आयकर अपीलीय अधिकरण, हैदराबाद पीठ

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

Before Shri R.K. Panda, Vice-President
AND
Shri Laliet Kumar, Judicial Member

ITA Nos.239 to 241/Hyd/2022		
Assessment Years: 2013-14 to 2015-16		
M/s. Navayuga Engineering Company Ltd Hyderabad	Vs.	A.C.I.T. Central Circle 1(1) Hyderabad
(Appellant) PAN:AAACN7396R		(Respondent)
Assessee by:	Shri Pawan Kumar Chakrapany, C.A	
Revenue by:	Smt.Mamata Choudhary, Sr. Standing Counsel and Smt. TH Vijaya Lakshmi, CIT (DR)	
Date of hearing:	22/11/2023	
Date of pronouncement:	11/12/2023	

ORDER

Per R.K. Panda, Vice President.

The above 3 appeals filed by the assessee are directed against the separate orders dated 31.03.2022 of the learned CIT (A)-11, Hyderabad relating to A.Ys 2013-14 to 2015-16 respectively. Since common issues are involved in all these appeals, therefore, these were heard together and are being disposed of by this common order for the sake of convenience.

2. ITA No.239/Hyd/2022 filed by the assessee is taken as the lead case and are adjudicated as under.

3. Facts of the case, in brief, are that the assessee is a company engaged in the business of construction. It originally filed its return of income for the A.Y 2013-14 on 30.11.2013 admitting total income of Rs.28,68,02,280/-. The assessment was completed u/s 143(3) on 29.01.2015 and the income was assessed at Rs.29,59,62,962/-.

4. A search & seizure operation was conducted in the case of the assessee u/s 132 of the Act on 25.10.2018. Subsequently, the case was centralized to the Central Circle 1(1) vide order dated 30.11.2018. Notice u/s 153A dated 23.8.2019 was issued and served on the assessee to which the assessee filed return of income on 21.09.2019 admitting total income at "Nil" after claiming deduction u/s 80IA of the Act at Rs.100,07,65,302/-. The assessee admitted income of Rs.10,69,31,507 as per the provisions of section 115JB. The Assessing Officer issued statutory notices u/s 143(2) and 142(1) on 3.10.2019 to which the AR of the assessee appeared before the Assessing Officer and furnished the requisite information as called for.

5. During the course of search and seizure operation it was found that the company is following certain specified Standard operating procedure (SOP) with respect to purchase of material. As per SOP the purchase process starts from receipt of requisition from various project sites by procurement department. The procurement department floats enquiries and purchase order is placed on the selected suppliers. The purchase invoices available in the accounts department contain various seals/stamps like security gate and after verification of material and quantity a specific project stamp is affixed. Further, Goods

Receipt Note (GRN) is issued to the supplier by the stores department with proper acknowledgements. It was noticed that in respect of purchases from some of the parties the company has not followed SOP and there were deviations. When confronted with the discrepancies noticed during the course of search and seizure operation, the Chairman of the company expressed his inability to produce complete documentation to prove the genuineness of supply of material and accepted the discrepancies found by the department. He further stated that all related documents were maintained at the respective sites and it is not possible to produce the supporting documentation for procurement of material. Though the material is delivered and consumed at the sites, considering the inability to produce the documents to the desired level of evidence as required by the department, he admitted Rs.90,99,60,704/- as additional income in the hands of assessee company for the A.Ys 2015-16 to 2019-20 over and above the regular income.

5.1 During the course of search operation, it was found that some of the sundry creditors continued to be shown in the books of account for more than 5 years. When asked about the non-moving sundry creditors it was stated that the said outstanding credits have not been paid so far due to issues such as incomplete sub-contract works and poor quality of material supplied by the parties. The assessee was asked as to why the outstanding credit balances for more than 5 years amounting to Rs. 50,61,88,865/- should not be treated as "ceased to exist" and treated as income for the A.Y.2018-19. It was stated, that the outstanding credit balances are to be paid to the respective creditors, however in view of the current status of inactivity with respect to the creditors, the said amounts are no longer payable

by the assessee company. Thus, the assessee company offered the outstanding credit balances amounting to Rs. 50,61,88,365/- as on 31.03.2018 as additional income in the hands of the company for the ay 2018-19.

6. The Assessing Officer noted from the return filed in response to notice/s 153A that the assessee has claimed deduction u/s 80IA(4) for an amount of Rs.100,07,65,302/- for the first time by admitting gross total income at Nil, the details of which are as under:

Gross Total Income -	Rs.30,60,57,963
Less: Deductions u/s Chapter VI A:	
a) Infrastructure facility u/s 80IA(4):Rs.1,00,07,65,302 -	Rs.30,60,57,963
Total Income	Rs. Nil

6.1 Since the assessee has not claimed any deduction u/s 80IA(4) in the original return but has made such claim for the first time in the return filed in response to notice u/s 153A, the Assessing Officer asked the assessee to substantiate such claim by providing the copies of agreement with Central/State Govt. or local authority or any statutory body. Rejecting the various explanation given by the assessee and distinguishing the various decisions cited before him, the Assessing Officer held that the assessee company is not entitled to make a fresh claim u/s 80IA(4) in the return filed in response to notice u/s 153A. He further held that the assessee is also not entitled for the deduction as the assessee company has not entered into agreements with the Govt. authorities directly, the Assessing Officer accordingly rejected the claim of deduction u/s 80IA(4) at Rs.30,67,57,963/-. Thus, the total income was assessed at Rs.30,60,57,963/-.

