining, or developing, operating and maintaining any infrastructure facility subject to satisfaction of the conditions laid down in the section. The Explanation to sub-section 80- IA(4)(i) states that for the purpose of this clause, infrastructure facility means inter alia:-

"(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;

The issue has been examined by the Board. It has been decided that widening of an existing road by constructing additional lanes as a part of a highway project by an undertaking would be regarded as a new infrastructure facility for the purpose of section 80-IA(4)(i). However, simply relaying of an existing road would not be classifiable as a new infrastructure facility for this purpose.

Thus as per the Circular issued by the CBDT, it is settled that widening of existing roads by construction of additional lanes of a highway shall be considered to be new infrastructure facility for the purpose of Section 80IA(4)(1) of the Act.

From all the agreement, it can be deduced that the assessee has actually carried out the work of widening/ improvement/ upgradation of roads and construction of new infrastructure facility.

Hence, it is submitted that the assessee is engaged in eligible infrastructure projects as per Section 80IA(4)(i) of the Act.

C> PROJECTS AWARDED BY INDIAN COMPANIES:

With respect to Mokama-Munger Project (Sr. No.-2) and Sonbarsa Project (Sr. No. 8), it is submitted that NHAI has awarded the above said projects to the consortium of BSCPL Infrastructure Ltd. and C&C Constructions Ltd. (i.e. BSC C&C JV, the applicant) vide LOA dated 19.05.2010 and 05.07.2010 respectively. Copies of the same are attached herewith for your kind perusal. The above said company - Mokama Munger Highway Ltd. and North Bihar Highway Ltd. was incorporated as a pre- condition of NHAI as specified in the said LOA. Kindly see the highlighted portion of above LOA.

After incorporation of the above said company, the concession agreement was made with NHAI and the applicant had entered into an agreement with the above said company to carry out the whole of the project.

Ratio propounded and upheld by Apex Court in case of Ranjit Project's case (supra) is squarely applicable to the present situation.

In view of above, it is submitted that since NHAI had awarded the contract to the applicant, it may kindly be held that the above said agreements were not entered into with Indian Companies rather the agreements may kindly be considered as entered into with NHAI and the deduction u/s 80IA of the Act may kindly be allowed to the applicant.

D> ASSESSEE IS A DEVELOPER OF AN INFRASTRUCTURE FACILITY AND NOT A WORK CONTRACTOR:

ASSESSEE IS NOT A WORK CONTRACTOR:

From a plain reading of the section, it is clear that deduction u/s 80-IA does not apply to a works contract. It is submitted that Section 80-IA nowhere defines the term "works contract", hence the natural meaning of the word shall apply. As per the Oxford dictionary the term "work" means application of effort to a purpose or use of energy. Thus going by the dictionary meaning we may say that a works contract is a contract which involves effort or in other words labour of the contractor. Further as per the Black's Law Dictionary, the term "work" means labour or in other words physical and mental exertion to attain an end esp. as controlled by and for the benefit of the employer. Thus as per Black's Law also, a works contract is a labour contract under which the contractor merely employs his labour as per the directions of the contractee. Further, attention is invited to relevant extracts of section 194C of the IT Act:

"(iv)" work" shall include-

(a) Advertising;

(b) Broadcasting and telecasting including production of programmes for such broadcasting or telecasting;

(c) Carriage of goods or passengers by any mode of transport other than by railways;

(d) Catering;

(e) Manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer, but does not include

manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, other than such customer."

Thus as per section 194C of the Act also, "works contract" does not include a contract wherein, the contractor in addition to employing labour, procures material from a third party. Thus, contracts involving mere labour of the contractor are included in the purview of "works contract".

Hon'ble Supreme Court in case of Associated Cement Co. Ltd. vs. CIT reported in 201 TTR 435 while interpreting the term 'work' u/s 194C of the Act had held that words any work in section 194C(1) of the Act means any work including supply of labour to carry out work and is not intended to be confined to or restricted to works contract, therefore, a person who credits to the account of or pays to a contractor any sum payable on behalf of organizations specified in section 194C(1) of the Act for carrying out any work (including supply of labour for carrying out any work) is liable to deduct income-tax as required under that sub-section. The words in the sub-section (1) of 194C of the Act on income comprised therein' appearing immediately after the words 'deduct an amount equal to two per cent of such sum as income-tax' from their purport, cannot be understood as the percentage amount deductible from the income of the contractor out of the sum credited to his account or paid to him in pursuance of the contract, but deduction is to be made out of payments made to the contractor.

It is a clear indication of the Legislature that the "work" in the sub-section is not intended to be confined to or restricted to "works contract". The Hon'ble Apex Court laid out that the term "work" used in section 194C need not be restricted to "works contracts" (i.e. labour contracts) because the subsection expressly includes supply of labour to carry out work. In other words, it is implied that works contract means supply of labour to carry out work:

Thus from the above, it is stated that a works contract constitutes a contract under which the contractor is merely employing his efforts or labour. Under such a contract, the contractee provides the material and other requisites (a complete infrastructure) needed to carry out the desired work to the contractor who by applying his labour to the said material turns the material into a desired product.

The memorandum explaining the provisions in the Finance Bill, 2007, reported in (2007) 289 ITR (St.) 292 at page 312 reads as under:

"Section 80-LA, inter alia, provides for a ten-year tax benefit to an enterprise or an undertaking engaged in development of infrastructure facilities, industrial parks and special economic zones. The tax benefit was introduced for the reason that industrial modernization requires a passive expansion of, and qualitative improvement in, infrastructure (viz, expressways, highways, airports, ports and rapid urban rail transport systems) which was lacking in our country. The purpose of the tax benefit has all along been for encouraging private sector participation by way of investment in development of the infrastructure sector and not for the persons who merely execute the civil construction work or any other works contract."

Accordingly, it is proposed to clarify that the provisions of section 80- LA shall not apply to a person who executes a works contract entered into with the undertaking or enterprise

referred to in the said section. Thus, in a case where a person makes the investment and himself executes the development work, i.e. carries out the civil construction work he will be eligible for tax benefit under section 80- IA of the Act. In contrast to this, a person who enters into a contract with another person (i.e., undertaking or enterprise referred to in section 80- IA) for executing works contract, will not be eligible for tax benefit under section 80-IA.

This amendment will take retrospective effect from 1st April 2000 and will accordingly apply in relation to the assessment year 2000-01 and subsequent years.

The Explanatory Memorandum clearly lays out that purpose of extending tax. benefit u/s 80-IA was to encourage investments from the private sector and hence work contracts, i.e. contracts involving merely labour (or mere execution of construction without making investments) are outside the purview of the provisions of section 80-1A. Thus, the term "works contract" used in Explanation to section 80-IA(13) means a contract of developing infrastructure by merely employing labour and making no investments.

Whereas the assessee, for all of the above said projects, has assumed complete responsibility of the project, provided complete material for the project, employed its own labour and Plant & Machinery, provided performance guarantee to the Employer and has undertaken complete entrepreneurial & investment risk. These all the aspects have been explained as below in detail.

Hence, it is submitted that the assessee is not a Work Contractor, rather is a developer of the infrastructure facility.

ASSEESSEE IS A DEVELOPER OF INFRASTRUCTURE FACILITY:

The issue of difference between a developer and a contractor was examined by a number of Hon'ble Courts as under:

*Rajkot ITAT in case of **Katira Constructions Limited reported in 185 ITD 173 (Rajkot)** has examined the scope of terms "developer", "contractor" and "work contract" vis a vis section 80IA(4) as under:*

".....For this purpose, first of all it is imperative to appreciate the difference between a 'developer' and a 'contractor'. Generally in common parlance a person is referred as 'developer' who undertakes the project to develop and construct on its own responsibility and takes all the risks of the development. These responsibilities and risk can be categorized as under:

(a) That in a development contract" responsibility is fully assigned to the developer to do all acts for execution and completion of work right from designing the project till handing over the project to the Government. As such, the agreement is not for a specific work, it is for development of facility as a whole. Indeed the ownership of the site or the ownership over the land remains with the Government/owner but during the period of development agreement the developer exercise complete realm over the land or the project. However, in some case there can be a situation that the developer has to take the approval of the design from the Government/contractee but that will not change the status of the developer as works contractor.

(b) That the first phase for the developers is to take over the existing premises of the projects and thereafter developing the same into infrastructure facility. Secondly, the assessee shall facilitate the people to use the available existing facility even while the process of development is in progress.

(c) That a developer has to execute managerial responsibility by engaging the requisite qualified/ skilled / semi-skilled staff and the labourers including the other supporting staff. As the developer under takes the complete responsibility of the manpower to be used in developing the infrastructure facility.

(d) The assessee has to utilize its expertise, experience including its technical knowhow in the development of the project.

(e) That a developer has to execute financial responsibility. A developer is therefore expected to arrange finances either by private placement or from financial institutions for the proper development of the project at its own risk. Thus the developers is the one who undertakes entrepreneurial and investment risk besides the business risk.

Ø That a developer is required to bring the qualitative material. The Government does not provide any material to the assessee.

(g) That a developer is required to bring plant and machineries to be utilized in the project.

(h) Any loss caused to the public or the Government in the process of developing the project would be the responsibility of the developer. The Government shall not take any responsibility for any such kind of loss except where it is responsible.

