

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, AHMEDABAD BENCHES, AHMEDABAD**

**BEFORE SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER
AND
MS. MADHUMITA ROY, JUDICIAL MEMBER**

ITA No.2118/Ahd/2013
Assessment Year: 2009-10

ITA No. 2302/Ahd/2014
Assessment Year:2010-11

ITA No. 2303/Ahd/2014
Assessment Year: 2011-12

ITA No. 1231/Ahd/2016
Assessment Year: 2013-14

ITA Nos. 1621/Ahd/2017
Assessment Year: 2014-15

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| The ACIT, Patan Circle, Room No.104, 1 st Floor, Santokba Hall, Rajmahal Road, Patan-384265, Gujarat | v. | Ajay Engineering Infrastructure Pvt. Ltd., 98, Old Market Yard, Unjha-384170 Gujarat |
| | | PAN:AAGCA8877L |
| (Appellant) | | (Respondent) |

ITA No.1650/Ahd/2017
Assessment Year: 2014-15

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| The DCIT, Patan Circle, Room No.101/4, 1 st Floor, Chinmay Corporate House, Patan-Deesa Highway, Patan-384265,Gujarat | v. | M/s Ajay Protech Pvt. Ltd., 59, Pratap Chambers 1 st Floor, Near Railway Circle, Unjha-384170, Gujarat |
| | | PAN:AAJCA4095R |
| (Appellant) | | (Respondent) |
| Assessee by: | Sh. S.N. Soparkar, Sr. Advocate & Sh. Parin Shah, A.R. | |
| Revenue by: | Sh. Chetram Meena, Sr. DR | |
| Date of hearing: | 24.01.2024 | |
| Date of pronouncement: | 19.04.2024 | |

ORDER

PER BENCH:

These five appeals bearing ITA Nos. 2118/Ahd/2013, 2302/Ahd/2014, 2303/Ahd/2014 ,1231/Ahd/2016 & 1621/Ahd/2017 for assessment years : 2009-10, 2010-11, 2011-12 , 2013-14 and 2014-15 respectively are filed by the Revenue before Income Tax Appellate Tribunal, Ahmedabad Bench, Ahmedabad , wherein Respondent is Ajay Engineering Infrastructure Private Limited, and appeal in ITA no. 1650/Ahd/2017 is filed by Revenue for assessment year 2014-15 wherein the Respondent is Ajay Protech Private Limited .

2. First, we shall take up appeal of Revenue in ITA no. 2118/Ahd/2013 for assessment year 2009-10 w.r.t. the assessee namely Ajay Engineering Infrastructure Private Limited , which appeal has arisen from the appellate order dated 16.05.2013 passed by the learned Commissioner of Income-tax (Appeals), Ahmedabad (hereinafter called "the CIT(A)") in Appeal No. CIT(A)/GNR/318/2011-12 for the assessment year 2009-10 , which in turn has arisen from the assessment order dated 30.12.2011 passed by learned Assessing Officer(hereinafter called "the AO") u/s 143(3) of the Income-tax Act,1961(hereinafter called "the Act").

3. The Revenue has raised following grounds of appeal in Memo of Appeal filed with Income Tax Appellate Tribunal, Ahmedabad Bench, Ahmedabad in ITA No. 2118/Ahd/2013 for assessment year 2009-10 , which reads as under:-

"1. The learned CIT(Appeals) has erred in law and on facts in deleting the disallowance of deduction made by the AO of Rs. 1,76,30,304/- u/s. 80IA(4)(i) of the Act.

2. On the facts and circumstances of the case the ld. CIT(A) ought to have upheld the order of the Assessing Officer.

It is therefore prayed that the order of the learned CIT(Appeals) may be set aside and that of the A.O. be restored to the above extent. "

4. The brief facts of the case are that the assessee is engaged in the business of Civil Construction. The assessee filed return of income electronically on 30.09.2009 declaring income of Rs. 35,90,260/- . The assessee has claimed deduction under section 80IA(4) of the Act , to the tune of Rs. 1,87,70,901/-. The case of the assessee was selected by Revenue for framing scrutiny assessment u/s 143(3) read with Section 143(2) of the 1961 Act. The AO has claimed to have issued and served statutory notices to the assessee u/s 143(2) and 142(1) of the 1961 Act. The assessee was asked by the AO to explain as to fulfillment of different conditions for eligibility of the claim of deduction under section 80IA(4) of the Act. The assessee submitted that it has carried out the business as developer for the infrastructure activity as mentioned in Section 80IA(4) of the Act and the assessee has not undertaken work contract as Contractor. The assessee drew attention of the AO to the terms and conditions of the agreement entered into by the assessee with the various Central / State Government authorities wherein various aspects of technical skill, human resources, financial resources, risk factors, designing various technical projects, introduction of additional finance, high managerial efficiencies etc., is utilized in carrying out the development activities in the form of various projects such as roads, bridges, Water Pipeline Resources etc. The assessee drew attention of the AO to the provisions of section 80IA(4) of the Act. The assessee also drew attention of the AO to the CBDT Circular No. 717 dt. 14.08.1995 reported in 215 ITR (ST) 70, 91, which reads as under:-

"Five Year tax holiday for infrastructure development."

34.2: Industrial modernizing requires the massive explanation of and quantitative improvement in infrastructure. Our country is very deficient in infrastructure such as express ways, highways, Air ports and Ports and rapid urban rural Transport system. Additional resources are noted to fulfill the requirements of the country within a reasonable time frame. In many countries the BOT or BOOT concepts have been utilized for developing new infrastructure."

4.2 The assessee drew attention of the AO to the judgment and order of Hon'ble Bombay High Court in the case of **CIT v. ABG Heavy Industries Ltd.**, reported in 322 ITR 323. The assessee submitted that explanation inserted below Sub-section 13 to Section 80IA cannot restrict the main provision 80IA(4) of the Act. The assessee also submitted before the AO that it has filed the audit report in Form No. 10CCB giving various details in respect of infrastructure activities carried out by the assessee during the year under consideration , for making claim of deduction of Rs. 1,87,70,901/- u/s 80IA(4) of the 1961 Act. The assessee prayed before the AO that the assessee be allowed deduction under section 80IA(4) of the 1961 Act.

4.3 The AO referred to the Explanation inserted below sub-section 13 of Section 80IA , which was substituted by Finance Act, 2009 wef 01.04.2000, which reads as under:-

“ 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 of State Government) and executed by the undertaking or enterprise referred to in sub-section (1).”

4.4 The AO rejected the contentions of the assessee by holding that deduction under section 80IA(4) is not available to a business which is in the nature of work contract. The assessee works as Contractor. It filed tender for the particular work and on acceptance of its tender, particular work order was awarded to it. That particular order is then executed by the assessee on the terms and conditions of the order stipulated by the authority granting such work order. The AO referred to the subject matters of the letters awarding such work contract , and observed that the assessee works as Contractor and execute the work orders awarded on approval of its tender. Few of such letters containing subject matters of the letters, awarding such work contract in favour of the assessee are reproduced by the AO in its assessment order

at page no. 7-10. The AO observed that the assessee is merely a Contractor who executes work orders as a Contractor awarded to it by approval of its tender. The AO also referred to provisions of Section 80IA(4)(i) to hold that the deduction under section 80IA(4) is allowable on the profit and gains derived from the enterprises which should be (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility. The assessee has entered into contract agreements as a 'Contractor' and earned income as 'Contract receipts' which income is not entitled for deduction under section 80IA(4)(i) of the Act. The assessee has not entered into any agreement as an owner of the project but has entered into an agreement as work contractor in all the work done by the assessee. The tax has been deducted at source under section 194C w.r.t. all the receipts for the assessee for executing the work contract order contract receipts, which proves that the assessee is a 'Contractor' and not an owner of the Project and enterprise. The AO also referred to the fact that letters awarding work contracts shows time limit for completion of work assigned. There is no ownership of the assessee over projects / enterprise, and the assessee is only supposed to carry out the work for which it is paid contract receipts. Ownership over the projects/enterprise is never with the assessee company. Thus, the AO observed that contract receipts are not eligible for deduction under section 80IA(4) because the income should be derived from the enterprise/ undertaking developing, operating and maintaining of the infrastructure facilities. The AO observed that the first condition of Section 80IA(4) is that the enterprise should be owned by a Company. The AO also observed that the letters awarding works shows that work were assigned to M/s Ajay Engineers , a partnership firm in six cases. The assessee company came into existence only on 27.02.2008 on conversion of said partnership firm into company. The AO also observed that the assessee company has no right to operate or maintain the infrastructure facilities and assessee is merely a contractor and not a developer. The AO observed that the risk assumed by the assessee is only to the extent of business

contract risk . The AO observed that the assessee company has taken risk of investment only to the extent of contract risk, while benefit of deduction u/s 80IA(4) is available only to developers who undertake entrepreneurial and investment risks. The AO also observed that the assessee company has not furnished separate project-wise report in Form No. 10CCB in support of eligibility for claiming deduction under section 80IA(4). The AO observed that separate project-wise report is required as per sub-clause 2 of Rule 18BBB of the Income-tax Rules, 1962, which reads as under:-

"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 80IB or 80IC and shall be accompanied by the Profit and Loss Account and Balance Sheet of the undertaking or enterprise as if the undertaking or the enterprise were a distinct entity"

4.5 The AO also referred to the Memorandum explaining the provisions of Finance Bill, 2007, wherein Hon'ble Finance Minister has clarified the Explanation inserted below sub-section 13 of Section 80IA, which is reproduced as under:-

"The tax benefit was introduced for the reason that the industrial modernization required a massive expansion of, and qualitative improvement in, infrastructure (viz., express ways, highways, airports, ports and rapid urban rail transport system) which was lacking in our country. The purpose of the benefit has all along been for encouraging private sector participation by way of investment in development of the infrastructure sector and not for person who merely execute the civil construction work or any other works contract."