7. In appeal, the learned CIT (A) dismissed the appeal of the assessee and upheld the action of the Assessing Officer.

8. Aggrieved with such order of the learned CIT (A) the assessee is in appeal before the Tribunal by raising the following grounds:

> *1. The impugned order of the learned Authorities below in so far as it is against the appellant is opposed to law, weight of evidence, natural justice, probabilities, facts and circumstances of the Appellant's case.*
>
> *2. The Appellant denies himself liable to be assessed on a total income of Rs.30,60,57,930/-, as against the income returned an amount being Rs. NIL, under the facts and circumstances of the case.*
>
> *3. The Appellant denies himself liable to be assessed on a total income under the MAT provisions of an amount being Rs. 116,58,36,867/-, as against the actual total income under the MAT provisions of an amount being Rs. 104,69,31,507/-, under the facts and circumstances of the case.*
>
> *4. Whether the learned Authorities below are justified in denying the claim of deduction under section 801A[4] of the Act, of an am being Rs. "30,60,57,963/-, made by the Appellant in the return of income filed in response to notice under section 153A of the Act, under the facts and circumstances of the case.*
>
> *5. Whether the learned Authorities below are justified in concluding that the fresh claim made under section 801A[4] of the Áct, of an amount being Rs.30,60,57,960/-, for the first time in the return of income filed in response to notice under section 153A of the Act, in the completed assessment cannot be entertained, under the facts and circumstances of the case.*
>
> *6. Whether the learned Authorities below are justified in not appreciating the fact that the eligible projects involve design, development, operation and maintenance and the Appellant is eligible to claim deduction of an amount being Rs. 30,60,57,963/-, under section 801IA [4] of the Act, under the facts and circumstances of the case.*

7. Whether the learned Authorities below are justified in denying the claim of deduction of an amount being Rs. 30,60,57,963/-, under section 801A [4] of the Act, on the pretext that the work was awarded to the Joint Venture and the Appellant has not satisfied the conditions laid in section 801A of the Act, for granting deduction, under the facts and circumstances of the case.

8. Whether the learned Authorities below are correct in not appreciating the fact that, the Appellant has executed the works and was responsible for designing, drawing, risk of project, execution of project, maintenance and defect liability, under the facts and circumstances of the case.

9. Whether the learned Authorities below have erred in not appreciating the fact that, the Appellant is involved in design, development, operation and maintenance, and is eligible for claim of deduction under section 801A of the Act, of an amount being Rs. 30,60,57,963/-, under the facts and circumstances of the case.

10. The learned Authorities below ought to have considered the tax relief claimed by the Appellant, an amount being Rs. 12,22,825/-, under section 90/90A of the Act, under the fact and circumstances of the case.

11. The Appellant denies himself liable to be charged to interest under section 234D of the Income-Tax Act, 1961, under the facts and circumstances of the case.

12. The Appellant craves leave to add, alter, delete or substitute any of the grounds urged above.

13. In the view of the above and other grounds that may be urged at the time of the hearing of the appeal, the Appellant prays that the appeal may be allowed in the interest of justice and equity."

9. The learned Counsel for the assessee Mr. Pawan Kumar Chakrapani, made oral submission and submitted that the written submissions filed may be considered for deciding the issue. The written submission filed by the assessee read as under:

Name of the Appellant	:	M/s. Navayuga Engineering Company Limited, Hyderabad - 33.
Assessment Years	:	2013-14, 2014-15 & 2015-16.
ITA No's	:	239, 240 & 241/Hyd/2022.

CHRONOLOGY OF EVENTS & SYNOPSIS:

1. The above mentioned appellant humbly submits before this Hon'ble Tribunal that the following sequential facts/events as regard to the appeal preferred by the appellant under section 253 of the Income-tax Act, 1961 [in short "Act"] in the above mentioned ITA No's. 239 240 & 240/Hyd/2022 for the Assessment Years 2013-14 to 2015-16:-

CHRONOLOGY OF EVENTS

<table>
<tr><th>Sl.No.</th><th>PARTICULARS</th><th>DATE</th></tr>
<tr><td>[i].</td><td>The Appellant is a Limited Company carrying on the business of design and development of infrastructure projects.</td><td>-</td></tr>
<tr><td>[ii].</td><td>The appellant had filed its original return of income under section 139 of the Act for the above mentioned assessment years 2013-14, 2014-15 & 2015-16.
<table>
<tr><th>A.Y.</th><th>Date of filing of the Original return</th><th>Amount declared in the Original Return.</th><th>Date of processing of return u/s. 143[1] of the Act.</th><th>Date of passing of regular order of Assessment U/s. 143[3]</th></tr>
<tr><td>2013-14</td><td>30/11/2013</td><td>28,68,02,280</td><td>-</td><td>29/01/2015</td></tr>
<tr><td>2014-15</td><td>29/11/2014</td><td>205,69,89,240</td><td>-</td><td>22/09/2016</td></tr>
<tr><td>2015 - 16</td><td>30/11/2015</td><td>200,92,73,460</td><td>01/10/2016</td><td>-</td></tr>
</table></td><td>-</td></tr>
</table>

<table>
<tr><td>[iii].</td><td>There was an action of search under section 132 of the Income-tax Act, 1961 on the Appellant.</td><td>25/10/2018</td></tr>
<tr><td>[iv].</td><td>Subsequently the learned assessing officer issued notice under section 153A of the Act for the impugned assessment years i.e. 2013-14 to 2015-16, calling upon it to file the return of income.</td><td>23/08/2019</td></tr>
<tr><td>[v].</td><td>Pursuance to the notice issued under section 153A of the Act, the Appellant filed the return of income for the impugned assessment years 2013-14 to 2015-16 declaring the following respective Incomes:
<table>
<tr><th>A.Y.</th><th>Date of filing of the return u/s. 153A of the Act</th><th>Amount declared in the return u/s. 153A of the Act.</th></tr>
<tr><td>2013-14</td><td>21/09/2019</td><td>NIL</td></tr>
<tr><td>2014-15</td><td>21/09/2019</td><td>36,30,37,160/-</td></tr>
<tr><td>2015-16</td><td>21/09/2019</td><td>72,43,15,293/-</td></tr>
</table></td><td>21/09/2019</td></tr>
<tr><td>[vi].</td><td>The learned assessing officer issued statutory notices and called for certain details and explanations.</td><td>NIL</td></tr>
<tr><td>[vii].</td><td>The learned Assessing Officer concluded the assessment by passing an order of assessment under section 143 [3] r.w.s. 153 A of the Act for the impugned Assessment Years determining the total income of the appellant, by making disallowance of deduction claimed by the Appellant under section 80IA [4] of the Act, for the Assessment Years 2013-14 to 2015-16, by holding that the Appellant is not entitled for fresh claim of deduction under section 80IA[4] of the Act, which was not claimed in the return of income filed under section 139[1] of the Act. The learned Assessing Officer denied the deduction claimed under section 80IA[4] of the Act, on merits by stating that the Appellant is one of the JV / Constituent who has executed the project and the JV has entered into agreements with the Government authorities directly and not the Appellant who is one of the party in the JV.
<table>
<tr><th>Particulars</th><th>A.Y. 2002-03</th><th>A.Y. 2003-04</th><th>A.Y. 2004-05</th></tr>
<tr><td>Total Income admitted as per original return of income</td><td>28,68,02,280</td><td>[-] 1,99,166/-</td><td>22,57,815/-</td></tr>
<tr><td>Total income</td><td>29,59,62,962</td><td>10,54,762/-</td><td>10,16,650/-</td></tr>
</table></td><td>29/04/2021</td></tr>
</table>