(i) That a developer stands as guarantor for the project developed by it and in the event of any defect it, he shall provide the remedy for the same..

(j) That a developer shall be exposed to the penalty if it contravenes the any of the clause appearing in the contract awarded by the Government. Thus, the developer is responsible to complete the construction in a specified manner failing which it would be responsible for the consequences of delay/any other fault attributable to it.

(k) That a developer shall undertake to maintain safety, security and protection of the environment.

(l) That a developer shall provide and maintain at his own cost all lights, guards, fencing, warning signs and watching, when or where necessary.

These are few broad sample qualities/parameters of a developer through which the character of a developer can be defined.

13.2 On the other hand, a 'contractor' is a person who undertakes work on a contract basis. He does not assume risks and responsibilities like that of a developer. He merely carries out the work as has been instructed to him by the contractee. Moreover, in case of such work the contractor gets fixed amount of revenue for executing such work and is not entitled to any share of profit from revenue generated by the developer/land owner.

13.3 To summarize, the developer acts as a principal whereas the contractor acts as an agent in performing the functions as required by the developer. The developers, in true sense, are the persons who are carrying out the business of developing or operating and maintaining or developing, operating and maintaining the infrastructure facility the infrastructure facility whereas the contractors are those persons who merely execute part of these functions on behalf of developer and do not own any risks and responsibilities of the work. In such cases, the contractors may not be eligible for the deduction under section 80-IA of the Act, as they are not developing any infrastructure facility but only providing assistance to the actual developer.

13.4 In view of the above, we note that it is possible to ascertain whether a civil construction work is assigned on development basis or contract basis only on the basis of the terms and conditions of the agreement. Only on the basis of the terms and conditions it can be ascertained about the nature of the contract assigned that whether it is a "work contract" or a "development contract....."

TRUE TEST THEREFORE IS WHO IS CARRYING ON ENTREPRENEUR RISK.

The above proposition has also echoed by the decision of **Kolkatta ITAT in case of ACIT vs Ho Hup Simplex reported in (2018) 92 taxmann.com 106(Kol)** and it is held as under:

"6.15 We find that like any other entrepreneur who employs his material, plant, machinery, labour etc in a project and undertakes risk, the assessee was also exposed to a substantial amount of risk by virtue of engaging his establishment in the infrastructure projects. In addition, the assessee was exposed to risk of non-completion of work within time, any damage caused to the works, site etc. increase in prices of materials, labour etc. beyond what the Government had agreed to compensate as per the agreement.

6.16 From the facts stated above, it is clear that the assessee was a developer and not a mere works contractor. Thus, it is clearly outside the purview of the Explanation to section 80-IA(13) of the Act."

Kind reference is also invited to the decision of another Kolkatta ITAT decision in case of **BMW Industries Ltd reported in 162 ITD 650(Kol)** where in again it is held as under:

"21. The CIT has also observed that the Assessee was only a contractor and not a developer because he was carrying out work as per the contracts awarded by the Executive Engineer. As rightly pointed out by the learned counsel for the Assessee, the question as to whether the Assessee as per the question as to whether the Assessee is 'developer' or 'contractor' has to be tested in the light of the subsequent decisions rendered on the issue by the Hon'ble Bombay High Court in the case of **ABG Heavy Industries (supra)** and the order of the Division Bench of ITAT giving effect to the larger bench (third member) decision in the case of **B.T. Patil & Sons (supra)**. According to these decisions what is to be seen is as to whether the assessee has shouldered out Investment & technical risk in respect of the work executed and it is liable for liquidated damages if it failed to fulfill the obligation laid down in the agreement. The liability that was assumed by the assessee under terms of the contract would be obligations involving the development of an infrastructure facility. The assessee has also

in its employment technically and administratively qualified team of persons. If the above conditions are satisfied then it would not be correct to say that assessee is merely a contractor and not a developer. Without giving adverse finding on the above tests, the CIT could not conclude that the order of the AO was erroneous and prejudicial to the interest of the revenue."

It will therefore be relevant to see whether the applicant has acted as an entrepreneur who has employed his material, plant, machinery, labour etc in a project and has undertaken risk.

This has been narrated in detail in for each project as follows:

Before detailing the fulfilment of the above said conditions, we are giving hereby flow chart of getting construction contracts from NHAI, PWD, IRCON, DFCC, PGCIL etc.

FLOW CHART FOR OBTAINING CONSTRUCTION CONTRACTS:

- *Different Ministries such as Road & Transport Ministry, Railway Ministry, Power Ministry etc. decide about the development of infrastructure facility as per their yearly plan and as provided in the budget every year.*
- *According to the plan, these Ministries give work to different PSUs/PSES or other autonomous bodies - PWD, NHAI or other PSUs.*
- *These PSUs/ PSES/ Autonomous Bodies float the Tender on the leading newspaper and on their web-site.*
- *Interested parties collect the tender documents from the concerned offices. This tender documents contains, specifications, standards (including what type of material to be used), schedule, drawings of the entire project.*
- *The department will also provide the Estimated Project Cost (bench mark).*
- *The interested parties send their survey team to inspect the entire stretch of the project and compare with the drawings provided by the department.*
- *Accordingly, the Contractor submits the Tender and the work will be awarded to the lowest bidder.*
- *The lowest bidder will receive the LOI (Letter of Intent) from the Department and the bidder will send the confirmation.*
- *The Department and the bidder will execute the Contract Agreement and the bidder would give performance bank guarantee within the stipulated time mentioned in the Agreement.*
- *As per the agreement terms the bidder will get mobilisation advance on submission of bank guarantee.*
- *The bidder will start the work and submit the monthly work bill and the department will release the amount after verification of the work done and deduct the statutory deduction.*
- *Independent Engineer/Authority Engineer will issue the Completion Certificate after successful completion of the Work and Defects Liability Period will start from Completion Certificate date.*

APPLICATION OF THE ABOVE SAID CONDITIONS TO THE PROJECTS EXECUTED BY THE APPLICANT:

It is submitted that applicant has complied with all the above conditions as enumerated in Section 80(IA) of the Act.

For ease of ready reference the same has been demonstrated for two of our projects below:

Sr. No. 1: MEGHALAYA PROJECT:

• **FIRST CONDITION - The Project has been awarded by State Government:**

It is submitted that the project in this case was awarded by The Chief Engineer, P.W.D., Highway, Meghalaya. State Government has awarded the Project. Hence, the applicant has fulfilled first condition that the project was awarded by Central/ State Government/ local authority/ Statutory Body.

• **SECOND CONDITION The Project should be for development of a new infrastructure facility and infrastructure facility includes road, bridge, railway system etc.**

Your Honours would observe from the following clauses that the assessee was engaged in the development of a new infrastructure facility which includes road, bridges etc:

Project: *2 laining of Nongstoin-Shillong section of NH-44 and Nongstoin-Rongjeng-Tura Road, in the state of Meghalaya under Phase-'A' of SARDP-NE- Job No. SARDP-NE-NH-44 & SR-MG-PWD-2010-11-172.*

Detailed Project Description: *Clause 9 of the Contract Data contains detailed project description as follows.*

9. Work consists of Earthwork, GSB, WMM, DBM, BC, Bridges, Culverts, Retaining/ Breast Wall, Road Sign etc.

The work shall, inter-alia, include the following, as specified or as directed.

(A) Road Works

Site clearance; setting-out and layout: widening of existing carriageway and strengthening including camber corrections; construction of new roads/ parallel service roads: bituminous pavements remodelling/construction of junctions, intersections, bus bays, lay byes; supplying and placing of drainage channels, flume, guard posts and construction/extensions of cross guard other related items: drainage works, bridges, approaches and other related stones; road marking, road signs and kilometre/ hectometre stones; protective works for roads/ bridges; all aspects of quality assurance of various components of the works; rectification of the defects in the completed works during the Defects Liability Period: submission of "As built" drawings and any other related documents; and other item of work as may be required to be carried out for completing the works in accordance with the drawings and provisions of the contact to ensure safety.

(B) Bridge Works

Site clearance; setting out, provision of foundations, piers abutment and bearings; prestressed/reinforced cement concrete superstructure; wearing coat, hand railings, expansion joint, approach slabs, drainage spouts/down take pipes, arrangement for fixing light posts, water mains, utilities etc; provision of suitably designed protective works; providing wing/return walls; provision of road markings, road signs etc; all aspects of quality assurance; clearing the site and handing over the works on completion; rectification of the defects during the Defects Liability Period and submission of "As-built" drawings and other related documents; and other items of work as may be required to be carried out for completing the works in accordance with the drawings and the provisions of the contract and to Insure safety.

The above said detailed project description duly includes widening of the existing carriageway and construction of new roads/ parallel road which establishes development of "New Infrastructure Facility" since as per Board's Circular widening of the existing roads by constructing additional lane would be development of New Infrastructure Facility.

• **THIRD CONDITION. - The assessee is a developer of New Infrastrucutre Facility.**

Following clauses of the Contract Agreement would substantiate that the applicant is Developer of a New Infrastructure facility and not a mere contractor as the applicant has undertaken both managerial as well as financial responsibility; it is under an obligation to design the project; it is fully responsible for development or completion of the project; it has undertaken complete risk of the project; it has employed manpower, machinery and has also arranged finances.