4.6 The AO observed that in the present case, assessee is a contractor and has stated its business as 'Civil Construction' in the audit report. Thus, the AO held that the assessee is only a 'Work Contractor' and entered into agreement by way of tender to complete the well planned and designed work which should be completed within the stipulated time. The AO observed that the assessee has not entered in BOT, BOOT & BOLT system . The AO held that the assessee company is not entitled for

deduction under section 80IA(4)(i) of the Act. The AO further observed that the assessee has failed to fulfill the other conditions for claiming deduction u/s 80IA of the 1961 Act. The AO disallowed the claim of the assessee for deduction u/s 80IA of Rs. 1,87,58,401/- , vide assessment order dated 30.12.2011 passed by the AO u/s 143(3) of the 1961 Act.

5. Aggrieved by the assessment framed by the AO u/s 143(3) of the 1961 Act, the assessee filed first appeal with Id. CIT(A) , which appeal stood allowed by the Id. CIT(A) , by holding as under:-

"5.2 I have carefully gone through the facts of the case, the observations and objections of the AO which have been summarized in para 5 of this order, the various orders of the judicial authorities including those relied upon by the appellant, the terms of agreement as per tender documents of various projects and the submissions of the appellant.

5.2.1 One of the objection of the AO raised in earlier year while denying the benefit of section 80IA(4) to the appellant was that the agreements for many of the projects were entered into when the appellant was doing business in the status of a firm. The appellant is a Company, came into existence on conversion of partnership firm into Limited Company under chapter IX of the Companies Act, 1956 with effect from 27-02-2008. Prior to that, the partnership firm in the name and style of 'Ajay Engineers' was carrying on the business of developer/construction etc. The said partnership firm was converted into a Public Limited Company under Chapter IX of the Companies Act under the name and style as 'Ajay Engi. Infrastructure Ltd.' along with its all existing business, assets and liabilities as per the provisions of Companies Act.

There is no doubt or dispute that the profits on which the deduction has been claimed during the year have been earned in the previous year itself and in the impugned year the business was carried entirely in the status of the company.

The following facts are material in the case:

i) the company had converted from a firm into a company limited by shares by operation of law under Part IX of the Companies Act, 1956 as going concern and continued the partnership business including all its assets, movable and immovable, rights, debts and liabilities in connection therewith; and had so converted before the commencement of the previous year in question.

(ii) Many of the agreements were entered into by the appellant after conversion into the company itself.

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(iii) In the cases, where the agreements were signed earlier in the status of firm, the appellant had informed the authorities with whom the agreement was entered of the change in their status and none of them have objected to it and legally all the terms were binding on both the parties as per law itself. In fact, TDS certificates have been issued in the name of company only during the year.

(iv) As held by the Rajasthan High Court, in the case of Chetak Enterprises (P.) Ltd reported at 271 ITR 444, the conversion of the firm into company legally with all the liabilities and assets and business as a going concern before commencement of the previous year, would make it eligible for 80IA(4) as also the fact that proviso to section 80IA(4)(c) would also be applicable even if it is considered as a transferee enterprise which has undertaken the work of development or maintenance and operation.

Following the spirit and ratio of the judgment of the Hon'ble Rajasthan High Court in the case of Chetak Enterprises (P.) Ltd (supra), it is decided on the facts of the case that the company which has earned the profits during the year could not be denied the benefit of deduction u/s 80IA(4) on this basis. The other objections would be dealt separately, in subsequent paragraphs.

5.2.2 The major objection of the AO is that the company has merely entered into contract agreements and acted as a contractor. He has observed that TDS has been deducted u/s 194C which proves that the assessee is a contractor and not owner of the projects and the appellant was 'not owner of the projects'. The AO has held that the company is neither developing or operating or maintaining the projects and the risk of the appellant is not of the nature of entrepreneurial and investment and is limited to the extent of contract undertaken. He has also relied on the explanation below section 80IA(13) with retrospective effect from 1/4/2000 which clarifies that any person executing the work contract who undertakes a work contract with the undertaking or enterprise is not eligible for the deduction.

Before I proceed with individual projects and their terms; I would like to quote the criteria and guidelines as decided by various courts. The Hon'ble jurisdictional ITAT, Ahmedabad in the case of Sugam Construction Pvt. Ltd. vs. ITO (30 taxmann.com 331) in its recent judgment, after discussing the provisions of law and various judgements, has discussed the various aspects like what is contract/contractor; concept of developer, requirement of ownership etc., after discussing the law and the various decisions. I would like to reproduce some of the very relevant observations made by the Hon'ble Tribunal.

"12. With this factual background, we have examined few case laws to ascertain whether the assessee's nature of work had fallen under the definition of a "contractor" or a "developer". In this regard, we have perused an order of Tribunal pronounced in the case of B.T. Patil & Sons Belgaum Construction (P.) Ltd. (supra). Vide paragraph No.39, the

Respected Bench has clarified that the words "developer" and "contractor" have not been defined for the purpose of application of section 801A. According to the Bench, It is a settled legal position that ordinary meaning is required to be given for a word used in the Statute. Rather the Bench has said that a word used in one Statute cannot per se be imported into another. A reference of General Clauses Act, 1897 was made, but it was found that the word "contractor" or "developer" had not been defined therein. Then, the Respected Bench has taken the help of Oxford Advanced Learners' Dictionary. As per the said dictionary, the word "developer" means a person or a company that designs or creates new product. Whereas as per the dictionary meaning, the word "contractor" is a person or a company that has a contract to do work or provide services or goods to another. As per new shorter Oxford dictionary, the word "contractor" means a person who enters into a contract or agreement. As per the Bench, a developer is a person who conceives the project. He may execute the entire project himself or assign some part of it to others. As per Respected Bench, on the contrary, a contractor is the one who is assigned a particular job to be accomplished on behalf of the developer. The duty of a contractor is to translate such design into reality. The role of a developer is much larger than that of the contractor. As per Bench, It is no doubt that in certain circumstances a developer may also do the work of a contractor but a mere contractor per se can never be called as a developer, who undertakes to do work according to the pre-decided plan. These findings have Indeed helped us in deciding the Issue in hand.

12.1 This technical term, i.e. "developer" was also under question in the case of Radhe Developers (supra), wherein vide an order dated 13.12.2011, the Hon'ble Court has quoted as under:

"Secondly, term "developer" has been understood in common parlance as well as in legal sense carrying a much wider connotation. The Tribunal itself In the impugned order has traced different meanings of the term "developer" explained in different dictionaries, which read as under:

"1. The Webster's Encyclopedia unabridged of the English language gives the following meaning of the term developer as:

1. One who or that which develops;
 2. A person who invests in and develops the urban or suburban potentialities of real estate.
- b. Oxford Advanced Learners Dictionary of Current English, Fourth Indian Edition, gives meaning of the term 'developer' as persons or company that develops land.