	assessed as per order U/s. 143[3] of the Act				
	Total income declares as per return U/s. 153A of the Act, dated 21/09/2019	NIL	5,74,932/-	5,56,726/-	
	Add: Disallowance of claim made U/s. 80IA of the Act	30,62,57,963	22,84,970/-	Nil	
	Add: **[i].** Inadmissible Loss **[ii].** Agricultural Expenses Disallowed	-NA-	-NA-	42,908/- 5,61,278/-	
	Total Income Assessed	**30,62,57,963**	**25,65,634/-**	**33,21,928/-**	
	Note: Copy of the order of assessment passed under section 143 [3] r.w.s. 153 A of the Act dated 29/04/2021 for the A.Y. 2013-14 are at Pages 169 to 204; for the A.Y. 2014-15 are at pages 178 to 219 and for the A.Y. 2015-16 are at pages 169 to 204 of the Memorandum of Appeal.				
[viii].	Aggrieved by the order of assessment passed by the learned assessing officer under section 143 [3] r.w.s. 153A of the Act dated 29/04/2021 for the impugned assessment years 2013-14 to 2015-16, the appellant preferred an appeal before the learned Commissioner of Income-tax [Appeals]-11, Hyderabad.				27/05/2021
[ix].	The learned Commissioner of Income-tax [Appeals] dismissed the appeal of the appellant for the Assessment Years 2013-14 to 2015-16 by by upholding the order of the learned assessing officer. **Note:** Copy of the CIT[A] order dated 31/03/2022 for the A.Y. 2013-14 are at Pages 7 to 164, for the A.Y. 2014-15 are at pages 7 to 172, and for A.Y. 2015-16 are at pages 7 to 164, of the Memorandum of Appeal.				31/03/2022

[x].	The Appellant being aggrieved by the orders passed by the learned Commissioner of Income-tax [Appeals] for the impugned A.Y's 2013-14 to 2015-16, preferred appeal before the Honorable Income-tax Appellate Tribunal, Hyderabad which is numbered as ITA No's. 239 to 241/Hyd/2022. **Note: Copy of the grounds of appeal filed by the appellant for the A.Y. 2013-14 are at Pages 4 to 6; for the A.Y. 2014-15 are at pages 4 to 6 and for the A.Y. 2015-16 are at pages 4 to 6 of the Memorandum of Appeal.**	12/04/2022
[xi].	That being aggrieved by the order of the learned Commissioner of Income-tax [Appeals] 11, Hyderabad, the appellant has preferred the present appeal before this Hon'ble Tribunal as per the provisions of section 253 of the Act in pursuit of justice, by raising various ground which are enclosed along with the Memorandum of Appeal.	

SYNOPSIS

2. The appellant crave leave of this Hon'ble Tribunal to kindly consider ground No. 4 before adjudicating the other grounds: Whether the learned Authorities below are justified in denying the claim of deduction under section 80IA of the Act, made by the Appellant in the return of income filed in response to notice under section 153A of the Act, under the facts and circumstances of the case:

[i]. It is submitted that as could be seen from the order of assessment passed under section 143 [3] r.w.s. 153A of the Act dated 29/04/2021 of the order of assessment it is clear that the claim of deduction under section 80IA[4] of the Act, was denied by the learned assessing officer on the ground that the Appellant is not entitled for fresh claim in the return of income filed in response to notice under section 153A of the Act. The relevant portion of the order of assessment for the Assessment Year 2013-14 to 2015-16 is reproduced hereunder for immediate reference:

> *"In the light of the above facts and circumstances of the case and also keeping view of the elaborate discussion(s) made at Para 7 above, the assessee company is not entitled for fresh claim of deduction under section 80IA[4] in the return of income filed under section 153A of Rs. 171,28,77,085/- in respect of Pranahitha-*

Chevella Package-6 and Pranahitha-Chevella Package-21. Further, the assessee is also not entitled for the deduction as the assessee-company has not entered into agreements with the Government authorities directly as discussed at Para 4 & 6 above. Accordingly, the deduction claimed by the assessee of Rs. 171,28,77,085/-, is disallowed and added the income returned." (Emphasis Supplied)

[ii]. Thus, from the above extracts it is clear that the disallowance of deduction under section 80IA of the Act, for the Assessment Years 2013-14 to 2015-16 are made by the learned Assessing Officer only on the presumption that once the assessment order is passed under section 143[3] of the Act, the case attains finality and new claim cannot be made by the Assessee in the return filed in response to notice under section 153A of the Act.

[iii]. On the perusal of Section 153A of the Act, read with circular no. 7/2003, dated 5/9/2003, it is pertinent to mention that the contents of the provisions of Section 153A of the Act, start with a non-obstante clause with reference to sections 139, 147, 148, 149, 151 and 153 of the Act. In case of a person who has been searched under section 132(1) of the Act, or in whose case books of account, other documents or any assets are requisitioned under section 132A of the Act, after 31.5.2003, the Assessing Officer has to issue a notice to him for filing the return in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which the search or the requisition is made.

[iv]. The learned Assessing Officer issued notice under section 153A of the Act, dated 23/08/2019, the Appellant in response to notice under section 153A of the Act, filed the return of income on 21/09/2019, which is valid return and sustainable in law. It is because of the provision of law stated in section 153A[1][a] of the Act, that a statutory presumption is made that a return filed under section 153A of the Act, is a return required to be filed under section 139[1] of the Act.

[v]. The liability to file a return of income in response to a notice issued under section 153A of the Act, is as much good as the liability to file a return under section 139[1] of the Act. The liability to file return arises under

section 139[1] of the Act, all other sub-sections of section 139 of the Act, are only derivatives thereof and explanations thereto. Therefore, the reference made to section 139 of the Act, in section 153A[1][a] of the Act, is virtually the reference made to section 139[1] of the Act. **Therefore, a return filed in pursuance of a notice issued under section 153A of the Act, is as good as a return filed under section 139 of the Act, and more particularly under section 139[1] of the Act**.