Responsibilities of the Contractor include following:

GENERAL CONDITIONS OF THE CONTRACT

Materials: *Materials are all supplies, including consumables, used by the contractor for incorporation in the work.*

Plant: *Plant is any integral part of the Works which is to have a mechanical, electrical, electronic or chemical or biological function.*

"9 Personnel

9.1 *Contractor shall employ the key personnel named in the Schedule Key Personnel as referred to in the Contract Data to carry out the functions stated in the Schedule or other personnel approved by the Engineer. The Engineer will approve any proposed replacement of key personnel only if their qualifications abilities and relevant experience are substantially equal to or better than those of the personnel listed in the Schedule.*

12 Contractor's Risks

12.1 *All risks of loss of or damage to physical property and of personal injury and death which arise during and in consequence of the performance of the Contract other than the excepted risks are the responsibility of the Contractor.*

13 Insurance

13.1 *The Contractor shall provide in the joint names of the Employer and the Contractor, insurance cover from the Start Date to the end of the Defect Liability Period in the amounts and deductibles stated in the Contract Data for the following events which are due to the Contractor's Risks:*

(a) loss of or damage to the Works, Plant and Materials;

(b) loss of or damage to Equipment;

(c) loss of or damage of property (except the Works, Plant, Materials and Equipments) in connection with the Contract; and

(d) personal injury or death.

21. Possession of the Site

21.1 *The Employer shall give possession of all parts of the Site to the Contractor. If possession of a part is not given by the date stated in the Contract Data the Employer is deemed to have delayed the start of the relevant activities and this will be Compensation Event.*

27 Programme

27.1 *Within the time stated in the Contract Data the Contractor shall submit to the Engineer for approval a Programme showing the general methods, arrangements, order, and timing for all the activities in the Works along with monthly cash flow forecast.*

32 Early Warning

32.1 *The Contractor is to warn the Engineer at the earliest opportunity of specific likely future events or circumstances that -may adversely affect the quality of the work, increase the Contract Price or delay the execution of works. The Engineer may require the Contractor to provide an estimate of the expected effect of the future event or circumstance on the Contract Price and Completion Date. The estimate is to be provided by the Contractor as soon as reasonable possible.*

49 Liquidated Damages

49.1 *The Contractor shall pay liquidated damages to the Employer at the rate per day stated in the Contract Data for each day that the Completion Date is later than the Intended Completion Date (for the whole of the works or the milestone as stated in the contract data). The total amount of liquidated damages shall not exceed the amount defined in the Contract Data. The Employer may deduct liquidated damages from payments due to the Contractor. Payment of liquidated damages does not affect the Contractor's liabilities.*

52 Securities

52.1 *The Performance Security (including additional security for unbalanced bids) shall be provided to the Employer no later than the date specified in the Letter of Acceptance and shall be*

issued in an amount and form and by a bank or surety acceptable to the Employer and denominated in Indian Rupees. The Performance Security shall be valid until a date 28 days from the date of expiry of Defect Liability Period and the additional security for unbalanced bids shall be valid until a date 28 days from the date of issue of the certificate of completion.

54 Cost of Repairs

54.1 *Loss or damage to the Works or Materials to be incorporated in the Works between the Start Date and the end of the Defects Correction period shall be remedied by the Contractor at the Contractor's cost if the loss or damage arises from the Contractor's acts or omissions.*

SPECIAL CONDITIONS OF CONTRACT

1. LABOUR

The Contractor shall, unless otherwise provided in the Contract, make his own arrangements for the engagement of all staff and labour, local or other, and for their payment, housing, feeding and transport.

2. COMPLIANCE WITH LABOUR REGULATIONS:

During the continuance of the contract, the Contractor and his sub-contractors shall abide at all times by all existing labour enactments and rules made there under, regulations, notifications and bye laws of the State or Central Government or local authority and any other labour law-

ADDITIONAL SPECIAL CONDITION

1 *From the date of taking over of site by contractor till the completion of **the whole work, the entire responsibility for maintenance of the road portion including the portions where the work is not yet started (in addition to the maintenance of the already executed works) shall lie with the contractor.** In case the contractor fails to carry out the maintenance works, he will be notified by the Executive Engineer to execute the same. If the contractor still then fails to carry out the same within 7 days from the date of receiving instruction etc. from the Executive Engineer in writing, the Executive Engineer will be done the work and the cost thereof will be recovered from the contractor's next bill for the works. The maintenance Road as required in the place of work is to be carried out as per the existing provisions of the road i.e. WBM/BUSG/PC/SC as may be applicable as per the director of the Engineer-in-charge.*

Your Honours would observe from the above said details that the Shillong Project duly complies with the conditions laid down for claiming deduction u/s 80IA as follows:

i> The Project has been awarded by the State Government of Meghalaya;

ii> The Project is for development of "New Infrastructure facility" as the project is for widening of the existing carriageway;

iii> The Project was awarded after 01.04.1995;

iv> The applicant has to execute the whole of the project

v> The above said terms and conditions duly establish that total risk of the project is on the applicant; and is responsible for both managerial and financial responsibility; has duly given performance guarantee to the Employer; has bigger role than a Contractor, the applicant has to amend errors which may arise therein; it has to make own arrangement for plant, labour and material and hence, the applicant is a Developer.

Hence, it is submitted that the assessee may kindly be allowed deduction u/s 80IA with respect to the above said Project

Sr. No. 3: Danapur ROB:

A> FIRST CONDITION - The Project has been awarded by the Central Government:

It is submitted that the project in this case was awarded by IRCON International Limited (A Government of India Enterprise owned by Ministry of Railways). Kindly see underlined of the Letter of Acceptance and of Tender Documents. Ministry of Railways through IRCON International Limited has awarded this Project. Hence, the applicant has fulfilled first condition that the project was awarded by Central/ State Government/ local authority/ Statutory Body.

B> SECOND CONDITION - The Project should be for development of a new infrastructure facility and infrastructure facility includes road, bridge, railway system etc.

Your Honours would observe from the following clauses that the assessee was engaged in the development of a new infrastructure facility which includes road, bridges railway system etc. Kindly see underlined portion of Letter of Acceptance which provides details of the project to be executed:

"Construction of Road over Bridge both railway span and adjacent approaches span including Reinforced Earth Wall /Retaining wall in lieu of LC-35 B at Km 613/11-12 between section Phulwarisharif- Danapur, on EC Railway, Bihar."

Detailed Scope of Work has been detailed in Special Conditions of the Contract, which provides as follows:

"2.0 SCOPE OF WORK:

The scope of the work shall comprises for carrying out all the construction activities related to "Construction of Road over Bridge both railway span and adjacent approaches span including Reinforced Earth wall/ Retaining wall in lieu of LC-35 B at Km 552/11-13 between section Phulwarisharif - Danapur Section on Patna Mughalsarai Route in Danapur Division of E C Railway, Bihar." The details of ROB is/are indicated elsewhere in the tender documents/ drawings. The scope described hereunder is only indicative in nature and shall be deemed inclusive all items to be executed for its completion as per Specifications and Drawings. This will be inclusive of:

- (i) Review all the available reports, drawings, and information, site details already available and consider the same while planning & executing the work.

- (ii) *Checking approved General Arrangement Drawing (GAD) & all other relevant drawings for subject ROB and do inform for necessary correction for incorporation through The Employer, if required. Before commencement of construction activities, the traffic bypass arrangement/diversion to be constructed & maintained during the entire construction period. Time to time, the diversion plan, should be prepared & submitted to Employer. Planning & executing the construction of all activities relevant to completion of ROB duly complying with all requirements of IRC, BIS, RDSO and MOST specification as applicable & as directed by Employer & desired by Railways, State Government, Local Authorities etc. In case of any modification in GAD, the contractor shall obtain a corrected copy of GAD's in hard copy to follow at site.*
- (iii) *The Contractor will arrange site clearing, required Dismantling, left over utility shifting etc. and submit the proposed land utilisation plans for proposed construction of ROB. The limits of construction shall be cordoned by continuous barricade of approved design and drawing. The steel Frame & plate barricade safety boards duly written with desired LOGO & safety slogans shall be provided continuous blocking for not intercepting the construction activities by flying traffic. Safety bands, Ribbons and other gadgets for Construction site & Workmen shall be maintained as per scheme approved by the engineer.*
- (iv) *Based on the approved GAD, design, the contractor will organize surveys and shall prepare detailed layout plans showing approach roads, piers, abutments RE wall & approaches of ROB etc. and execute based on detailed engineering drawings for all items of works. The working drawings shall be prepared on computer in standard CAD format.*
- (v) *The contractor shall submit Quantities with calculations for any item mandatory for execution, but not covered in subject contract by any means, along with its justification, analysis of rates and detailed specifications for any/all such items for finalizing rates & obtain instructions from the Engineer for its execution. Awaiting approval of Rates for any such item, the work will not be stopped at site. The AOR is to be prepared based on RCD SOR (latest) and/or MOSRTH standard codes of practice, MOSRTH Standard Data Book and/or as per instruction of the Engineer.*
- (vi) *The contract shall submit a detailed construction delivery program for completion of proposed ROB alongwith schedule of matching resources deployment proposed within 14 days from issue of LOA.*
- (vii) *The contractor shall carry out construction of all components of ROB based upon approved drawing, design & approved methodology, following codal provisions and requirements etc. for all safe & sound completion of the proposed ROB by providing his own Manpower, Machineries, Materials etc. complete.*
- (viii) *The contractor shall submit free of cost all "As' built" drawings "(in Hard copies and soft copies)" in appropriate size & sufficient number of copies, as directed by the Engineer.*