C. *Random House Dictionary of the English Language, the following can be found Develop*

- a. *To bring out the capabilities or possibilities of; bring to a more advanced or effective state.*
- b. *To cause to grow or expand.*

Developer

- a. *The act or process of developing; progress.*
- b. *Synonym: Expansion, elaboration, growth, evolution, unfolding, maturing, maturation.*
- d. *Webster Dictionary, the following definitions emerge:*
 - a. *To realize the potential of;*
 - b. *To aid in the growth of strength, develop the biceps,*
 - c. *To bring into being: make active (develop a business)*
 - d. *To convert (a tract of land) for specific purpose, as by building extensively.*
 - e. *Law lexicon Dictionary: The following definitions could be seen.*

Development

- a. *To act, process or result of development or growing or causing to grow; the state of being developed.*
- b. *Happening."*

12.2 *There is an another decision which has been cited before us pronounced by ITAT Hyderabad Bench in the case of GVPR Engineers Ltd. (supra), wherein the assessee-company had entered into a contract with the Government to develop an infrastructure facility. The AO's objection was that the assessee had entered into a contract for building for which the entire investments were made by the Government and the assessee was paid "on running bill to bill basis". This question was elaborately dealt with by the Respected Coordinate Bench and after due consideration of the work executed by the said concern, it was opined that the words "developer" and "contractor" have not been defined in section 80IA of the Act. It was noted that the BOT/BOOT models seek to augment infrastructural assets in addition to Government spending and not simply feed on Government expenditure. As per the Tribunal, the deduction u/s.80IA is available to the former and not to the latter. The term "developer" has to be seen de hors the contract. The Bench has also*

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opined that word "ownership" is attributable only to the enterprise
carrying on the business which would mean that only companies are
eligible for deduction u/s. 80IA(4).

12.3 An another controversy in such type of cases is in respect of the term "ownership" prescribed as per the language of the Section. The Section 80IA(4) prescribes that it applies to any enterprise carrying on the business of developing, operating and maintaining any infrastructure facility which fulfills the conditions, namely, It is owned by company registered in India or by a consortium of such companies and that it has entered into an agreement with the Central Government or State Government and that it has started operating and maintaining the infrastructure facility on or after 1995. The term "it is owned" has been defined by the Revenue Department as if the infrastructure facility is to be owned by the enterprise claiming 80IA(4) deduction. But the view expressed by the Hon'ble Courts is entirely different. In one of the decision pronounced by ITAT Hyderabad Bench In the case of Koya & Co. Construction (P.) Ltd. (supra), It is held that the word "owned" is attributable to the enterprise carrying on the business. Further, the word "It" denotes the enterprise carrying on the business. The word "it" do not relate to the "Infrastructure facility". The Infrastructure facility, such as, rail system, high-way projects, Irrigation project, port, air-port, etc. cannot be owned by an enterprise other than the Government.

12.4 An another reason for not granting the deduction u/s.80IA(4) by the Revenue Department was generally because of the reason of Insertion of Explanation by Finance Act (No.2), 2009 with retrospective effect from 1.4.2000 which says that 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 work contract awarded by Central or State Government and executed by an Undertaking or an Enterprise. Due to this Explanation, Revenue has taken a stand that the eligibility is to be granted only to a "developer" and If the nature of activity is a "works contract", then the deduction is not be granted. However, In the case of Koya & Co. Construction (P.) Ltd. (supra), this issue was dealt with elaborately, wherein it was held that pure development is eligible for claim of deduction. It was clarified that to avoid misuse of the provisions, the said Explanation was inserted in section 80IA, so that mere "works contract" would not be eligible for deduction u/s.80IA. Certainly the said Explanation has been inserted to deny the tax holiday to an entity who does only "work contract" or acted merely as a sub-contractor, apparently being distinct from the developer. Applying this ratio on the present set of facts and

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circumstances It can be held that the nature of construction
executed by this assessee had fallen under the category of
"developer" and not under the category of "works-contract".

12.5 Next, an another controversy has also been raised by the Revenue Department that in the agreements in question the term "contractor" has been referred by the Government. This question has been duly addressed by ITAT Mumbai Bench in the case of Bharat Udyog Ltd. (supra), wherein Patel Engg. Ltd. (supra) was followed and it was opined that the term "contractor" is not essentially in contradiction to the term "developer". By entering into a lawful agreement and thereby becoming a "contractor" in no way bar an enterprise to execute the work as a "developer". It was opined that merely because in the agreement for development of Infrastructure facility an enterprise is referred to as a contractor do not detract an enterprise from the position of being a "developer". In number of decisions, the Coordinate Benches have cited ITAT Pune Bench decision pronounced in the case of Laxmi Civil Engineering Pvt. Ltd. (supra), wherein it is mentioned as under:-

"2. Tracing the background of the case, learned counsel for the assessee mentioned that in the first round, the appeals were decided relying on the decision of the Third Member In the case of B.T.Patil & Sons 126 TTJ 577 vide order dated 18.02.2010. Subsequently, the said order of the Tribunal was recalled in view of the binding jurisdictional high Court's judgment pronounced on 15.02.2010 in the case if ABG Heavy Engg. Ltd. reported in 37 DTR (Bom) 233."

13. In the background of the above discussion, it can be summarized that an enterprise has to enter into an agreement with the Central or State Government or a Local Authority or any Statutory Authority. That undisputedly the infrastructure facility belonged to the Government, therefore the infrastructure facility is owned by the Government. But the enterprise which is developing or constructing the infrastructure facility is to be owned by a Company registered in India. The Act also says that an enterprise which is constructing or developing the infrastructure facility can be a consortium of such companies. Such an arrangement is eligible for the claim of deduction. Few Circulars have been issued by CBDT through which it has also been clarified, as discussed in the foregoing case-laws, that the benefit of the impugned deduction is available to an enterprise which either develops or maintains or operated or executed the combination of these three, inter alia as a Build, Operate and Transfer (BOT), or, Build, Own, Operate and Transfer (BOOT), or, Build, Own, Lease and Transfer (BOLT) basis or similar other basis where ultimately the infrastructure facility so constructed is ultimately transferred to Government or Public Authority, then such

an enterprise is within the ambits of qualification of deduction. The explanatory memorandum to the Finance Act, 2007, as quoted before us, states that the purpose of the tax benefit has all along been to encourage investment in development of infrastructure sector and not for the persons who merely execute the civil construction work.

13.1 In the light of the above discussion and the view expressed by the Hon'ble Courts, a conclusion can be drawn that there is a distinction between "developer" and a "contractor". (i) That in a case of civil contractor, it's duty is only of civil construction. (ii) That after the civil construction is over, he is paid for the job of civil construction as per the bills raised. (iii) That at that point of time, his contract is over and the agreement ends. (iv) That after the completion or at the end of the agreement, a civil contractor hand over the site to the owner. (v) That a civil contractor constructs as per specifications given. (vi) That a contractor does not involve much of his money but raises bill of his civil construction work time-to-time to collect the expenditure incurred. (vii) That a contractor has no domain over the land or the site. (viii) That his access to the site is restricted and limited from commercial angle. (ix) That on the basis of the project he cannot raise the funds from the private financial Institutions. (x) That "a contractor" is not responsible for the development of the project but his responsibility is limited to the job-assigned to him. (xi) That a "contractor's" duties and responsibilities can only be examined on the basis of the terms and conditions of the contract agreement.

13.2. Now we shall examine about a "developer". From the above reading we have also gathered (a) That a developer is a person who undertakes the responsibility to develop a project. (b) That a developer is therefore not a civil contractor simplicitor. (c) That if we apply the commercial aspect, then a developer has to execute both managerial as well as financial responsibility. (d) That the role of a developer, according to us, is larger than that of a contractor. (e) That when a person is acting as a developer, then he is under obligation to design the project, It is an another aspect that such design has to be approved by the owner of the project, I.e. the Government in the present case. (f) That he has not only to execute the construction work in the capacity of a contractor but also he is assigned with the duty to develop, maintain and operate such project. (g) That to ascertain whether a civil construction work is assigned on development basis or contract basis can only be decided 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"

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or a "development contract". (h) That in a "development contract" responsibility is fully assigned to the developer for execution and completion of work. (i) That although the ownership of the site or the ownership over the land remains with the owner but during the period of development agreement the developer exercise complete domain over the land or the project. (j) That a developer is not expected to raise bills at every step of construction but he is expected to charge the cost of construction plus mark-up of his profit from the assignee of the contract. (k) That a developer is therefore expected to arrange finances and also to undertake risk. (l) That in contrast to the rights of a "contractor" a "developer" is authorized to raise funds either by private placement or by financial Institutions on the basis of the project. These are few broad qualities of a developer through which the character of a developer can be defined."