[vi]. Hence, the return filed by the Appellant on 21/09/2019, under section 153A of the Act, are to be treated as return filed under section 139[1] of the Act, by virtue of the law stated in section 153A[1][a] of the Act. As such the Appellant is entitled for the deduction available under section 80IB[4] of the Act. The rider provided in section 80AC of the Act, does not apply to the preset case, as the return filed by the Appellant under section 153A of the Act, have to be considered as return filed under section 139[1] of the Act, within time.

[vii]. Reliance is placed on the decision of the Hon'ble Calcutta High Court in the case of Shrikant Mohta Vs. CIT, reported in 414 ITR 270.

[viii]. Reliance is also placed on the decision of the Hon'ble Bombay High Court in the case of CIT Vs. B.G. Shirke Construction Technology (P) Ltd., reported in 395 ITR 371. The Hon'ble Court has held that, the return filed in the regular course under section 139[1] of the Act, would also continue to apply in case of return filed under section 153A of the Act.

[ix]. The appellant further places reliance on the decision of the Hon'ble Jurisdictional Tribunal, in the case of KNR Constructions Ltd Vs. DCIT in ITA No. 946 to 948/Hyd/2016, dated 16/10/2015, where it was held that:

> *We, therefore, follow the decision of the Chennai Bench of this Tribunal in the case of ACIT Vs. VN Devodoss 157 TTJ 165 [supra] as well as the decision of Mumbai Bench in the case of DCIT Vs. Eversmile Construction Co. Ltd., [supra] to **hold that the assessee is entitled to claim deduction under section 80IA in the returns filed in response to the notices issued under section 153A for the relevant six years i.e., A.Ys. 2006-07 to 2011-12 including A.Ys. 2009-10 to 2011-12 where the assessments had been originally completed under section***

143[3] prior to the date of search. We accordingly reverse the decision of the Ld. CIT(A) rendered on this issue for A.Ys. 2006-07 to 2008-09 and uphold the same for A.Ys. 2009-10 to 2011-12. The appeals of the assessee for A.Ys. 2006-07 to 2008-09 involving this solitary issue thus are allowed whereas, the relevant ground of the Revenue's appeal on this issue for A.Y. 2009-10 to 2011-12 are dismissed." (Emphasis Supplied)

[x]. The appellant places reliance on the following decisions for the above proposition canvassed that the return filed in response to notice under section 153A of the Act, has to be considered as return filed under section 139[1] of the Act.

- Kirti Dahyabhai Patel Vs. ACIT [2015] 280 CTR 216 [Guj];
- ACIT Vs. Splendor Landbase Limited 2018 TaxPub(DT) 3602 [Del];
- Nandini Delux Vs. ACIT [2015] 37 ITR(Trib) 52 [Bang];
- ACIT Vs. V.N. Devadoss [2013] 093 DTR 0073 [Chennai];
- DCIT Vs. Eversmile Construction Co. (P) Ltd., [2012] 143 TTJ 322 [Mum];
- Faisal Abbas Vs. DCIT in ITA No. 4385 & 387/Mum/2010, dated 25/10/2011, [Mumbai];
- DCIT Vs. Megha Engg. & Infrastructure Ltd in ITA No. 1375/Hyd/2016, dated 15/02/2019, [Hyderabad];
- DCIT Vs. Indu Projects Limited ITA No. 186 to 189/Hyd/18, dated 28/02/2022, [Hyderabad].

[xi]. Therefore, it is most respectfully submitted that the return filed by the Appellant on 21/09/2022, in response to notice under section 153A of the Act, dated 23/09/2019, have to be considered as return filed under section 139[1] of the Act, within time, and the Appellant is entitled for the deduction available under section 80IA of the Act.

[xii]. In the instant case as could be seen from the order of assessment passed under section 143[3] r.w.s. 153A of the Act, the disallowance made by the learned Authorities below is on the ground that the Appellant cannot make

new claim in the return of income filed in response to notice under section 153A of the Act, as the assessments are already concluded and the order of assessment is passed under section 143[3] of the Act.

[xiii]. In view of the above submissions the appellant humbly prays and submit before this Hon'ble Tribunal to hold that the Appellant can make new claim in the return of income filed in response to notice under section 153A of the Act, where the assessments had been originally completed under section 143[3] of the Act, prior to the date of search, as the return of income is to be treated on par with the return filed under section 139[1] of the Act, for the assessment years 2013-14 to 2015-16, for the advancement of substantial cause of justice.

3. The appellant crave leave of this Hon'ble Tribunal to kindly consider ground No. 8 before adjudicating the other grounds: Whether the learned Authorities below are justified in denying the claim of deduction under section 80IA[4] of the Act, on the pretext that the work was awarded to the joint venture and the Appellant has not satisfied the conditions laid in section 80IA of the Act, for granting deduction, under the facts and circumstances of the case?

[i]. It is submitted that the learned Assessing Officer held that the Appellant does not have any agreement with Government authorities directly and the projects was awarded to JV / Consortium. The learned Assessing Officer while denying the claim of the Appellant has further stated that the Honorable ITAT decision in the case of M/s. Transtroy India Limited was not accepted by the Revenue and further appeal has been filed before the Honorable High Court against the order of the Honorable ITAT.

[ii]. The Honorable CIT(A)'s has dismissed the ground raised by the Appellant by stating that the Appellant is prima facie ineligible for filing a claim and therefore the process of verification of the claim becomes infructuous. In short the Honorable CIT(A)'s has not adjudicated this ground raised by the Appellant.

[iii]. Without prejudice, the learned authorities ought to have appreciated that the JV / Consortium is only a pass through entity and the constituents do

the actual execution of the work procured by the JV. The JV has never offered the income for taxation in its return nor claimed any deduction under section 80IA[4] of the Act, in the return of income.

[iv]. It is the Appellant who had executed the work and consequently derived the income and therefore eligible for deduction. As per the provisions of section 80IA[4] of the Act, the benefit of deduction under this section is to be given only to the enterprise who carried on the project. The Appellant has rightly claimed the deduction under section 80IA[4] of the Act, hence, the deduction may be allowed in the hands of the Appellant who has carried out the project.

[v]. Reliance is placed on the judgment of the Honorable jurisdictional Tribunal in the case of DCIT Vs. KNR Construction Limited in ITA No. 190 & 191/Hyd/2018, dated 23/04/2021, where the Honorable Tribunal while upholding the decision of the learned CIT(A)'s stated that the JV is entitle to claim 80IA deduction.