- (ix) *The contractor shall provide complete design for any/all load test e. g. Plate load test, Pile load test, Bridge load test etc. of required no & desired location during construction stage including all temporary works & arrangements etc. for the same, without claiming any extra cost & desired by the Engineer.*
- (x) *Preparation of detailed Girders launching scheme along with complete methodology and to make all arrangements for the same" approved from The Engineer and The Railways authorities.*
- (xi) *To organize, conduct & maintain required & quality control test and records for day to day work on regular basis. The contractor shall ensure that the work is executed conforming to the approved design, drawings and specifications. For the period for execution of ROB, the contractor has to follow the quality Assurance, Safety, Health & Environment Manual of IRCON. The Engineers to be deployed by the Contractor shall work under the direction of the Engineer-in-charge. They shall be bound the carry out all duties related with the work assigned by the Engineer-in-charge or his representative. All facilities & equipment's required for proper construction & quality control during execution of entire work such as survey instruments including TOTAL STATION, testing equipment's, laboratory facilities etc. shall be arranged by the contractor.at his own cost.*
- (xii) *Wherever required, the contractor has to carry out accurate instrumental survey to establish co-ordinate, layout and proper verification system at site.*
- (xiii) *The "work shall be carried out in terms of specifications of latest editions (and up-to-date correction amendment/errata) of IRS (Indian Railways Standards) IRC (Indian Road Congress) and BIS (Beaureu of Indian Standard), RDSO & other relevant international code, whatever/wherever applicable and as directed by the Employer/Client.*
- (xiv) *Vertical & Horizontal Clearance shall be maintained for corresponding construction/components of subject ROB, within/outside Railway / Construction limits for maintaining desired safety/construction requirements.*
- (xv) *The girder may be of Precast pre-stressed contract (Pre/ Post tensioned), steel or composite or R.C.C/PSC Beams/ Slabs etc. depending upon the designs approved.*
- (xvi) *Launching / Erection of Girders with approved methodology and equipments.*
- (xvii) *The approaches of the bridges will be Reinforced earth work and viaduct depending upon the site conditions and requirements of the design & Drawings. The decision of the engineer-in-charge shall be final in this regard.*
- (xviii) *Construction of road side Drain, Drainage scheme & spouts, Footpath, smooth transition to and from ROB approaches, removal & clearing of all left over material & clearing of all left over material & Debris within / from ROB limits, completion of approaches & adjoining service road with Concrete pavement / bituminous wearing surfaces, etc. all activities essential for completion of ROB.*

The above said detailed project description duly includes construction of a new Road over Bridge and Scope of Work includes complete responsibility of the contractor, which establishes development of "New Infrastructure Facility".

C> THIRD CONDITION - The assessee is a developer of New Infrastructure Facility.

Following clauses of the Contract Agreement would substantiate that the applicant is Developer of a New Infrastructure facility and not a mere contractor as the applicant has undertaken both managerial as well as financial responsibility; it is under an obligation to design the project; it is fully responsible for development or completion of the project; it has undertaken complete risk of the project; it has employed manpower, machinery and has also arranged finances.

Responsibilities of the Contractor include following:

Kindly see following Clauses of the Agreement for assessee's obligations with respect to the Project, which provides as follows:

"4.5 Labour camps

4.5.1 Labour camps, if allowed to be removed from site on completion and site shall be cleared to the entire satisfaction of the Employer / Client in better manner. The contractor with prior permission may erect the labour camps at his own cost at: suitable place near the site of work if land is available or make his own arrangement at his own cost. The contractor shall make all necessary adequate arrangements for preservation of the hygiene of his staff as per regulations of the local bodies. The contractor shall be responsible for all arrangements with respect to such labour camps, including water, power, sewerage, hygiene as well as complying with regulations and stipulations of local bodies and other statutory departments etc. The contractor shall at all times permit inspection of the sanitary arrangements made by the contractor by the Engineer's representative or any authority of local bodies and shall be bound by their decisions.

6.0 SUPPLY OF MATERIALS BY ENGINEER

6.1 Contractor shall make his own arrangements at his cost for all materials required for execution, completion and maintenance of all items of work included in his scope of work to the complete satisfaction of the Engineer. Engineer shall not supply any materials nor shall assist for procurement of any materials required for execution; completion and maintenance of works.

6.2 CEMENT

The Contractor shall procure cement from the reputed cement manufacturer: only and in accordance with the specifications of the contract with the prior approval of the Engineer. The Contractor shall submit the proof of procurement of cement from the agency approved by the Engineer. The Contractor shall also submit the test certificates regarding the quality of the materials.

Instead of Ordinary Portland Cement Grade-53 (OPC Grade Cement, Ordinary Portland Cement Grade 43 (OPC 43 grade Cement) and/or Portland Pozzolana Cement (PPC), from reputed cement manufacturer, may be permitted by the Engineer in specific case and as per the conditions mentioned elsewhere in the tender document. In any case use of Portland Slag Cement (PSC) is prohibited and cannot be used in any component of the Contract

6.3 STEEL FOR REIUFORCEMENT

Reinforcement steel shall be procured by contractor from either of following:

- i. SAIL,*
- ii. RINL*
- iii. TISCO*

The Contractor shall procure reinforcement steel from the any of the above manufacturer in accordance with the specification of the contract. The Contractor shall submit the proof of procurement of reinforcement steel from one of the above agencies. The Contractor shall be submit the test certificates regarding the quality of the steel. In any specific case such as scarcity/shortage/Non production etc., the contractor may approach & request The Engineer, with supporting test certificates satisfying the required quality standards, to approve an alternative source. This will be at sole discretion of The Engineer to accept/reject contractor's request as he ascertains, in the interest of work.

6.4 STRUCTURAL STEEL

Structural steel shall be procured by contractor from either of following:

- i. SAIL,*
- ii. RINL,*
- iii. TISCO*
- iv. JINDAL*

The Contractor shall procure structural steel from any of the above manufacturers in accordance with the specifications & standards for the contract. The Contractor shall submit the proof of procurement of structural steel from the above agencies. The Contractor shall also submit the test certificates regarding the quality of the steel. In any specific case such as scarcity/shortage/Non production etc., the contractor may approach & request The Engineer, with supporting test certificates satisfying the required quality standards, to approve another sources. This will be at sole discretion of The Engineer to accept/reject contractor's request as her ascertains, in the interest of work.

7.0 PLANT AND MACHINERY

7.1 The Contractor shall make his own arrangements at his cost for all Plant and Machinery required for execution, completion and maintenance of all of work included in his scope of work to the complete satisfaction of the Engineer, IRCON shall neither supply any

Plant and Machinery nor assist for procurement of any Plant and Machinery required for execution, completion and maintenance of works.

7.2 It will be mandatory on the part of the contractor to deploy concrete batching plant of suitable capacity for production of all grades of concrete above M15 grade. Depending upon the requirement, placing of the concrete shall either be done with a concrete pump, concrete transit mixtures or crane and bucket system as per the site condition.

7.3 The contractor shall arrange and operate at his own cost all necessary tools, plants, machineries and equipments necessary for successful and timely completion of work.

7.4 If in the opinion of the Engineer, equipment / plant brought by the contractor are not suitable for the work concerned, the engineer shall have the right to order the contractor to replace them by the suitable plant/ equipments. In the interest of public convenience, the engineer may interest on the specific way of execution of the work.

8.0 LABORATORY

8.1 Contractor shall have to provide a field laboratory at his own cost for carrying out all tests required, as per Specifications or as stated elsewhere in the contract, including supply of laboratory equipment and also provision of adequate number of qualified personnel, erection, maintenance and running of laboratory including all consumable during execution of works.

The design of job mix, well in advance, shall be done by the contractor and got approved by IRCON/Consultants. IRCON/Consultants reserve the right to suggest changes in the job mix submitted by the contract, or and no claim on account of these changes shall be entertained from the contractor. The approved job mix would be followed strictly by the contractor.

The contractor shall also be responsible for carrying out all tests at site and getting approval from the client for the same. For site testing all the materials, equipment, consumables, Stationary & samples etc. including manpower will be arranged by contractor, at his own cost.

10.0 DEPLOYMENT OF ENGINEERS

10.1 The Contractor shall provide and keep on the works, during the execution of the works, efficient and competent Engineers to ensure that the work is executed strictly as per provisions of the Contract.

18.0 INSURANCE

(This clause supersedes the clause '9.0' of General Conditions of Contract).

Before commencing of works, it shall be obligatory for the contractor to obtain, at his own cost, insurance cover in the joint name of the Contractor and Employer from reputed companies for the following requirements:

a) Contractors All Risk (CAR) Policy.