The judgment of Hon'ble Mumbai High Court in the case of ABG Heavy Industries Ltd. 322 ITR 323, where the SLP of the Revenue has also been dismissed gives important parameters/guidelines in this regard and the gist is as under:-

'Profits and gains from infrastructure undertakings - Deduction under section 80-IA is available to an enterprise which (i) develops; or (ii) operates and maintains; or (iii) develops, maintains and operates that infrastructure facility inasmuch as subsequent amendment to section 80-IA(4) has made it clear that three conditions of development, operation and maintenance were not intended to be cumulative in nature -- Assessee was awarded a contract for leasing of container handling cranes at Jawaharlal Nehru Port Trust ('JNPT') in terms of policy of Government of India to encourage private sector participation in development of infrastructure Under contract, assessee was responsible for supplying, installation, testing, commissioning and maintenance of cranes - Contract envisaged two different options, first being one under which assessee would carry out operation and maintenance of equipment, while second consisted of an option to JNPT to carry out operations and only maintenance was to be carried out by assessee- Assessee assumed responsibility of making equipment available for operation for a minimum number of days as stipulated in contract and would become liable to pay liquidated damages for non-availability of equipment after commissioning. After expiry of lease period of ten years, assessee was liable to hand over equipment to JNPT free of cost - On facts, held that it could be said that assessee had carried on business of

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developing, maintaining and operating an infrastructural facility
so as to entitle it to a deduction under section 80-IA'*

The court has agreed that an assessee did not have to develop the entire port in order to qualify for a deduction under section 80-IA. Parliament did not legislate a condition impossible of compliance. A part of a port was also held to qualify for the deduction. The decision was followed by the Pune ITAT in the case of the case of B.T. Patil & Sons Belgaum Constructions Pvt Ltd (supra) cited by the appellant.

5.2.3 Now, I would like to go into the aspects of various projects on which the deduction u/s 80IA(4) has been claimed and whether these could be said to be development contract as against works contract and whether they qualify on other grounds like being an eligible infrastructure project or not.

The appellant had executed 12 projects during the year; out of which with respect to two i.e., (1) approach ramp for Sola ROB (II) construction of subway at Sonini Chali; it had itself not claimed deduction under section 80IA(4) as it has not entered into the agreement with the government agency directly etc.

As per the list of projects claimed eligible for deduction, as per submissions reproduced earlier in the order; there were 10 projects in total undertaken by the appellant during the year. Out of these, only 9 have been claimed to have yielded profits. The other project according to the claim of the appellant have yielded loss. The loss has been reduced from the eligible profits claimed. Therefore, I would not go into the merits of loss case as the appellant has not disputed it and there is no loss to revenue as far as these projects are concerned.

The appellant also submitted brief details of all the projects undertaken including nature and scope of work and also the name of authority with which the agreement was reached, period for which it was to bear liability of maintenance and also produced the tendered documents.

The definition of infrastructure facility as per the explanation 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*

The remaining 9 projects include:

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1. Bridges, Railway Bridges, Flyover Bridges and ROB.
2. Road/culvert Work
3. Intake well, Water Supply

The agreements have been undertaken with Indian Railways, Government of India, AUDA, with different departments of Government of Gujarat, Surat Municipal Corporation, etc.

The works of bridges, canals, pipelines for water works, projects for new roads would fall under the definition of infrastructure facility as defined under the Act.

To examine and decide whether the appellant could be said to be a contractor or acted as a developer; the terms and conditions and scope of various projects undertaken were examined carefully and are being representatively and briefly discussed hereafter.

One of the projects was undertaken in an agreement with the Western Railway, Government of India and was of Providing 2X6.00X3.30 M RCC box by pushing for Dharangadhra Canal Crossing.. The scope of work included: (a)Procurement/Fabrication of necessary plants and equipment, jacking, packs, jack pumps for execution of this work. (b)Earth work in excavation for thrust bed for Box pushing Including disposal of excavated earth in nearby Railway land within a maximum lead of 1 Km. (c) Casting of the thrust bed including, casting of foundation as per the design submitted by the tenderer and approved by the Railway. (d) Jacking of the precast boxes to form the opening below the track under running traffic conditions. The maximum allowable deviation at any time from the theoretical arrangements will be limited to 200mm horizontally and 100 mm vertically. Any deviation beyond this tolerance will have to be rectified by contractor at his cost. (e) While coming out of the bank, Box has tendency to disturb the existing bank resulting in slipping of slopes or caving in the bank, the appellant was required to protect the bank for safe passage of traffic at his own cost. (f) Maintenance of track during and after Box pushing work until the track is handed over to open line. g) The appellant was to submit the detailed design mix for M-20, M-25, M-30, M-35 and M-45 for the approval of Railway. Maintenance of the said infrastructure for a period of 61 month (during the period of development 49 months and defect liability period of 12 months) was also the responsibility of the appellant.

Some other projects are also in the nature of bridges including flyovers and ROB in lieu of level crossing etc. For e.g. one is Construction of approach bridges for ROB in Lieu of level crossing no. 2 on Ahmedabad - Delhi B.G Railway Line at Gota in Ahmedabad (Item 3 of appellant's letter reproduced earlier) for which agreement was entered into with Ahmedabad Municipal Corporation. As per agreement, the appellant was required to

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provide his own equipment (vide Page No. 70 of bid document); including 1 Pilling Equipment 2. Slurry Preparation and Testing Equipment 3. Concreting Equipment 4. Lifting Devices 5. Choice of rotary, percussion, grabbing equipment, and equipment for direct or reverse mud circulation, etc, shall be made to suit the soil conditions, vibrating and noise produced during construction should not have any damaging effect on the people and existing structure. Besides, Standard Pucca RCC bench marks of required numbers were to be established by contractor on both the ends on each bank sides before commencement of the work and connected to the nearest GTS bench mark according to which, whole work shall be carried out. The maintenance of all these BM till completion shall be the responsibility of the contractor. The appellant was to be solely responsible for the true and proper setting out of the alignments and for the provision of all necessary instruments, at any time during the execution of the work. In case of any error regarding location, levels, dimensions, or alignment of any part of the work, it on being required to rectify such errors at his own expense. Maintenance of the said infrastructure for a period of 62 month (during the period of development 50 months and defect liability of 12 months) was also the responsibility of the appellant.

Some of the other works are of the nature of road and water supply projects and would be infrastructure facility covered the definition.

As discussed hereinabove, it is concluded that an enterprise which is either developing or operating or maintaining the infrastructure facility is required to be owned by a company or a consortium of companies duly registered In India for purpose of section 80-IA and the Act do not prescribe that the infrastructure facility is to be owned by such an enterprise. The infrastructure facility is generally the property of the Government and an enterprise is bound by the agreement to transfer the same after developing It, after the settled period. The assessee's execution of work fall within first category, i.e. developing of infrastructure facility. Right from the planning, arranging /providing machinery to the work of construction has been done by this assessee and has borne the substantial financial risk and initially the cost also, itself. The assessee has made responsible for any damages or loss during execution as well as generally for some period of liability afterwards. The company has constructed, delivered and maintained and security is also maintained thereafter. So, this is a case of transfer of property in chattel and not a contract of service.

The decisions of CIT v ABG Heavy Industries Ltd. [2010] 322 ITR 323/189 Taxman 54 (Bom.), KMC Construction Ltd 51 SOT 214 (Hyd), Koya & Co. Construction (P.) Ltd. v. Asstt. CIT [2012] 51 SOT 203/21 taxmann.com 35 (Hyd.) (URO) and Radhe Developers v. Union of India [2008] 23 SOT 420 (Ahd.) and Asstt. CIT v. Bharat Udyog Ltd. [2009] 118 ITD 336 (Mum.) thus support the stand taken by the assessee. The assessee has executed the

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construction of infrastructure facility in respect of the government projects, as is evident from the list of the agreements placed on record. Therefore, it is held that the assessee is eligible for the deduction under section 80-IA on the 9 projects less loss of 10th project (with qualification of not considering merits of loss project; as discussed earlier in the order). The grounds are decided accordingly."

6. Aggrieved by the appellate order passed by ld. CIT(A), the Revenue has filed an appeal with the Tribunal. At the outset, ld. Senior Advocate, Sh. S.N. Soparkar, submitted that that the issue is directly covered by the judgment and order of Hon'ble Gujarat High Court in the case of ***The PCIT v. MonteCarlo Construction Ltd.*** in R/Tax No. 786 of 2023, dated 19.12.2023. The ld. Senior Advocate submitted that all the work done by the assessee was as a developer and not as work contractor. The ld. Sr. Advocate drew our attention to the order dated 28.06.2023 of ***ITAT, Ahmedabad*** in ***ACIT v. MonteCarlo Construction Limited*** in ITA No. 1892/Ahd/2013 & Ors. , and also judgment and order of ***Hon'ble Gujarat High Court*** in the case of ***The PCIT v. MonteCarlo Construction Ltd.*** in R/Tax No. 786 of 2023, dated 19.12.2023, and submitted that the issue is covered by the aforesaid judgment and order of ***Hon'ble Gujarat High Court*** , and the assessee is entitled for deduction under section 80IA. The ld. Sr. DR Mr. Chetram Meena on the other hand submitted that the assessee is a Contractor who is doing work contract. The ld. Sr. DR relied upon the assessment order passed by the AO.