[vi]. Reliance is placed on the judgment of the Honorable Agra Tribunal in the case of PNC Construciton Co. Ltd., Vs. DCIT [2013] 37 taxmann.com 361 [Agra-Trib]

[vii]. Reliance is also placed on the judgement of the Honorable Visakhapatnam Tribunal in the case of Transstory (India) Ltd., Vs. ITO in ITA No. 540/Vizag/2009, dated 14/07/2011.

[viii]. Wherefore, the appellant humbly prayed before this Hon'ble Tribunal to allow the deduction under section 80IA[4] of the Act, in the hands of the Appellant who has carried out the project, for the advancement of substantial cause of justice.

4. In view of the above submissions the Appellant pleads before this Hon'ble Tribunal that the appeal may kindly be allowed and appropriate order may be passed for the advancement of substantial cause of justice and equity.

Place: Hyderabad
Date: 18/11/2023

Pawan Chakrapani
Chartered Accountant &
Authorised Representative

9. The assessee also relied on the following decisions:

a) Shrikant Mohta vs. CIT (414 ITR 0270 (Cal)

b) CIT vs. B.G. Shirke Construction Technology (P) Ltd (2017) 395 ITR 0371 (Bom).

c) Nandini Delux vs. ACIT (2015) 37 ITR (Trib) 52 (Bang.)

d) ACIT vs. V.N. Devadoss (2013) 093 DTR 0073

e) DCIT vs. Eversmile Construction Co. Ltd (2012) 143 TTJ 0322

f) Mr.Faisal Abbas vs. DCIT (ITA No.3485 & 3487/ Mum/2010

g) CIT vs. Sun Engg. Works (P) Ltd (1992) 198 ITR 297 (S.C)

h) M/s. KNR Constructions Ltd vs. DCIT (Ita No.946 to 948/Hyd/2015)

i) DCIT vs. M/s. KNR Constructions Ltd (ITA 190 & 191/Hyd/2018)

j) PNR Construction Co. Ltd vs. DCIT (2013) 37 Taxmann.com 361 (Agra Trib)

k) M/s Transstory India Ltd vs. Income Tax Officer (Ita No.540/Vizag/2009.

10. Per contra the learned Standing Counsel for the Department, Mrs. Mamata Choudhary appeared along with the CIT (DR) Mrs. TH Vijaya Lakshmi and submitted that the issue is decided in favour of the Revenue by the recent decision of the Tribunal in the case of Dy. CIT vs. HES Infra (P) Ltd in ITA Nos.184 & 185/Hyd/2018. The ld Standing Counsel drew the attention of the Bench to Pages 106-107 of the order of the ld CIT(A) which reads as under:

6. The Decision:

A search u/s. 132 of the Income Tax Act, 1961 was conducted on 25.10.2018 in the case of the appellant company. The notices u/s. 153A were issued to the appellant company for AY 2013-14 to 2019-20. In the returns filed in response to notices u/s 153A, the appellant company had filed a fresh claim u/s. 80IA for AY 2013-14 to 2015-16, which was not claimed earlier in the original returns of income filed u/s 139(1) and the said returns filed u/s 139(1) were processed and completed either u/s 143(3) or 143(1).

In the proceedings u/s 153A, the assessments were completed by rejecting the claim of deduction u/s 80IA. The common issue is of disallowance of fresh claim of deduction u/s 80IA, not originally made in the regular return and concluded proceedings, is adjudicated below and the table below brings the perspective of the issue under consideration on comparison of the returns filed pre search and post search:

NAVAYUGA ENGINEERING COMPANY LIMITED

A.Y.	Original Date of Filing	Returned income	Deduction u/s. 80IA claimed	Assessment made u/s.	Asst. Order date	Assessed Income	Appeal filed against assessed Income	Date of Issue of 153A	Returned Income 153A	Deduction claimed u/s. 80IA for the first time u/s. 153A	Refund claimed u/s. 153A
20 3-14	30.11.2013	28,68,02,280	Nil	143(3)	29.01.2015	29,59,62,962	No	23.08.201	Nil	100,07,65,302	40,75,88,535
201 4-15	29.11.2014	205,69,89,240	Nil	143(3)	22.09.2016	205,69,89,240	No	23.08.201	36,30,37,160	171,28,77085	51,82,60,163
201 5-16	30.11.2015	200,92,73,460	Nil	143(1)	01.10.2016	200,92,73,460	No	23.08.201	72,43,15,293	129,86,64,528	21,04,75,804
										TOTAL	113,63,24,502

11. Referring to the above it was submitted that the assessee filed the return of income declaring the total income at Rs.28,68,02,280/- whereas the income of the assessee was computed after assessment at Rs.29,55,62,962/-as per the order passed u/s 143(3). Interestingly after the search was carried out the assessee had filed the return of income declaring 'nil' income and sought a refund of Rs. 40,75,88,535/-. For all the three years the assessee has sought a refund of Rs. 113,63,24,502/-. It was submitted that as per the law laid down by the Hon'ble Supreme Court in the case of Shelly Products (261 ITR 367), the income of the assessee cannot be assessed at lower than the income declared by the assessee in the return of income. Further, it was submitted that assuming in a hypothetical case for any reason, the search conducted by the Revenue was held to be bad in law, in that eventuality, the return subsequently filed will not determine the income of the assessee. It was further submitted that the assessee cannot be permitted to take advantage of search proceedings as the search proceedings are for the benefit of the Revenue and not for the benefit of the assessee. It was further submitted that once the assessment order was passed in favour of the assessee had attained finality and no appeal has been filed by the assessee, within the limitation period than the order u/s 143(3) qua assessee is final. However, so far as the Revenue is concerned, the order can be revisited within the four corners of section 147/148, 153A & 263 of the Act. In any case, it is not permissible for the assessee to raise a fresh claim while filing the return of income in response to notice u/s 153A claiming for a fresh deduction. It was submitted that for the purpose of claiming deduction u/s 80IA(4) it is essential to file the return of income as contemplated in law and it should be filed within the stipulated period as provided u/s 139 and the rules framed for that purpose

for claiming deduction u/s 80IA after fulfilling all the conditions. In the present case, the assessee has not claimed any such deduction while filing the original return of income and it was also not supported by any audit report. Subsequently, the assessee, with a view to take advantage of search without any incriminating material or the material having live link with the deduction claimed has sought to turn the proceedings of section 153A to its own benefit which is not permissible.