- b) *Liability for death of or injury to any person or loss of or damage to any property (other than the work) arising out the performance of the Contract.*
- c) *Construction Plant, Machinery and Equipment brought to site by the Contractor.*
- d) *Workmen Compensation Policy*
- e) *Any other insurance cover as may be required by the law of the land.*
- f) *The Contractor, if required, will engage a suitable consultant to liaise with insurer company in the interest of realization of insurance Claims at no cost to employer.*

27.0 SAFE WORKING METHODS

27.1 *The contractor shall at all times adopt such safe methods of working as to ensure safety of structures, equipment and labour. If any time Employer finds the safety arrangements inadequate or unsafe the contractor shall take immediate corrective action at his cost as directed by Engineers representative at site. Any direction in the matter shall in no way absolve the contractor of his sale responsibility to adopt safe working methods. The contractor is responsible for providing skilled personnel and adequate expert supervision so as to ensure complete safety.*

GENERAL CONDITIONS OF CONTRACT

8.0 PERFORMANCE SECURITY & RETENTION MONEY

8.1 *For contracts valuing upto Rs. 1.00 Crore, performance security shall be required to be submitted by the Contractor.*

8.2 *Performance Security for Contracts valuing more than Rs. 1.00 Crore:*

- i) *The successful bidder shall submit a performance Guarantee in the form of irrevocable bank guarantee in the Performa annexed as Annexure-II from' any scheduled bank" for an amount of 5% (Five percent) of the contract value. The value of PG to be submitted by the contractor will not be change for variation upto 25% (either increase or decrease). In case during the course of execution, value of contract increases by More than 25% of the original contract value, an additional performance Guarantee amounting to 5% (Pive percent) fir the excess value over the original contract value should be deposited by the contractor.*

15.0 PROGRAMME OF WORK

The Contractor shall submit the programme for completion of work to the Engineer for his approval within 15 days from the date of receipt of letter of acceptance. Unless otherwise directed the programme shall be in the form of Bar-Chart showing proposed execution of quantities of principal items of work. The programme shall be related to the capability of equipment proposed to be deployed and site conditions. The Contractor shall also provide in writing methodology for execution of major items of work as desired by the Engineer. The

submission and approval of such programme shall not relieve the Contractor of any of his duties or responsibilities or obligations under the contract. The Engineer shall have full power and authority during the progress of work to issue such instructions as may be necessary for the proper and adequate execution of the work.

23.0 SAFETY OF PUBLIC AND PUBLIC UTILITIES

- i) Existing road or water courses or any other utility shall not be blocked, cut through, altered, diverted or obstructed in any way by the Contractor, except with the permission of the Engineer. All compensation claimed by any Department /Organisation for any unauthorized closure, cutting through, alteration, diversion or obstruction to such roads or water courses by the Contractor or his staff shall be recovered from any moneys due to the Contractor.*

26.0 CARE OF WORKS

From the commencement of the work until completion, acceptance and final take over of the works by the Engineer, the Contractor shall take full responsibility for the care of all works including temporary works. In case any damage, loss or injury happens to the work or to any temporary works from any cause whatsoever, the Contractor shall at his own cost repair and make good the same so that on completion and at the time of final take over, the work shall be in good condition and in conformity in every respect with the requirements of the contract and the Engineer's instructions.

35.0 TOOLS, PLANT AND EQUIPMENT

Except for any specific item mentioned in the contract, the Contractor shall have to make his own arrangements, at his own cost, Plant, Machinery and Equipment required for execution and completion of all works to the entire satisfaction of the Engineer. This shall also include all other associated equipment, tools/tackles spare parts, POL, consumables, stores, manpower as required for the execution of works.]

36.0 PLANT AND MATERIALS OF THE CONTRACTOR

36.1 Contractor's plant/materials at site to be exclusive to the work All constructional, plant and materials brought on the site by the Contractor be deemed to be exclusively intended for the execution of the work or part of the work and the Contractor shall not remove the same without the permission of the Engineer till completion of work or part of work.

39.0 ENGAGEMENT OF LABOUR

The Contractor shall make his own arrangements for the engagement of all labour, except as provided otherwise in the contract.

- D> FOURTH CONDITION:** *Above responsibilities and duties alongwith other Clauses of the Agreement duly substantiate that the assessee is not a simplicitor contractor rather the*

assessee is a developer of the project who has taken complete responsibility and risk for the said ROB Danapur Project.

Your Honours would observe from the above said details that the ROB Danapur Project duly complies with the conditions laid down for claiming deduction u/s 80LA as follows:

- i> The Project has been awarded by the IRCON International Ltd. (A Government of India Enterprise);*
- ii> The Project is for development of "New Infrastructure facility" as the Government is constructing a new Road over Bridge at Danapur, Bihar;*
- iii> The Project was awarded after 01.04.1995;*
- iv> The applicant has to execute the given project wholly and exclusively.*
- v> The above said terms and conditions duly establish that total risk of the project is on the applicant; and is responsible for both managerial and financial responsibility; has duly given performance guarantee to the Employer; has bigger role than a Contractor, the applicant has to amend errors which may arise therein; it has to make own arrangement for plant, labour and material and hence, the applicant is a Developer.*

Hence, it is prayed that deduction u/s 801A may kindly be allowed for Danapur ROB Project.

We have made our submissions for two of our Projects. It is clarified that all other projects have also been executed in a like manner and there is parity of facts. If your goodself require submission of all the projects, we would be glad to submit the same. However, we are submitting the agreements of all other projects as below:

1. Sr. No. 2: Mokama-Munger Project:

- a. Agreement of Project Company (Mokama-Munger Highway Ltd. with NHAI).*
- b. Agreement of assessee JV with the Project Company.*

2.Sr. No. 4: Subansari Project

3. Sr. No. 5: Ganga Bridge- Digha Project

4. Sr. No. 6: Ganga Bridge- Sonapur Project

5. Sr. No. 7: Muzaffarpur ROB Project

6. Sr. No. 8: Sonbarsa Project

a. Agreement of Project Company (North Bihar Highway Ltd. with NHAI).

b. Agreement of assessee JV with the Project Company.

7: Sr. No. 9: SH-83 Project

2. Point No. 8 (Details of Expenses):

With regard to details of expenses, vide our letter dated 18.02.2021, we had submitted that most of sites of the assessee are in ERP Package and the Central Computer System has got damaged due to rain. We have prepared site-wise details of all the expenses as have been asked for. The same are attached herewith for your kind perusal.

Some of the work-sites are in Tally System. The assessee is in the process of extracting ledger accounts from the Tally System. We require a further 15 days time to submit the same.

It is further submitted that the accounts of t audited accounts and the assessee is under t inception. Its books of accounts have never been rejected by the earlier the assessee are duly Assessing Officers. The assessee intends to submit complete details, but is Scrutiny assessment since helpless due to non-working of Central Computer System. In such a scenario, we would request your goodself to kindly exempt the assessee from submissions of the ledger accounts maintained in ERP Package.

It is prayed accordingly.

3. Virtual Hearing:

Your goodself has allowed Virtual Hearing of the case. We would like to avail the said opportunity of being heard virtually. However, we would request your goodself to kindly give us some time to submit the pending details of expenses and we would request for Virtual Hearing after filing all the details.”

14. It may be seen that a detailed explanation to prove that the assessee fulfils all requisite conditions to claim deduction under section 80IA of the Act was given. For ease of ready reference as to how the conditions were complied with, two projects namely Meghalaya Project and Danapur ROB were taken up. At page 614 (internal page 34) of Paper Book it was submitted that submissions have been made for above two projects. It is however clarified that all other projects have also been executed in a like manner and there is parity of facts. The assessee was prepared to make submission for all the projects, if required. However, the assessee submitted agreements of all other projects including Sonbarsa Project and SH-83 Project. It was clarified that Mokama-Munger Project and Sonbarsa Project were awarded by NHAI to the assessee company.

14.1 We observe that a comprehensive note in support of the assessee's claim that it is a developer of an infrastructure facility and not a work contractor was given (pages 592-597) of Paper Book- Internal pages 12-17).

15. Neither the Ld. AO nor the Ld. DRP required the assessee to demonstrate as to how the necessary conditions for claiming deduction under section 80IA were fulfilled for Sonbarsa Project and SH-83 Project even though the assessee had offered to do so. None-the-less the fact remains that copy of agreement for these two projects were submitted before the Ld. AO. If he wanted, he could have gone into further details but the Ld. AO chose not to do so. Therefore, we do not find any substance in the argument of the Ld. CIT-DR that because claim of deduction under section 80IA has been made first time during the year for these two projects, the decision (supra) of the Tribunal does not cover the issue.

16. We have perused the decision (supra) of the Tribunal for AY 2016-17 in which same issue was involved. We find that the Tribunal has recorded its findings on all the points raised by the Ld. AO which have been repeated in the year under consideration as well. We reproduce hereunder the relevant observations and findings therefrom:

"21. We observe that the assessee filed all the agreements entered into by it in respect of various projects with various undertakings for developing the infrastructural projects and made elaborate submissions as to why the assessee fulfills the conditions specified in Section 80IA(4) of the Act. The assessee contended that the Corporations with which it had entered into agreements are public sector undertakings of State/Central Governments, therefore, fulfills the basic condition u/s 80IA(4) of the Act. The assessee also explained the various clauses of the agreements entered with various entities to prove that assessee is a developer and not merely a contractor. The basic objection of the AO in denying the claim u/s 80IA was that the enterprise with which the assessee entered into agreement for developing the projects are not statutory bodies. However, the submissions and evidences placed on record suggest that these Companies/Entities were formed under various Ministries of Government of India and, therefore, the contention of the AO that the basic condition of provisions of Section 80IA(4) of the Act was not fulfilled by the assessee is not correct.