7. We have considered rival contentions and perused the material on record. We have observed that the assessee is a Company , and has filed its return of income with Revenue declaring income of Rs. 35,90,260/- . The assessee has claimed deduction of Rs. 1,87,70,901/- u/s 80IA(4) of the 1961 Act. The case of the assessee was selected by Revenue for framing scrutiny assessment u/s 143(3) read with Section 143(2) of the 1961 Act. The AO has observed that the assessee is engaged in the business of Civil Construction. The assessee claimed that it is a Developer engaged in the development of infrastructure activities being development of roads ,

bridges , water pipeline resources etc. with State or Central Government, and having duly complied with the conditions stipulated u/s 80IA(4) of the 1961 Act . The assessee claimed that is eligible for deduction u/s 80IA(4). The AO denied the deduction u/s 80IA(4) on the grounds that the assessee is not a 'Developer' but a 'Contractor' who is executing work contract , and is hit by substituted Explanation below Section 80IA(13) of the 1961 Act by Finance Act, 2009 effective from 01.04.2000, and hence the assessee is not eligible for deduction u/s 80IA(4). The AO observed that the assessee has filled tenders for the particular work and on acceptance of its tender, particular work order is awarded to it. That particular work order is then executed by the assessee on the terms and conditions of the order stipulated by the authority granting such work order. The AO referred to the subject matters of the letters awarding such work contract , and observed that the assessee works as Contractor and execute the work orders awarded on approval of its tender. Few of such letters containing subject matters of the letters, awarding such work contract in favour of the assessee are reproduced by the AO in its assessment order at page no. 7-10. The AO observed that the assessee is merely a Contractor who executes work orders as a Contractor awarded to it by approval of its tender. The AO also referred to provisions of Section 80IA(4)(i) to hold that the deduction under section 80IA(4) is allowable on the profit and gains derived from the enterprises which should be (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility. The assessee has entered into contract agreements as a 'Contractor' and earned income as 'Contract receipts' which income is not entitled for deduction under section 80IA(4)(i) of the Act. The assessee has not entered into any agreement as an owner of the project but has entered into an agreement as work contractor in all the work done by the assessee. The tax has been deducted at source under section 194C w.r.t. all the receipts for the assessee for executing the work contract order contract receipts, which proves that the assessee is a 'Contractor' and not an owner of the

Project and enterprise. The AO also referred to the fact that letters awarding work contracts shows time limit for completion of work assigned. There is no ownership of the assessee over projects / enterprise, and the assessee is only supposed to carry out the work for which it is paid contract receipts. Ownership over the projects/enterprise is never with the assessee company. Thus, the AO observed that contract receipts are not eligible for deduction under section 80IA(4) because the income should be derived from the enterprise/ undertaking developing, operating and maintaining of the infrastructure facilities. The AO observed that the first condition of Section 80IA(4) is that the enterprise should be owned by a Company. The AO also observed that the letters awarding works shows that work were assigned to M/s Ajay Engineers , a partnership firm in six cases. The assessee company came into existence only on 27.02.2008 on conversion of said partnership firm into company. The AO also observed that the assessee company has no right to operate or maintain the infrastructure facilities and assessee is merely a contractor and not a developer. The AO observed that the risk assumed by the assessee is only to the extent of business contract risk . The AO observed that the assessee company has taken risk of investment only to the extent of contract risk, while benefit of deduction u/s 80IA(4) is available only to developers who undertake entrepreneurial and investment risks. The AO also observed that the assessee company has not furnished separate project-wise report in Form No. 10CCB in support of eligibility for claiming deduction under section 80IA(4). The AO observed that separate project-wise report is required as per sub-clause 2 of Rule 18BBB of the Income-tax Rules, 1962, which reads as under:-

"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 80IB or 80IC and shall be accompanied by the Profit and Loss Account and Balance Sheet of the undertaking or enterprise as if the undertaking or the enterprise were a distinct entity"

7.2 The AO also referred to the Memorandum explaining the provisions of Finance Bill, 2007, wherein Hon'ble Finance Minister has clarified the Explanation inserted below sub-section 13 of Section 80IA, which is reproduced as under:-

"The tax benefit was introduced for the reason that the industrial modernization required a massive expansion of, and qualitative improvement in, infrastructure (viz., express ways, highways, airports, ports and rapid urban rail transport system) which was lacking in our country. The purpose of the benefit has all along been for encouraging private sector participation by way of investment in development of the infrastructure sector and not for person who merely execute the civil construction work or any other works contract."

7.3 The AO observed that in the present case, assessee is a contractor and has stated its business as 'Civil Construction' in the audit report. Thus, the AO held that the assessee is only a 'Work Contractor' and entered into agreement by way of tender to complete the well planned and designed work which should be completed within the stipulated time. The AO observed that the assessee has not entered in BOT, BOOT & BOLT system . The AO held that the assessee company is not entitled for deduction under section 80IA(4)(i) of the Act. The AO further observed that the assessee has failed to fulfill the other conditions for claiming deduction u/s 80IA of the 1961 Act. The AO disallowed the claim of the assessee for deduction u/s 80IA of Rs. 1,87,58,401/-. .The ld. CIT(A) granted relief to the assessee with respect to 9 out of 12 projects undertaken by the assessee during the impugned assessment year, on the grounds that the assessee is a 'Developer' and not a 'Contractor'. The appellate order passed by ld. CIT(A) is reproduced hereunder:

"5.2 I have carefully gone through the facts of the case, the observations and objections of the AO which have been summarized in para 5 of this order, the various orders of the judicial authorities including those relied upon by the appellant, the terms of agreement as per tender documents of various projects and the submissions of the appellant.

5.2.1 One of the objection of the AO raised in earlier year while denying the benefit of section 80IA(4) to the appellant was that the agreements for many of the projects were entered into when the appellant was doing business in the status of a firm. The appellant is a Company, came into existence on conversion

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of partnership firm into Limited Company under chapter IX of the Companies Act, 1956 with effect from 27-02-2008. Prior to that, the partnership firm in the name and style of 'Ajay Engineers' was carrying on the business of developer/construction etc. The said partnership firm was converted into a Public Limited Company under Chapter IX of the Companies Act under the name and style as 'Ajay Engi. Infrastructure Ltd.' along with its all existing business, assets and liabilities as per the provisions of Companies Act.

There is no doubt or dispute that the profits on which the deduction has been claimed during the year have been earned in the previous year itself and in the impugned year the business was carried entirely in the status of the company.

The following facts are material in the case:

i) the company had converted from a firm into a company limited by shares by operation of law under Part IX of the Companies Act, 1956 as going concern and continued the partnership business including all its assets, movable and immovable, rights, debts and liabilities in connection therewith; and had so converted before the commencement of the previous year in question.

(ii) Many of the agreements were entered into by the appellant after conversion into the company itself.

(iii) In the cases, where the agreements were signed earlier in the status of firm, the appellant had informed the authorities with whom the agreement was entered of the change in their status and none of them have objected to it and legally all the terms were binding on both the parties as per law itself. In fact, TDS certificates have been issued in the name of company only during the year.

(iv) As held by the Rajasthan High Court, in the case of Chetak Enterprises (P.) Ltd reported at 271 ITR 444, the conversion of the firm into company legally with all the liabilities and assets and business as a going concern before commencement of the previous year, would make it eligible for 80IA(4) as also the fact that proviso to section 80IA(4)(c) would also be applicable even if it is considered as a transferee enterprise which has undertaken the work of development or maintenance and operation.

Following the spirit and ratio of the judgment of the Hon'ble Rajasthan High Court in the case of Chetak Enterprises (P.) Ltd (supra), it is decided on the facts of the case that the company which has earned the profits during the year could not be denied the benefit of deduction u/s 80IA(4) on this basis. The other objections would be dealt separately, in subsequent paragraphs.

5.2.2 The major objection of the AO is that the company has merely entered into contract agreements and acted as a contractor. He has observed that TDS has been deducted u/s 194C which proves that the assessee is a contractor and not owner of the projects and the appellant was 'not owner of the projects'. The AO has held that the company is neither developing or operating or maintaining

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the projects and the risk of the appellant is not of the nature of entrepreneurial and investment and is limited to the extent of contract undertaken. He has also relied on the explanation below section 801A(13) with retrospective effect from 1/4/2000 which clarifies that any person executing the work contract who undertakes a work contract with the undertaking or enterprise is not eligible for the deduction.