12. Per contra, the learned Counsel for the assessee submitted that section 153A is a complete code and therefore, the provisions of section 80AC as relied upon by the learned Standing Counsel cannot be brought into action.

13. We have heard the rival arguments made by both the sides, perused the orders of the AO and the learned CIT (A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us by both sides. We find the first issue in question is squarely covered against the assessee by our own decision in the case of HES Infra (P) Ltd vs. Dy. CIT (Supra) wherein we have held as under:

> *"14. We have heard the rival submissions and perused the material available on record. The ld. AR for assessee had made elaborate submissions on the eligibility of assessee to claim deduction on facts and law, for which he relied on various 18 M/s. HES Infra Pvt. Ltd. decisions of Hon'ble High Court and Hon'ble Supreme Court. More particularly, the ld. AR for the assessee had relied upon the decision of hon'ble Karnataka High Court in the case of PCIT Vs. Menzies Aviation Bobba (Bangalore) Pvt. Ltd. (2021) 133 Taxmann.458, against which SLP had been filed by the department and the same was dismissed. Though, the assessee may be having a case on merit but before examine the eligibility of the assessee under Section 80-IA of the Act, assessee is required to cross the first hurdle i.e., whether the assessee can be permitted to make a fresh claim in the return of income filed pursuant to notice u/s 153A of the Act.*

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

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

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

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

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

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

139. 98[(1) Every person99,—

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

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

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

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

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

(iii) 6[***]

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

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

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

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

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

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

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

19. The Rule 12 provides as under :

12. (1) The return of income required to be furnished under sub-section (1) or subsection (3) or sub-section (4A) or sub-section (4B) or sub-section (4C) or sub-section (4D) 35[or sub-section (4E)] 36[or sub-section (4F)] of section 139 or clause (i) of sub- section (1) of section 142 36a[or section 148] or section 153A 37[***] relating to the assessment year commencing 38[on the 1st day of April, 39[2023]] shall,—

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

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

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

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

20. The Rule 18BBB provides as under :

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

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

(2) A separate report is to be furnished by each undertaking or enterprise of the assessee claiming deduction under section 80-I or 80-IA or 80-IB 75[or 80-IC] and shall be accompanied by the Profit and Loss Account and Balance Sheet of the 23 M/s. HES Infra Pvt. Ltd. undertaking or enterprise as if the undertaking or the enterprise were a distinct entity.

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

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

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

CCB in this regard. In our view, the filing of the audit report and claiming the deduction in the return of income before filing the original return of income is mandatory. As the assessee failed to file the required audit report claiming the deduction under the prescribed Rules 12 and 18BBB r.w. Form 10 CCB in the return of income filed on 30.09.2009, hence, the assessee in our opinion would not be entitled to claim any deduction.

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

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

24. For the purpose of claiming the deduction, it was essential to claim the deduction before or on the date of filing the return under section 139(1) of the Act. Admittedly, the assessee has neither claimed the deduction in the original return of income filed on 30.09.2009 nor had claimed the deduction during the original assessment proceedings for A.Y. 2009-10 passed u/s 143(3) of the Act. The Assessing Officer had passed the assessment order on 22.12.2011 determining the total income of assessee at Rs.30,60,90,932/-. For all purposes, the assessment order, had attained finality in respect to the issues and matters which were subject matter of the assessment proceedings.

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

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

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

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

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

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

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

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

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

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

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

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

29. A perusal of the assessment order passed under section 143(3) r.w. section 153A dated 31.03.2014, shows that the Assessing Officer has accepted the income determined as per the assessment order under section 143(3) dt.22.12.2011 for Rs.30,60,90,932/-. Thus, no addition was made by the 29 M/s. HES Infra Pvt. Ltd. Assessing Officer during the assessment proceedings under section 143(3) r.w. section 153A of the Act. In our view, the Assessing Officer was right in denying the claim of deduction u/s 80IA to the assessee as no addition was made in the hands of the assessee during the assessment proceedings on account of any incriminating material. Further, the issues which have attained finality, in an unabated assessment are required to be restricted having a live link with the incriminating material.

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

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

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

32. We are of the opinion that re-assessment proceedings u/s 153A is not a denovo re-assessment as the re-assessment can only be made with respect to the incriminating material found during the course of search. The above said finding is based on the finding recorded by the Hon'ble High Courts in the cases of (1) GMR Infrastructure Limited Vs. DCIT (ITA 1036 of 2017 of Hon'ble Karnataka High Court),

(2) Jai Steels (India) Jodhpur Vs. ACIT reported in 36 taxmann.com 523 (Bombay High Court) and (3) Rachana Infrastructure (P) Ltd., (2022) 138 taxmann.com 416 (Gujarat High Court). For the above said purposes, we are reproducing the finding portion of the Hon'ble Gujarat High Court in the case of Rachana Infrastructure which in turn had relied upon other decisions and which is as under:

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

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

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

"it is clear that under section 264, the CIT is empowered to exercise revisional powers in favour of the assessee. In exercise of this power, the CIT may, either of his own motion or on an application by the assessee, call for the record of any proceeding under the Act and pass such order thereon not being an order prejudicial to the assessee, as the thinks fit. 32 M/s. HES Infra Pvt. Ltd. Sub - ss. (2) and (3) of section 264 provide for limitation of one year for the exercise of this revisional power, whether suo motu, or at the instance of the assessee. Power is also conferred on the CIT to condone delay in case he is satisfied that the assessee was prevented by sufficient cause from making the application within the prescribed period. Sub-s. (4) provides that the CIT has no power to revise any order under s. 264(1) : (i) while an appeal against the order is pending before the AAC, and (ii) when the order has been subject to an appeal to the Tribunal. Subject to the above limitation, the revisional powers conferred on the CIT under s. 264 are very wide. He has the discretion to grant or refuse relief and the power to pass such order in revision as he may think fit. The discretion which the CIT has to exercise is undoubtedly to be exercised judicially and not arbitrarily according to his fancy. Therefore, subject to the limitation prescribed in S. 264, the CIT in exercise of his revisional power under the said section may pass such order as he thinks fit which is not prejudicial to the assessee. There is nothing in s. 264 which places any restriction on the CIT's revisional power to give relief to the assessee in a case where the assessee detects mistakes on account of which he was over assessed after the assessment was completed. We do not read any such embargo in the CIT's power as read by the CIT in the present case. It is open to the CIT to entertain even a new ground not urged before the lower authorities while exercising revisional powers. Therefore, though the Petitioner had not raised the grounds regarding under-totaling of purchases before the ITO, it was within the power of the CIT to admit such a ground in revision. The CIT was also not right in holding that the over-assessment did not arise from the order the assessment. Once the Petitioner was able to satisfy that there was a mistake in totaling purchases and that there was under- totaling of purchases to the tune of Rs. 20,000, it is obvious that there was over-assessment. In other words, the assessment of the total income of the assessee is not correctly made in the assessment order and it has resulted in over-assessment. The CIT would not be acting de hors the IT Act, if he gives relief to the assessee in a case where it is proved to his satisfaction that there is over-assessment, whether such over-assessment is due to a mistake detected by the assessee after completion of assessment or otherwise. In our opinion, the CIT has misconstrued the words "subject to the provisions of this Act" in s. 264(1) and read a restriction on his revisional power which does not exist. The CIT was, therefore, not right in holding that it was not open to him to give relief to the Petitioner on account of the Petitioner's own mistake which it detected after the assessment was completed. Once it is found that there was a mistake in making an assessment, the CIT had power to correct it under s. 264(1). In our opinion, therefore, the CIT was wrong in not giving relief to the Petitioner in respect of over-assessment as a result of under totaling of the purchases to the extent of Rs. 20,000."