22. The second contention of the AO is that the assessee has entered into EPC agreement with Mokama-Munger Highway Ltd. which in turn had obtained a contract from NHAI and, therefore, the assessee is only an EPC contractor for carrying out work awarded by NHAI to

Mokama-Munger Highway Ltd. and, therefore, the basic condition of sub-section (4) of Section 80IA is not fulfilled.

23. *On perusal of the Letter of Authority (LOA) dated 19.05.2010 which is placed at page 733 of the PB it is observed that the NHAI accepted the assessee JV as a successful builder for developing two Layning with paved shoulders of Mokama-Munger section of NH80 in the State of Bihar on BOT basis under NHDP-III. The LOA clearly specifies that assessee JV shall promote and incorporate the concessionary as a Limited Liability Company under the Companies Act as the NTT which shall undertake and perform the obligations and exercise the rights of the builder under LOA including the obligation to enter into the concession agreement pursuant to the LOA for executing the project. This clearly shows that MokamaMunger Highway Ltd. was incorporated as a pre condition for execution of the project as per the terms of LOA issued by NHAI to the assessee JV. Therefore, since NHAI through LOA has put a condition for incorporation of Limited Liability Company under the Companies Act for the purpose of undertaking and performing the obligation and exercise the rights of the builder under LOA and also to enter concession agreement pursuant to LOA for executing the project we are of the view that the assessee fulfills the basic condition under sub-section (4) of Section 80IA of the Act.*

24. *Coming to the last contention of the AO that the assessee is not a developer but only a contractor we find no substance in the contention of the AO. Various clauses in the agreement entered into by the assessee for execution of infra projects clearly shows that the assessee is the complete risk bearer, liable for liquidated damages in case of delay in execution of the projects. Some of the clauses in the agreement entered into by the assessee with the Chief Engineer PWD Highway, Meghalaya State Government are as follows:*

“9 Personnel

9.1 Contractor shall employ the key personnel named in the Schedule Key Personnel as referred to in the Contract Data to carry out the functions stated in the Schedule or other personnel approved by the Engineer. The Engineer will approve any proposed replacement of key personnel only if their qualifications abilities and relevant experience are substantially equal to or better than those of the personnel listed in the Schedule.

12 Contractor’s Risks

12.1 All risks of loss of or damage to physical property and of personal injury and death which arise during and in consequence of the performance of the Contract other than the excepted risks are the responsibility of the Contractor.

13 Insurance

13.1 The Contractor shall provide in the joint names of the Employer and the Contractor, insurance cover from the Start Date to the end of the Defect Liability Period in the amounts and deductibles stated in the Contract Data for the following events which are due to the Contractor's Risks:

(a) loss of or damage to the Works, Plant and Materials;

(b) loss of or damage to Equipment;

(c) loss of or damage of property (except the Works, Plant, Materials and Equipments) in connection with the Contract; and

(d) personal injury or death.

21 Possession of the Site

21.1 The Employer shall give possession of all parts of the Site to the Contractor. If possession of a part is not given by the date stated in the Contract Data the Employer is deemed to have delayed the start of the relevant activities and this will be Compensation Event.

27 Programme

27.1 Within the time stated in the Contract Data the Contractor shall submit to the Engineer for approval a Programme showing the general methods, arrangements, order, and timing for all the activities in the Works along with monthly cash flow forecast.

32 Early Warning

32.1 The Contractor is to warn the Engineer at the earliest opportunity of specific likely future events or circumstances that may adversely affect the quality of the work, increase the Contract Price or delay the execution of works. The Engineer may require the Contractor to provide an estimate of the expected effect of the future event or circumstance on the Contract Price and Completion Date. The estimate is to be provided by the Contractor as soon as reasonable possible.

49 Liquidated Damages

49.1 The Contractor shall pay liquidated damages to the Employer at the rate per day stated in the Contract Data for each day that the Completion Date is later than the Intended Completion Date (for the whole of the works or the milestone as stated in the contract data). The total amount of liquidated damages shall not exceed the amount defined in the Contract Data. The Employer may deduct liquidated damages from payments due to the Contractor. Payment of liquidated damages does not affect the Contractor's liabilities.

52 Securities

52.1 The Performance Security (including additional security for unbalanced bids) shall be provided to the Employer no later than the date specified in the Letter of Acceptance and shall be issued in an amount and form and by a bank or surety acceptable to the Employer and denominated in Indian Rupees. The Performance Security shall be valid until a date 28 days from the date of expiry of Defect Liability

Period and the additional security for unbalanced bids shall be valid until a date 28 days from the date of issue of the certificate of completion.

54 Cost of Repairs

54.1 Loss or damage to the Works or Materials to be incorporated in the Works between the Start Date and the end of the Defects Correction period shall be remedied by the Contractor at the Contractor's cost if the loss or damage arises from the Contractor's acts or omissions.

SPECIAL CONDITIONS OF CONTRACT

1 LABOUR

The Contractor shall, unless otherwise provided in the Contract, make his own arrangements for the engagement of all staff and labour, local or other, and for their payment, housing, feeding and transport.

2 COMPLIANCE WITH LABOUR REGULATIONS:

During the continuance of the contract, the Contractor and his sub-contractors shall abide at all times by all existing labour enactments and rules made there under, regulations, notifications and bye laws of the State or Central Government or local authority and any other labour law.

ADDITIONAL SPECIAL CONDITION

*1 From the date of taking over of site by contractor till the completion of **the whole work. the entire responsibility for maintenance of the road portion including the portions where the work is not yet started (in addition to the maintenance of the already executed works) shall lie with the contractor.** In case the contractor fails to carry out the maintenance works, he will be notified by the Executive Engineer to execute the same. If the contractor still then fails to carry out the same within 7 days from the date of receiving instruction etc. from the Executive Engineer in writing, the Executive Engineer will be done the work and the cost thereof will be recovered from the contractor's next bill for the works. The maintenance Road as required in the place of work is to be carried out as per the existing provisions of the road i.e. WBM/BUSG/PC/SC as may be applicable as per the director of the Engineer-in-charge.*

***D> FOURTH CONDITION:** Above responsibilities and duties duly substantiate that the assessee is not a simplicitor contractor rather the assessee is developer of the project."*

25. The above clauses of the agreement clearly shows that the assessee is liable for all risks for loss, damage to physical property, personal death insurance in consequence of performance of contract liable for liquidated damages to the employer due to delay in

execution of contract, liable for cost of repairs for the loss or damages to the works or materials. Assessee is responsible for whole work from the date of takeover of the site till completion responsibility for maintenance of the road portion including the portions where the work is not started. All these clauses goes to show that the assessee is not a simplicitor contractor rather the assessee is a developer of the project. Therefore, the contention of the AO that the assessee is not a developer but only a contractor is misconceived.”

17. We are conscious that the tax benefit under section 80IA was introduced for encouraging private sector participation by way of investment in development of the infrastructure sector and not for the person who merely execute the civil construction work or any other works contract. We have also perused the decisions (supra) relied upon by the Ld. CIT-DR. In Yojaka Marine (P) Ltd. (supra) the assessee had entered into an agreement with Inland Waterways Authority of India to undertake work of construction of permanent banks of two canals in Kerala. The assessee claimed deduction under section 80IA for maintenance of infrastructure facility. The issue for consideration was whether agreement in question was a mere works contract to effect repairs to infrastructure by construction of permanent bank protection measures to two canals and maintaining same for three years. The Hon'ble Karnataka High Court answered it in affirmative. In BT Patil & Sons Belgaum Construction (P) Ltd. (supra) it was noticed from records that sphere of work assigned to assessee was simply to do job of civil construction and it was not involved in planning and development of infrastructure facility as a whole. It was in the backdrop of the said factual finding that the assessee's claim of deduction under section 80IA was negated. None of these two decisions (supra) relied upon by the Ld. CIT-DR assist him being distinguishable on facts. On the face of the clear cut finding of the Tribunal that the assessee is a developer of the Projects and not only a contractor, the contention of the Ld. CIT-DR is rejected being devoid of merit.

18. Following the decision (supra) of the Tribunal and for the reasons set out above we decide Ground No. 3 in favour of the assessee holding that the

assessee is eligible to claim the impugned deduction under section 80IA of the Act.

19. Ground No. 4 relates to disallowance of Rs. 38,34,16,688/- on account of deduction of expenses under section 40(a)(ia) disallowed in earlier years. The Ld. AO has not discussed this issue in draft assessment order. According to him, the assessee has claimed the impugned deduction in revised computation vide letter dated 04.09.2021. However the Ld. DRP directed the Ld. AO to verify the claim but the Ld. AO added it back to the income of the assessee for want of supporting evidence.