Before I proceed with individual projects and their terms; I would like to quote the criteria and guidelines as decided by various courts. The Hon'ble jurisdictional ITAT, Ahmedabad in the case of Sugam Construction Pvt. Ltd. vs. ITO (30 taxmann.com 331) in its recent judgment, after discussing the provisions of law and various judgements, has discussed the various aspects like what is contract/contractor; concept of developer, requirement of ownership etc., after discussing the law and the various decisions. I would like to reproduce some of the very relevant observations made by the Hon'ble Tribunal.

"12. With this factual background, we have examined few case laws to ascertain whether the assessee's nature of work had fallen under the definition of a "contractor" or a "developer". In this regard, we have perused an order of Tribunal pronounced in the case of B.T. Patil & Sons Belgaum Construction (P.) Ltd. (supra). Vide paragraph No.39, the Respected Bench has clarified that the words "developer" and "contractor" have not been defined for the purpose of application of section 801A. According to the Bench, It is a settled legal position that ordinary meaning is required to be given for a word used in the Statute. Rather the Bench has said that a word used in one Statute cannot per se be imported into another. A reference of General Clauses Act, 1897 was made, but it was found that the word "contractor" or "developer" had not been defined therein. Then, the Respected Bench has taken the help of Oxford Advanced Learners' Dictionary. As per the said dictionary, the word "developer" means a person or a company that designs or creates new product. Whereas as per the dictionary meaning, the word "contractor" is a person or a company that has a contract to do work or provide services or goods to another. As per new shorter Oxford dictionary, the word "contractor" means a person who enters into a contract or agreement. As per the Bench, a developer is a person who conceives the project. He may execute the entire project himself or assign some part of it to others. As per Respected Bench, on the contrary, a contractor is the one who is assigned a particular job to be accomplished on behalf of the developer. The duty of a contractor is to translate such design into reality. The role of a developer is much larger than that of the contractor. As per Bench, It is no doubt that in certain circumstances a developer may also do the work of a contractor but a mere contractor per se can never be called as a developer, who

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undertakes to do work according to the pre-decided plan. These findings have Indeed helped us in deciding the Issue in hand.

12.1 This technical term, i.e. "developer" was also under question in the case of Radhe Developers (supra), wherein vide an order dated 13.12.2011, the Hon'ble Court has quoted as under:

"Secondly, term "developer" has been understood in common parlance as well as in legal sense carrying a much wider connotation. The Tribunal itself In the impugned order has traced different meanings of the term "developer" explained in different dictionaries, which read as under:

"1. The Webster's Encyclopedia unabridged of the English language gives the following meaning of the term developer as:

1. One who or that which develops;

2. A person who invests in and develops the urban or suburban potentialities of real estate.

b. Oxford Advanced Learners Dictionary of Current English, Fourth Indian Edition, gives meaning of the term 'developer' as persons or company that develops land.

C. Random House Dictionary of the English Language, the following can be found Develop

c. To bring out the capabilities or possibilities of; bring to a more advanced or effective state.

b. To cause to grow or expand.

Developer

a. The act or process of developing; progress.

b. Synonym: Expansion, elaboration, growth, evolution, unfolding, maturing, maturation.

d. Webster Dictionary, the following definitions emerge:

a. To realize the potential of;

b. To aid in the growth of strength, develop the biceps,

c. To bring into being: make active (develop a business)

d. To convert (a tract of land) for specific purpose, as by building extensively.

e. Law lexicon Dictionary: The following definitions could be seen.

Development

a. To act, process or result of development or growing or causing to grow; the state of being developed.

d. Happening."

12.2 There is an another decision which has been cited before us pronounced by ITAT Hyderabad Bench in the case of GVPR Engineers Ltd. (supra), wherein the assessee-company had entered into a contract with the Government to develop an infrastructure facility. The AO's objection was that the assessee had entered into a contract for building for which the entire investments were made by the Government and the assessee was paid "on running bill to bill basis". This question was elaborately dealt with by the Respected Co-ordinate Bench and after due consideration of the work executed by the said concern, it was opined that the words "developer" and "contractor" have not been defined in section 80IA of the Act. It was noted that the BOT/BOOT models seek to augment infrastructural assets in addition to Government spending and not simply feed on Government expenditure. As per the Tribunal, the deduction u/s.80IA is available to the former and not to the latter. The term "developer" has to be seen de hors the contract. The Bench has also opined that word "ownership" is attributable only to the enterprise carrying on the business which would mean that only companies are eligible for deduction u/s. 80IA(4).

12.3 An another controversy in such type of cases is in respect of the term "ownership" prescribed as per the language of the Section. The Section 80IA(4) prescribes that it applies to any enterprise carrying on the business of developing, operating and maintaining any infrastructure facility which fulfills the conditions, namely, It is owned by company registered in India or by a consortium of such companies and that it has entered into an agreement with the Central Government or State Government and that it has started operating and maintaining the infrastructure facility on or after 1995. The term "it is owned" has been defined by the Revenue Department as if the infrastructure facility is to be owned by the enterprise claiming 80IA(4) deduction. But the view expressed by the Hon'ble Courts is entirely different. In one of the decision pronounced by ITAT Hyderabad Bench In the case of Koya & Co. Construction (P.) Ltd. (supra), It is held that the word "owned" is attributable to the enterprise carrying on the business. Further, the word "It" denotes the enterprise carrying on the business. The word "it" do not relate to the "Infrastructure facility". The Infrastructure facility, such as, rail system, high-way projects, Irrigation project,

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port, air-port, etc. cannot be owned by an enterprise other than the
Government.

12.4 An another reason for not granting the deduction u/s.80IA(4) by the Revenue Department was generally because of the reason of Insertion of Explanation by Finance Act (No.2), 2009 with retrospective effect from 1.4.2000 which says that 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 work contract awarded by Central or State Government and executed by an Undertaking or an Enterprise. Due to this Explanation, Revenue has taken a stand that the eligibility is to be granted only to a "developer" and If the nature of activity is a "works contract", then the deduction is not be granted. However, In the case of Koya & Co. Construction (P.) Ltd. (supra), this issue was dealt with elaborately, wherein it was held that pure development is eligible for claim of deduction. It was clarified that to avoid misuse of the provisions, the said Explanation was inserted in section 80IA, so that mere "works contract" would not be eligible for deduction u/s.80IA. Certainly the said Explanation has been inserted to deny the tax holiday to an entity who does only "work contract" or acted merely as a sub-contractor, apparently being distinct from the developer. Applying this ratio on the present set of facts and circumstances It can be held that the nature of construction executed by this assessee had fallen under the category of "developer" and not under the category of "works-contract".

12.5 Next, an another controversy has also been raised by the Revenue Department that in the agreements in question the term "contractor" has been referred by the Government. This question has been duly addressed by ITAT Mumbai Bench in the case of Bharat Udyog Ltd. (supra), wherein Patel Engg. Ltd. (supra) was followed and it was opined that the term "contractor" is not essentially in contradiction to the term "developer". By entering into a lawful agreement and thereby becoming a "contractor" in no way bar an enterprise to execute the work as a "developer". It was opined that merely because in the agreement for development of Infrastructure facility an enterprise is referred to as a contractor do not detract an enterprise from the position of being a "developer". In number of decisions, the Coordinate Benches have cited ITAT Pune Bench decision pronounced in the case of Laxmi Civil Engineering Pvt. Ltd. (supra), wherein it is mentioned as under:-

"2. Tracing the background of the case, learned counsel for the assessee mentioned that in the first round, the appeals were decided relying on the decision of the Third Member In the case of B.T.Patil & Sons 126 TTJ 577 vide order dated 18.02.2010. Subsequently, the

said order of the Tribunal was recalled in view of the binding jurisdictional high Court's judgment pronounced on 15.02.2010 in the case of ABG Heavy Engg. Ltd. reported in 37 DTR (Bom) 233."

13. In the background of the above discussion, it can be summarized that an enterprise has to enter into an agreement with the Central or State Government or a Local Authority or any Statutory Authority. That undisputedly the infrastructure facility belonged to the Government, therefore the infrastructure facility is owned by the Government. But the enterprise which is developing or constructing the infrastructure facility is to be owned by a Company registered in India. The Act also says that an enterprise which is constructing or developing the infrastructure facility can be a consortium of such companies. Such an arrangement is eligible for the claim of deduction. Few Circulars have been issued by CBDT through which it has also been clarified, as discussed in the foregoing case-laws, that the benefit of the impugned deduction is available to an enterprise which either develops or maintains or operated or executed the combination of these three, inter alia as a Build, Operate and Transfer (BOT), or, Build, Own, Operate and Transfer (BOOT), or, Build, Own, Lease and Transfer (BOLT) basis or similar other basis where ultimately the infrastructure facility so constructed is ultimately transferred to Government or Public Authority, then such an enterprise is within the ambits of qualification of deduction. The explanatory memorandum to the Finance Act, 2007, as quoted before us, states that the purpose of the tax benefit has all along been to encourage investment in development of infrastructure sector and not for the persons who merely execute the civil construction work.