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

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

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

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

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

34 M/s. HES Infra Pvt. Ltd. 33. In view of the above, we are of the opinion that the assessee cannot be permitted to make a fresh claim of deduction in the re-

assessment proceedings u/s 153A of the Act. The above said finding is not only based on the interpretation of the provision of section 153A read with section 139(1) of the Act, but also based on the mandatory provisions which require the assessee to file the audit report along with the original return of income for claiming the deduction under Chapter VI of the Act.

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

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

35. The hon'ble Delhi High Court in the case of Neeraj Jindal (supra) had explained the concept and held that for all purposes, the return of income filed by the assessee in response to the notice under section 153A would be a return of income filed under section 139 of Income Tax Act 1961. In other words, the earlier return of income filed by the assessee, would stand withdrawn from the record for all practical purposes and would be replaced / substituted by the subsequent return of income filed by the assessee in response to the notice under Section 153A of the Act. First of all, the said decision was not rendered in context of penalty provisions of Section 271(1)(c) of the Act. Further, in our understanding, the Hon'ble High Court has not decided the issue with respect to the time frame provided for claiming the deduction as per section 80AC r.w. section 139(1) and Rule 18BBB and

Form 10CCB of the Act. In our considered opinion, the assessee can take the benefit of the re-assessment proceedings in an unabated assessment only with respect to the material or additions which are relatable to the incriminating material. Hence, the judgment of Hon'ble Delhi High Court in our opinion is also not applicable.

36. The reliance of the assessee on the decision of Hon'ble Supreme Court in the case of Abhisar Buildwell Pvt. Ltd. (supra), is of no help to the assessee as the Hon'ble Supreme Court in the said case has held that on what basis, the Assessing Officer can make the additions in the reassessment proceedings under 37 M/s. HES Infra Pvt. Ltd. section 153A of the Act. The Hon'ble Supreme Court has held as under :

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

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

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

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

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

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

14. Now the assessee has relied upon the following judgments at the time of hearing the appeals:

a) Shrikant Mohta vs. CIT (414 ITR 0270 (Cal)

b) CIT vs. B.G. Shirke Construction Technology (P) Ltd (2017) 395 ITR 0371 (Bom).

c) Nandini Delux vs. ACIT (2015) 37 ITR (Trib) 52 (Bang.)

d) ACIT vs. V.N. Devadoss (2013) 093 DTR 0073

e) DCIT vs. Eversmile Construction Co. Ltd (2012) 143 TTJ 0322

f) Mr.Faisal Abbas vs. DCIT (ITA No.3485 & 3487/ Mum/2010

g) CIT vs. Sun Engg. Works (P) Ltd (1992) 198 ITR 297 (S.C)

h) M/s. KNR Constructions Ltd vs. DCIT (Ita No.946 to 948/Hyd/2015)

i) DCIT vs. M/s. KNR Constructions Ltd (ITA 190 & 191/Hyd/2018)

j) PNR Construction Co. Ltd vs. DCIT (2013) 37 Taxmann.com 361 (Agra Trib)

k) M/s Transstory India Ltd vs. Income Tax Officer (ITA No.540/Vizag/2009.

15. The above cited judgments except Shrikant Mohta vs. CIT (Supra) were considered by the Tribunal and thereafter only the decision in the case of Dy. CIT vs. HES Infra (P) Ltd was passed. With respect to the judgment in the case of Shrikant Mohta (Supra) is concerned, suffice to say the said judgment was on its own facts and the Hon'ble High Court has no occasion to

examine the issue in the perspective of section 80IA and 80AC. In this case, search was carried out in assessee's premises on 2.9.2004 and no return was filed for the A.Y 2004-05, as it was required to be filed on 31.10.2004 (i.e. after the date of search) and in response to notice u/s 153A, received by the assessee on 27.03.2006, the assessee reported to have filed the return of income on 26.04.2006 and claimed a loss that the assessee intended to carry forward in the subsequent year. However, in the assessment order the Assessing Officer did not expressly record that the losses in the relevant A.Y were to be caried forward to subsequent years. When the Assessing Officer allowed such loss to be carried forward in A.Y 2006-07, the learned CIT invoked the provisions of section 263. Under these circumstances, the Hon'ble High Court has observed as under:

> "*The non obstante clause at the beginning of Section 153A (1) of the Act suspends, for the purpose and to the extent as indicated in such provision, the operation of several other provisions of the Act, including Section 139 and even Section 147 in course of any reassessment. In other words, when a search is initiated under Section 132 of the Act, the assessee is not required to file the assessee's return till such time that the assessee receives a notice under Section 153A(1)(a) thereof. Once such notice is received the liability fastens on the assessee to file the return within the reasonable time specified in the relevant notice. To boot, the second proviso to Section 153A(1) of the Act, insofar as it is material for the present purpose, mandates that any "assessment or reassessment ... relating to ... the relevant assessment year or years ... pending on the date of initiation of the search under Section 132. ... shall abate".*
>
> *It goes without saying that since the search operations in this case were initiated on September 2, 2004, it was no longer necessary for this assessee to file his regular return by October 31, 2004 notwithstanding the mandate of Section 139(1) of the Act. The obligation to file the return remained suspended, in view of the clear opening words of Section 153A(1) of the Act, till such time that a notice*

was issued to him under clause (a) of such sub-section. If such is the meaning of Section 153A(1) of the Act, the operation of Section 139(3) of the Act qua the time available for filing a return in order to avail of the benefit of carrying forward any loss stands extended till a return is called for under Section 153A(1)(a) of the Act and such return is filed, provided the return is filed within the time indicated in the relevant notice under Section 153A(1)(a) of the Act. There can be no dispute to such being the effect of Section 153A(1)(a) of the Act.