19.1 The Ld. AR submitted that before the Ld. DRP the assessee objected to non-acceptance of the revised computation of income and submitted complete details (pages 10-12 of Paper Book) as also comparison of original and revised return in this regard along with necessary documentary evidence. He urged that the matter be sent to the Ld. AO for examining the details and decide the issue afresh.

19.2 The Ld. CIT-DR had no objection thereto.

20. On consideration of the submission of the parties, we deem it fit to remit the matter to the file of the Ld. AO to examine the details and supporting documentary evidence and decide the issue afresh in accordance with law after affording reasonable opportunity of hearing to the assessee. We order accordingly. This ground is treated as allowed for statistical purposes.

21. Ground No. 6 relates to transfer pricing adjustment of Rs. 41,22,712/- on account of interest receivable on advance given to M/s. BSC C&C JV Nepal Pvt. Ltd. The Ld. TPO discussed this issue in para 4.1 of his order dated 29.01.2021 passed under section 92CA(3) of the Act. The Ld. TPO found from balance sheet that the assessee had advance receivable of Rs. 8,15,79,744/- to BSC C&C JV Nepal Ltd. which is an Associated Enterprise (AE). He show caused the assessee why ALP of interest on

advance given to the said AE be not determined at SBI PLR rates applicable to FY 2016-17. The assessee filed detailed explanation reproduced by the Ld. TPO in para 4.2 of his order. The submissions of the assessee were not acceptable to the Ld. TPO who determined ALP of the interest given to BSC C&C Nepal Pvt. Ltd. at Rs. 1,14,41,802/- and required the Ld. AO to make adjustment thereof. The assessee objected the said adjustment before the Ld. DRP who followed the directions given by it in AY 2016-17 the issue being identical. Paras 4.2.2 & 4.2.3 of Ld. DRP's directions dated 31.05.2022 under section 144C(5) of the Act refer.

22. Before us the Ld. AR submitted that similar issue came up for consideration before the Tribunal in AY 2016-17 wherein the issue has been set aside and matter has been restored back to Ld. TPO for fresh adjudication. The Ld. CIT-DR conceded.

23. We have perused the order of the Tribunal in ITA No. 705/Del/2021 dated 30.11.2022. In para 30-35 thereof, the Tribunal recorded its observations and findings which we reproduce hereunder:-

"30. Heard rival submissions, perused the orders of the authorities below. The TPO observed that as per the balance sheet assessee had given advance of Rs.8,14,37,921/- to BSE C&C JV Nepal Pvt. Ltd. which is an Associate Enterprise and required the assessee to show cause why it should not be treated as a separate transaction and ALP of interest chargeable be determined. Assessee submitted that it had charged no interest on such advance receivables as the AE Company is being established by JV Partners in the 50:50 ratio by BSE PL & C&C to provide working capital requirement for crusher unit which was set up in Nepal to provide aggregate as product from boulders as the cost of production in Nepal is quite lower than in India. Therefore, since both the JV Partners are the shareholders in BSE and C&C JV Nepal are the shareholders in such company in equal proportion charging any interest from its own pocket do not have any commercial expediency and, therefore, there is no transaction of any interest which require any benchmarking. However, the TPO in view of the Explanation 1 to Section 92B introduced by the Finance Act, 2012 w.e.f. AY 2012-13 and also relying on the decision of the Delhi High Court in the case of Mkensay Knowledge Center India Pvt. Ltd. Vs. PCIT (96 taxmann.com 237) and applying the principles of the decision in the case of CIT Vs. Cotton Naturals India Pvt. Ltd. (55 taxmann.com 523) the Arm's Length Price of interest on advance given to BSC & C&C Nepal Pvt. Ltd. was determined at 12.51% (9.51% + 300 basis points) and accordingly made adjustment of Rs.1,01,87,884/-.

31. Before the DRP the assessee made the following submissions along with additional evidences:

"9. Factual and Legal arguments against the addition proposed by the Assessing Officer.

a) At the outset it is stated that sum of Rs 8,14,37,921/- is NOT AN AMOUNT ADVANCED by the applicant. In this regard it is submitted that M/s BSC C&C Joint Venture (JV) {hereinafter referred to as 'assessee' or 'applicant'} is a joint venture between two companies - BSCPL Infrastructure Ltd. and C&C Construction Ltd. Both the JV Partners are having 50% share in the assessee JV.

b) Both the JV partners had established a company in Nepal during the year 2007 - BSC C&C JV Nepal Pvt. Ltd. having equal share of 50% in the capital of the company.

c) The Nepal company was established to supply Aggregate to the applicant for its Bihar Projects as it was very cost effective to make aggregate and Nepal and transport it to the construction units in Bihar.

d) Due to terrorism in Nepal, production activities in Nepal was closed down and its all the assets consisting mainly of Crusher Unit were transferred to the construction sites in Bihar. We are enclosing herewith copies of ledger accounts of our construction sites in Bihar, where the assets/LCs issued by JV Partners were transferred.

This is an additional evidence for which separate request has been made for its admission as these documents could not be submitted before AO due to paucity of time.

Your Honours would observe from the above said ledger accounts that earlier there was a credit balance. After transfer of LCs issued by JV Partners, the amount due to Nepal Unit was converted to a debit balance. This debit balance was shown as receivable in the books of the applicant company.

e) Your goodself would observe that the applicant company has not given any advance to its foreign AE. This is only the transfer of LCs issued by JV Partners on account of closure of business activities in Nepal which has turned credit balance to a debit balance. We are also enclosing year-wise detail of Credit and Debit Balances of M/s BSC C&C Nepal Pvt Limited (Site-wise) for your kind perusal.

This is an additional evidence for which separate request has been made for its admission as these documents could not be submitted before AO due to paucity of time.

From details submitted your goodself will appreciate that the account balance of M/s BSC C&C Nepal Pvt Limited got converted from a debit to credit in FY 2011-12. Thereafter in FYs 2012-13 to 2015-16 the account remained as debit due of Rs 8.14 crores. In assessments for these years it has never been the case of tax department that the debit balance is either "money advanced" or "sum receivable". The fact that amount shown as debit was not "money advanced" or "sum receivable" is further cemented by the fact that the Debit Balance was subsequently also written off in FY 2017-18.

f) Further, it is submitted that applicant is a joint venture between two companies - BSCPL Infrastructure Ltd. and C&C Construction Ltd. having 50% equal share in the profits & loss of the applicant. The foreign AE - BSC C&C JV Nepal Pvt. Ltd. also has two shareholders - BSCPL Infrastructure Ltd. and C&C Constructions Limited having equal share of 50% in the capital of the company. All the transfers made upon closure of the Nepal Company was on account of

the JV Partners. Only the transfer of assets (mainly the Crusher) was to the specific work-site of the applicant. Transfer of LCs was on account of the JV Partners as JV Partners own/liable for the said LCs. LCs were issued by the JV Partners and not by the applicant.

The balance shown as a debit to the Nepal Company is actually to be transferred to JV Partners who have Capital Balance in the applicant JV. The applicant JV is not liable for the liabilities and also cannot release the receivables of Nepal Company. It is only the JV Partners, who are equal shareholders in the Nepal Company, are liable for all the liabilities including LCs and are authorised to realise the assets of the Nepal Company.

g) Hence, charging any interest from its own pocket does not have any commercial expediency. In support kind reference of your goodself is invited to the decision of Hon'ble ITAT in case of Nimbus Communications Ltd reported in 16 ITR (Trib) 477 (Mum) wherein it was held as under:

"5. A continuing debit balance, in our humble understanding, is not an international transaction per se, but is a result of the international transaction. In plain words, a continuing debit balance only reflects that the payment, even though due, has not been made by the debtor. It is not, however, necessary that a payment is to be made as soon as it becomes due. Many factors, including terms of payment and normal business practices, influence the fact of payment in respect of a commercial transaction. Unlike a loan or borrowing, it is not an independent transaction which can be viewed on standalone basis. What can be examined on the touchstone of arm's length principles is the commercial transaction itself, as a result of which the debit balance has come into existence, and the terms and conditions, including terms of payment, on which the said commercial transaction has been entered into. The payment terms are an integral part of any commercial transaction, and the transaction value takes into account the terms of payment, such as permissible credit period, as well. The residuary clause in the definition of 'international transaction', i.e., any other transaction having a bearing on the profits, incomes, losses or assets of such enterprises, does not apply to a continuing debit balance, on the given facts of the case, for the elementary reason that there is nothing on record to show that as a result of not realizing the debts from associated enterprises, there has been any impact on profits, incomes, losses or assets of the assessee. In view of these discussions, in our considered view, a continuing debit balance per se, in the account of the associated enterprises, does not amount to an international transaction under section 92B in respect of which ALP adjustments can be made. The factum of payment has to be considered vis- a-vis terms of payment set out in the transaction arrangement, and not in isolation with the commercial terms on which transaction in respect of which payment is, according to the revenue authorities, delayed. In any event, even when an ALP is made in respect excessive credit period allowed under the CUP method, stated by the TPO, the comparable has to be dues recoverable from a debtor and not a borrower. It appears that the TPO has adopted interest at the rate of 2.19 per cent LIBOR on balances which exceed 30 days, but LIBOR rate is relevant only in the case of lending or borrowing of funds, and not in the case of commercial overdues. Even assuming that the continuing debit balances of associated

enterprises can be treated as 'international transactions' under section 92B, the light course of applying the CUP method, in the case of noncharging of interest on overdue balances, would have been by comparing this not charging of interest with other cases in which the assessee has charged interest on over dues with independent enterprises (internal CUP) or with the cases in which other enterprises have charged interest, in respect of over dues in respect of similar business transactions, with independent enterprises (external CUP). No such exercise has been carried out in this case, nor is it shown,, as is- the condition precedent for bringing. this continuing debit balance in the ambit of 'international transaction', that as a result of not realizing the debts from associated enterprises, there has been any impact on profits, incomes, losses or assets of the assessee."

h) Further, without prejudice to the above, it is submitted that interest, if any, chargeable on the advance given, should be at LIBOR since it is an international transaction. The foreign AE, if it has to pay, would pay at the applicable LIBOR rate.