13.1 In the light of the above discussion and the view expressed by the Hon'ble Courts, a conclusion can be drawn that there is a distinction between "developer" and a "contractor". (i) That in a case of civil contractor, it's duty is only of civil construction. (ii) That after the civil construction is over, he is paid for the job of civil construction as per the bills raised. (iii) That at that point of time, his contract is over and the agreement ends. (iv) That after the completion or at the end of the agreement, a civil contractor hand over the site to the owner. (v) That a civil contractor constructs as per specifications given. (vi) That a contractor does not involve much of his money but raises bill of his civil construction work time-to-time to collect the expenditure incurred. (vii) That a contractor has no domain over the land or the site. (viii) That his access to the site is restricted and limited from commercial angle. (ix) That on the basis of the project he cannot raise the funds from the private financial Institutions. (x) That "a contractor" is not responsible for the development of the project but his responsibility is limited to the job-

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assigned to him. (xi) That a "contractor's" duties and responsibilities
can only be examined on the basis of the terms and conditions of the
contract agreement.

13.2. Now we shall examine about a "developer". From the above reading we have also gathered (a) That a developer is a person who undertakes the responsibility to develop a project. (b) That a developer is therefore not a civil contractor simplicitor. (c) That if we apply the commercial aspect, then a developer has to execute both managerial as well as financial responsibility. (d) That the role of a developer, according to us, is larger than that of a contractor. (e) That when a person is acting as a developer, then he is under obligation to design the project, It is an another aspect that such design has to be approved by the owner of the project, I.e. the Government in the present case. (f) That he has not only to execute the construction work in the capacity of a contractor but also he is assigned with the duty to develop, maintain and operate such project. (g) That to ascertain whether a civil construction work is assigned on development basis or contract basis can only be decided 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". (h) That in a "development contract" responsibility is fully assigned to the developer for execution and completion of work. (i) That although the ownership of the site or the ownership over the land remains with the owner but during the period of development agreement the developer exercise complete domain over the land or the project. (j) That a developer is not expected to raise bills at every step of construction but he is expected to charge the cost of construction plus mark-up of his profit from the assignee of the contract. (k) That a developer is therefore expected to arrange finances and also to undertake risk. (l) That in contrast to the rights of a "contractor" a "developer" is authorized to raise funds either by private placement or by financial Institutions on the basis of the project. These are few broad qualities of a developer through which the character of a developer can be defined."

The judgment of Hon'ble Mumbai High Court in the case of ABG Heavy Industries Ltd. 322 ITR 323, where the SLP of the Revenue has also been dismissed gives important parameters/guidelines in this regard and the gist is as under:-

'Profits and gains from infrastructure undertakings - Deduction under section 80-IA is available to an enterprise which (1) develops; or (ii) operates and maintains; or (iii) develops,

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maintains and operates that infrastructure facility inasmuch as subsequent amendment to section 80-IA(4) has made it clear that three conditions of development, operation and maintenance were not intended to be cumulative in nature -- Assessee was awarded a contract for leasing of container handling cranes at Jawaharlal Nehru Port Trust ('JNPT') in terms of policy of Government of India to encourage private sector participation in development of infrastructure Under contract, assessee was responsible for supplying, installation, testing, commissioning and maintenance of cranes - Contract envisaged two different options, first being one under which assessee would carry out operation and maintenance of equipment, while second consisted of an option to JNPT to carry out operations and only maintenance was to be carried out by assessee- Assessee assumed responsibility of making equipment available for operation for a minimum number of days as stipulated in contract and would become liable to pay liquidated damages for non-availability of equipment after commissioning. After expiry of lease period of ten years, assessee was liable to hand over equipment to JNPT free of cost - On facts, held that it could be said that assessee had carried on business of developing, maintaining and operating an infrastructural facility so as to entitle it to a deduction under section 80-IA'

The court has agreed that an assessee did not have to develop the entire port in order to qualify for a deduction under section 80-IA. Parliament did not legislate a condition impossible of compliance. A part of a port was also held to qualify for the deduction. The decision was followed by the Pune ITAT in the case of the case of B.T. Patil & Sons Belgaum Constructions Pvt Ltd (supra) cited by the appellant.

5.2.3 Now, I would like to go into the aspects of various projects on which the deduction u/s 80IA(4) has been claimed and whether these could be said to be development contract as against works contract and whether they qualify on other grounds like being an eligible infrastructure project or not.

The appellant had executed 12 projects during the year; out of which with respect to two i.e., (1) approach ramp for Sola ROB (II) construction of subway at Sonini Chali; it had itself not claimed deduction under section 80IA(4) as it has not entered into the agreement with the government agency directly etc.

As per the list of projects claimed eligible for deduction, as per submissions reproduced earlier in the order; there were 10 projects in total undertaken by the appellant during the year. Out of these, only 9 have been claimed to have yielded profits. The other project according to the claim of the appellant have yielded loss. The loss has been reduced from the eligible profits claimed. Therefore, I would not go into the merits of loss case as the appellant has not

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disputed it and there is no loss to revenue as far as these projects are concerned.

The appellant also submitted brief details of all the projects undertaken including nature and scope of work and also the name of authority with which the agreement was reached, period for which it was to bear liability of maintenance and also produced the tendered documents.

The definition of infrastructure facility as per the explanation means-

(b) 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

The remaining 9 projects include:

- 1. Bridges, Railway Bridges, Flyover Bridges and ROB.*
- 2. Road/culvert Work*
- 3. Intake well, Water Supply*

The agreements have been undertaken with Indian Railways, Government of India, AUDA, with different departments of Government of Gujarat, Surat Municipal Corporation, etc.

The works of bridges, canals, pipelines for water works, projects for new roads would fall under the definition of infrastructure facility as defined under the Act.

To examine and decide whether the appellant could be said to be a contractor or acted as a developer; the terms and conditions and scope of various projects undertaken were examined carefully and are being representatively and briefly discussed hereafter.

One of the projects was undertaken in an agreement with the Western Railway, Government of India and was of Providing 2X6.00X3.30 M RCC box by pushing for Dharangadhra Canal Crossing.. The scope of work included: (a)Procurement/Fabrication of necessary plants and equipment, jacking, packs, jack pumps for execution of this work. (b)Earth work in excavation for thrust bed for Box pushing Including disposal of excavated earth in nearby Railway land within a maximum lead of 1 Km. (c) Casting of the thrust bed including, casting of foundation as per the design submitted by the tenderer and approved by the Railway. (d) Jacking of the precast boxes

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to form the opening below the track under running traffic conditions. The maximum allowable deviation at any time from the theoretical arrangements will be limited to 200mm horizontally and 100 mm vertically. Any deviation beyond this tolerance will have to be rectified by contractor at his cost. (e) While coming out of the bank, Box has tendency to disturb the existing bank resulting in slipping of slopes or caving in the bank, the appellant was required to protect the bank for safe passage of traffic at his own cost. (f) Maintenance of track during and after Box pushing work until the track is handed over to open line. g) The appellant was to submit the detailed design mix for M-20, M-25, M-30, M-35 and M-45 for the approval of Railway. Maintenance of the said infrastructure for a period of 61 month (during the period of development 49 months and defect liability period of 12 months) was also the responsibility of the appellant.

Some other projects are also in the nature of bridges including flyovers and ROB in lieu of level crossing etc. For e.g. one is Construction of approach bridges for ROB in Lieu of level crossing no. 2 on Ahmedabad - Delhi B.G Railway Line at Gota in Ahmedabad (Item 3 of appellant's letter reproduced earlier) for which agreement was entered into with Ahmedabad Municipal Corporation. As per agreement, the appellant was required to provide his own equipment (vide Page No. 70 of bid document); including 1 Pilling Equipment 2. Slurry Preparation and Testing Equipment 3. Concreting Equipment 4. Lifting Devices 5. Choice of rotary, percussion, grabbing equipment, and equipment for direct or reverse mud circulation, etc, shall be made to suit the soil conditions, vibrating and noise produced during construction should not have any damaging effect on the people and existing structure. Besides, Standard Pucca RCC bench marks of required numbers were to be established by contractor on both the ends on each bank sides before commencement of the work and connected to the nearest GTS bench mark according to which, whole work shall be carried out. The maintenance of all these BM till completion shall be the responsibility of the contractor. The appellant was to be solely responsible for the true and proper setting out of the alignments and for the provision of all necessary instruments, at any time during the execution of the work. In case of any error regarding location, levels, dimensions, or alignment of any part of the work, it on being required to rectify such errors at his own expense. Maintenance of the said infrastructure for a period of 62 month (during the period of development 50 months and defect liability of 12 months) was also the responsibility of the appellant.