Unfortunately,the notice issued under Section 153A(1)(a) of the Act is not available in the records relied upon by the parties nor is there any reference to the date of such notice in any of the orders appended to the papers. Indeed, the time permitted by the relevant notice under Section 153A(1)(a) of the Act for the assessee to file the return is also not available. As recorded above, it is the submission of the assessee that such notice was received by the assessee on March 27, 2006 and it afforded a month's time to the assessee to file the assessee's return and the assessee's return for the assessment year 2004-05 was filed on April 26, 2006. The date when the return was filed, however, is verifiable from the orders available.

In the light of the substantial questions of law being answered herein, a definitive final order cannot be passed without being sure of the date of issuance of the notice under Section 153A(1)(a) of the Act and the time afforded by such notice for the assessee to file the return. For such purpose, the orders impugned passed by the Appellate Tribunal require to be set aside and the matters remitted back to the Tribunal for the Tribunal to ascertain the details as to the date of the notice and the time afforded to file the return and pass an order in the light of the views expressed herein on the questions of law and it is ordered accordingly.

The first question of law indicated above is answered thus : For the purpose of carrying forward the loss in terms of Section 72 read with Section 80 of the Act, in a case where search operations have been conducted under Section 132 of the Act, the time to file the return within the meaning of Section 139(3) of the Act has to be regarded as the reasonable time afforded by the consequent notice under Section 153A (1)(a) of the Act.

The second question is answered thus :

When search operations are conducted under Section 132 of the Act, the obligation of the assessee to file any return remains suspended till such time that a notice is issued for such purpose under Section 153A(1)(a) of the Act. If the return is filed by the assessee within the reasonable time permitted by such notice under Section 153A(1)(a) of the Act, such return would then be deemed to have been filed within the time permitted under Section 139 (1) of the Act for the benefit under Section 139(3) of the Act to be availed of by the assessee."

15.1 However, this decision is not applicable (1) since it was a case where the time for filing the return was available (2) even the time for filing the revised return was available (3) thirdly the high court was not concerned with the claim of deduction u/s 80IA in the return filed u/s 153A, after assessment order was passed before 4 years of search.

15.2 In the present case the return of income was filed on 30.11.2013 and the assessment order u/s 143(3) was passed on 29.1.2015. The search took place on 25.10.2018 and therefore, 153A notice was issued on 23.8.2019 and assessment order was passed u/s 143(3)/153A on 28.4.2021. Therefore, there was no reason to substitute a valid return of income filed by the assessee with the new return dated 21.8.2019.

15.3 Further, the said case was not a case where the assessement proceeding has been concluded and no appeal has been preferred by the assessee. In view of the above, the above said judgment is not applicable to the facts of the present case.

16. Now coming to the additional argument raised by the Revenue is concerned, the same is with respect to the fact that

the assessee while filing the return of income u/s 153A has sought to claim the refund and has claimed deduction u/s 80IA(4) for the first time. In this regard, though the issue has been considered by us elaborately while passing the decision in the case of Dy.CIT vs. HES Infra (P) Ltd, however, the important aspect is that the assessee was required to file the audit report along with the agreement with the said govt.deptt. etc., in the requisite format and claim the deduction. Now after a lapse of considerable period (original return of income was filed on 30.11.2013 and search took place on 25.10.2018), and the assessee has filed the return of income on 21.9.2019 claiming the deduction u/s 80IA(4) for the first time. Admittedly, the period for revising the return of income or filing the revised return was already over and the order of the assessment u/s 143(3) passed on 29.1.2015 had attained finality. No appeal has been preferred against the original order passed by the Assessing Officer. Even time for filing the rectification application has also lapsed. In the return filed on 21.9.2019 the assessee for the first time has claimed the deduction and sought a refund. As held by us in the case of Dy. CIT vs. HES Infra (P) Ltd (Supra), the assessee is not permitted to make a fresh claim of deduction at the time of filing of the return of income in response to notice u/s 153A. Further, we are also of the view that the assessee cannot take advantage of the proceedings u/s 153A to its own benefit more particularly when the original return of income filed by the assessee and the assessment order passed on 29.01.2015 had been accepted. The assessee cannot be permitted to claim a deduction on the basis of activity, which formed the basis of filing return of income on 30.11.2013 and which were considered by the Assessing Officer while passing the order on 29.1.2015. Now the assessee, in our opinion, cannot claim deduction u/s 80IA and ask for a refund of

taxes already paid, while revising its return in the garb of return of income filed in response to notice u/s 153A. The above said issue has been considered and decided by the Hon'ble Supreme Court in the case of Shelly Products (Supra) wherein it was held that the assessed income shall not be less than the returned income. In view of the above, we are of the opinion that the above said claim of the assessee is not required to be considered. In view of our above discussion, the appeal filed by the assessee is dismissed.

17. With regard to the remaining two appeals filed by the assessee are concerned, we find the grounds raised by the assessee are more or less identical to the grounds of appeal in ITA No.239/Hyd/2022 except the quantum of addition. We have already decided the issue and the appeal of the assessee has been dismissed. Following similar reasonings, the grounds raised by the assessee in the remaining two appeals are also dismissed in the light of our findings given in ITA No.239/Hyd/2022. Thus, all the appeals filed by the assessee are dismissed.

18. In the result, all the three appeals filed by the assessee are dismissed.

Order pronounced in the Open Court on 11th December, 2023.

Sd/-	**Sd/-**
(LALIET KUMAR) **JUDICIAL MEMBER**	**(R.K. PANDA)** **VICE-PRESIDENT**

Hyderabad, dated 11th December, 2023.
Vinodan/SPS

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4	DR, ITAT Hyderabad Benches
5	Guard File

By Order