In view of above submissions, it is submitted that the debit balance of Nepal company in the books of the applicant is not an advanced given rather it is a net-off balance on account of transfer of LCs issued by JV Partners which ultimately is to be debited to the Partners of the applicant since they have incorporated the Nepal Company in equal ratio and hence, no adjustment on account of interest on the debit balance of Nepal Company should be made to the returned income of the applicant."

32. As could be seen from the above, the assessee contended before the DRP that the ledger accounts in earlier years showed credit balance and after transfer of LCs issued by JV Partners the amount due to Nepal Unit was converted to a debit balance and this was shown as receivable in the books of the assessee company. It was contended that the assessee company has not given any advance to its foreign AE and this is only transfer of LCs issued by JV Partners on account of closure of business activities in Nepal which has turned into credit balance to a debit balance and the assessee furnished year wise details of credit and debit balances of BSC C&C Nepal Pvt. Ltd. as additional evidences. It was also contended that the account balances of BSC C&C Nepal Pvt. Ltd. got converted from a debit to credit in FY 2011-12. Thereafter, in financial years 2012-13 to 2015-16 the account remained as debit due of Rs.8.14 crores. It was contended that in the assessments for these years it has never been the case of the Department that the debit balance is either "money advanced" or "sum receivable". It was also stated that the amount shown as debit was not money advanced or sum receivable and was subsequently written off in 2017-18 to prove the contention that it is neither money advanced nor sum receivable.

33. At this stage the observations of the Hon'ble Delhi High Court in the case of PCIT Vs. Kusum Healthcare (P) Ltd. (398 ITR 66) are very much relevant and they are as follows:

"10. The court is unable to agree with the above submissions. The inclusion in the Explanation to section 92B of the Act of the expression "receivables" does not mean that dehors the context every item of "receivables" appearing in the accounts of an entity, which may have dealings with foreign associated enterprises would automatically be characterised as an international transaction. There may be a delay in collection of monies for supplies

made, even beyond the agreed limit, due to a variety of factors which will have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the assessee will have to be studied. In other words, there has to be a proper inquiry by the Transfer Pricing Officer by analysing the statistics over a period of time to discern a pattern which would indicate that vis-a-vis the receivables for the supplies made to an associated enterprise, the arrangement reflects an international transaction intended to benefit the associated enterprise in some way."

34. *As could be seen from the above observations of the Hon'ble Delhi High Court that every item of "receivables" appearing in accounts of entity which may have dealings with foreign AE would not automatically be characterized as an International Transaction. It is also observed that there has to be a proper enquiry by the TPO by analyzing the statistics for a period of time to discern a pattern which would indicate that vis-à-vis the "receivables" for the supplies made to an AE, the arrangement reflects an International Transaction intended to benefit the AE in some way.*

35. *On perusal of the TPO's order, we find that no such exercise has been carried out by the TPO in benchmarking the interest on "receivables". Further, we observed from the order of the DRP none of the submissions or additional evidences were considered nor is there any finding by the DRP though the assessee has produced additional evidences before the DRP and made its submissions which were not made before the Assessing Officer."*

24. Since the parties agree that the issue is covered by the decision (supra) of the Tribunal, respectfully following the same we send the matter back to the Ld. AO/TPO for deciding the issue afresh keeping in view the evidence submitted by the assessee as also the observations of the Hon'ble Delhi High Court in PCIT vs. Kusum Health Care (P) Ltd. 398 ITR 66 (Del.) and as per law. This ground is treated as allowed for statistical purpose.

25. Ground No. 7 and 8 relate to addition of Rs. 18,84,08,295/- on account of retention money retained by the employer. The Ld. AO has discussed this issue in para 5 of his order. He found that in its revised return/computation the assessee claimed the impugned deduction. On being asked for justification the assessee submitted that while claiming the impugned deduction the assessee has also offered for taxation a sum of Rs. 7,23,59,198/- released by the employer of the assessee for which project completion certificate was received during the year. Clause 48 of the contract agreement with PWD, Govt. of Meghalaya dealing with the receipt and payment of retention money was brought to the notice of the Ld. AO to demonstrate that retention money becomes due to the assessee only on

expiry/completion of Defect Liability Period (“DLP”) i.e. typically one year after completion of the construction. Further such retention money is released to the assessee only if no defect arises in the construction during the DLP. It was thus submitted that retention money does not accrue to the assessee on completion of construction but is contingent upon satisfactory completion of the DLP. In support, numbers of decisions were cited. The explanation was not acceptable to the Ld. AO who recorded the finding that the moment the payment becomes due to the assessee it has to be accounted for as income whether it has been received or not and disallowed the assessee’s claim of deduction resulting in the impugned addition to its income.

26. Before us the Ld. AR submitted that for the year under consideration the assessee had claimed that a sum of Rs. 18,84,08,295/- on account of retention money retained by the employer is not chargeable to tax. However, the assessee had offered for tax a sum of Rs. 7,23,59,198/- released by the employer of the assessee for which project completion certificate was received by the assessee during the year. He referred to certain decisions in support of the proposition that retention money is not liable to tax as the same accrues only when project completion certificate is received. However, the Ld. AR submitted that in view of amended law by way of insertion of section 43CB, the issue be restored back to the file of the Ld. AO for fresh decision.

27. The Ld. CIT-DR objected to remanding back of the issue to the Ld. AO for adjudication afresh.

28. We have given careful thought to the rival submission. It is not in dispute and the parties agree that the Finance Act, 2018 has inserted section 43CB with retrospective effect from 01.04.2017 and thus apply to AY 2017-18 and subsequent years. It is also not in dispute that in the case of the assessee the amended law has to be applied. We, therefore, consider it fit and in the interest of justice to restore the matter back to the file of the Ld. AO with a direction to him to apply the provisions of section 43CB(2)

and decide the issue afresh after allowing reasonable opportunity of hearing to the assessee. We order accordingly and treat these grounds as allowed for statistical purpose.

29. Ground No. 9 relates to disallowance of Rs. 1,42,72,894/- on account of late deposit of EPF contribution of employees though deposited before due date of filing ITR. The Ld. AO discussed the issue in para 8 of his order. The Ld. DRP dismissed the assessee's objection holding that employee's contribution to EPF not deposited within the due date as per section 36(1)(va) of the Act cannot be allowed. Para 4.4.9 of Ld. DRP's directions refers.

30. The Ld. AR submitted that in the revised return the assessee had made suo-moto disallowance of Rs. 1,40,86,958/-. Our attention was drawn to page 89 of the Paper Book containing the revised computation dated 04.09.2021 and page 79 of the Paper Book which is revised Return filed on 31.03.2018. The Ld. AR pointed out that the said suo-moto disallowance is acknowledged in intimation dated 28.02.2019 issued under section 143(1) of the Act which is evident from page 519 of the Paper Book. It is submitted that the sum disallowed in Return of Income is Rs. 1,40,86,958/- and the sum disallowable as per statutory provisions is of Rs. 1,42,72,897/-. The additional difference of Rs. 1,85,939/- has been disallowed by CPC in intimation under section 143(1) of the Act.

30.1 The Ld. AR submitted that in the assessment order the Ld. AO has made fresh disallowance of Rs. 1,42,72,897/- without acknowledging the suo-moto disallowance of Rs. 1,40,86,958/- made by the assessee in Return of Income. It is urged that the Ld. AO be directed to restrict the disallowance to the extent of Rs. 1,85,939/- only.

31. The Ld. DR did not controvert the above submission of the Ld. AR.

32. On hearing the submission of the parties and perusal of the records, we deem it fit to restore the issue to the file of the Ld. AO with a direction to

him to verify the veracity of the contention raised by the Ld. AR before us and if his contention is found to be correct and in accordance with the settled position of law as enshrined by the Hon'ble Supreme Court in Checkmate Services (P) Ltd. vs. CIT (2022) 448 ITR 518 (SC), modify the assessment accordingly.

33. Ground No.10 and 11 relate to TDS credit. It is stated that the Ld. AO has allowed credit of TDS of Rs. 10,64,37,556/-only whereas TDS credit of Rs. 12,40,95,837 is allowable to the assessee according to the income offered for taxation by the assessee.

34. It is a matter which requires verification from the records. We, therefore direct the Ld. AO to look into the assessee's claim and after due verification take remedial action in accordance with law.

35. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 3rd November, 2023.

**sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER**

**sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER**

Dated: 3/11/2023

Veena

Copy forwarded to -

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	

Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	