Some of the other works are of the nature of road and water supply projects and would be infrastructure facility covered the definition.

As discussed hereinabove, it is concluded that an enterprise which is either developing or operating or maintaining the infrastructure facility is required to be owned by a company or a consortium of companies duly

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registered In India for purpose of section 80-IA and the Act do not prescribe that the infrastructure facility is to be owned by such an enterprise. The infrastructure facility is generally the property of the Government and an enterprise is bound by the agreement to transfer the same after developing It, after the settled period. The assessee's execution of work fall within first category, i.e. developing of infrastructure facility. Right from the planning, arranging /providing machinery to the work of construction has been done by this assessee and has borne the substantial financial risk and initially the cost also, itself. The assessee has made responsible for any damages or loss during execution as well as generally for some period of liability afterwards. The company has constructed, delivered and maintained and security is also maintained thereafter. So, this is a case of transfer of property in chattel and not a contract of service.

The decisions of CIT v ABG Heavy Industries Ltd. [2010] 322 ITR 323/189 Taxman 54 (Bom.), KMC Construction Ltd 51 SOT 214 (Hyd), Koya & Co. Construction (P.) Ltd. v. Asstt. CIT [2012] 51 SOT 203/21 taxmann.com 35 (Hyd.) (URO) and Radhe Developers v. Union of India [2008] 23 SOT 420 (Ahd.) and Asstt. CIT v. Bharat Udyog Ltd. [2009] 118 ITD 336 (Mum.) thus support the stand taken by the assessee. The assessee has executed the construction of infrastructure facility in respect of the government projects, as is evident from the list of the agreements placed on record. Therefore, it is held that the assessee is eligible for the deduction under section 80-IA on the 9 projects less loss of 10th project (with qualification of not considering merits of loss project; as discussed earlier in the order). The grounds are decided accordingly.”

7.4 Before proceedings further it will be profitable to reproduce the relevant extract of provisions of Section 80IA of the 1961 Act as were prevalent at the relevant times, which is reproduced hereunder:-

[Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.³²

80-IA. ³³[(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 specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park ³⁴[or

develops ³⁵[***] a special economic zone referred to in clause (iii) of sub-section (4)] or generates power or commences transmission or distribution of power ³⁶[or undertakes substantial renovation and modernisation of the existing transmission or distribution lines ³⁷[^{37a}[or lays and begins to operate a cross-country natural gas distribution network]]] :

³⁸[**Provided** that where the assessee develops or operates and maintains or develops, operates and maintains any infrastructure facility referred to in clause (a) or clause (b) or clause (c) of the *Explanation* to clause (i) of sub-section (4), the provisions of this sub-section shall have effect as if for the words "fifteen years", the words "twenty years" had been substituted.]

³⁹[(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the deduction in computing the total income of an undertaking providing telecommunication services, specified in clause (ii) of sub-section (4), shall be hundred per cent of the profits and gains of the eligible business for the first five assessment years commencing at any time during the periods as specified in sub-section (2) and thereafter, thirty per cent of such profits and gains for further five assessment years.]

(3) This section applies to ⁴⁰[an ⁴¹[undertaking]referred to in ⁴²[clause (ii) or] clause (iv) ⁴³[^{43a}[or clause (vi)]]] of sub-section (4)] which fulfils all the following conditions, namely :—

- (i) it is not formed by splitting up, or the reconstruction, of a business already in existence :

Provided that this condition shall not apply in respect of an ⁴⁴[undertaking] which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such ⁴⁴[undertaking]as is referred to in [section 33B](#), in the circumstances and within the period specified in that section;

- (ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose:

⁴⁵[**Provided**that nothing contained in this sub-section shall apply in the case of transfer, either in whole or in part, of machinery or plant previously used by a State Electricity Board referred to in clause (7) of [section 2](#) of the Electricity Act, 2003 (36 of 2003), whether or not such transfer is in pursuance of the splitting up or reconstruction or reorganisation of the Board under Part XIII of that Act.]

Explanation 1.—For the purposes of clause (ii), any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely :—

- (a) such machinery or plant was not, at any time previous to the date of the installation by the assessee, used in India;
- (b) such machinery or plant is imported into India from any country outside India; and
- (c) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of the installation of machinery or plant by the assessee.

Explanation 2.—Where in the case of an ⁴⁶[undertaking], any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with.

(4) This section applies to—

(i) any enterprise carrying on the business ⁴⁷[of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining]any infrastructure facility which fulfils all the following conditions, namely :—

(a) it is owned by a company registered in India or by a consortium of such companies ⁴⁸[or by an authority or a board or a corpora-tion or any other body established or constituted under any Central or State Act;]

⁴⁹(b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i)developing or (ii)operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;]

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

Provided that where an infrastructure facility is transferred on or after the 1st day of April, 1999 by an enterprise which developed such infrastructure facility (hereafter referred to in this section as the transferor enterprise) to another enterprise (hereafter in this section referred to as the transferee enterprise) for the purpose of operating and maintaining the infrastructure facility on its behalf in accordance with the agreement with the Central Government, State Government, local authority or statutory body, the provisions of this section shall apply to the transferee enterprise as if it were the enterprise to which this clause applies and the deduction from profits and gains would be available to such transferee enterprise for the unexpired period during which the transferor enterprise would have been entitled to the deduction, if the transfer had not taken place.

⁵⁰[*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 port⁵¹, airport, inland waterway ⁵²[, inland port or navigational channel in the sea];]

⁵³[(ii) any undertaking which has started or starts providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite service, network of

trunking, broadband network and internet services on or after the 1st day of April, 1995, but on or before the 31st day of March, ⁵⁴[2005].]

Explanation.—For the purposes of this clause, "domestic satellite" means a satellite owned and operated by an Indian company for providing telecommunication service;

- (iii) any undertaking which develops, develops and operates or maintains and operates an industrial park ⁵⁵[or special economic zone]notified⁵⁶ by the Central Government in accordance with the scheme framed⁵⁶ and notified⁵⁷ by that Government for the period beginning on the 1st day of April, 1997 and ending on the 31st day of March, ⁵⁸[2006]:

⁵⁹[**Provided**that in a case where an undertaking develops an industrial park on or after the 1st day of April, 1999 or a special economic zone on or after the 1st day of April, 2001 and transfers the operation and maintenance of such industrial park or such special economic zone, as the case may be, to another undertaking (hereafter in this section referred to as the transferee undertaking), the deduction under sub-section (1) shall be allowed to such transferee undertaking for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee undertaking :

⁶⁰[**Provided further**that in the case of any undertaking which develops, develops and operates or maintains and operates an industrial park, the provisions of this clause shall have effect as if for the figures, letters and words "31st day of March, 2006", the figures, letters and words "31st day of March, ^{60a}[2011]" had been substituted;]

- (iv) an ⁶¹[undertaking]which,—

- (a) is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on the 31st day of March, ⁶²[2011];
- (b) starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period beginning on the 1st day of April, 1999 and ending on the 31st day of March, ⁶²[2011] :

Provided that the deduction under this section to an ⁶³[undertaking]under sub-clause (b) shall be allowed only in relation to the profits derived from laying of such network of new lines for transmission or distribution;

- ⁶⁴[(c) undertakes substantial renovation and modernisation of the existing network of transmission or distribution lines at any time during the period beginning on the 1st day of April, 2004 and ending on the 31st day of March, ⁶⁵[2011].

Explanation.—For the purposes of this sub-clause, "substantial renovation and modernisation" means an increase in the plant and machinery in the network of transmission or distribution lines by at least fifty per cent of the book value of such plant and machinery as on the 1st day of April, 2004;]

- ⁶⁶[(v) an undertaking owned by an Indian company and set up for reconstruction or revival of a power generating plant, if—

- (a) such Indian company is formed before the 30th day of November, 2005 with majority equity participation by public sector companies for the purposes of enforcing the security interest of the lenders to the company owning the power generating plant and such Indian company is notified⁶⁷ before the 31st day of December, 2005 by the Central Government for the purposes of this clause;
- (b) such undertaking begins to generate or transmit or distribute power before the 31st day of March, ⁶⁸[2011];]

⁶⁹[^{69a}[(vi) *any undertaking carrying on the business of laying and operating a cross-country natural gas distribution network, including pipelines and storage facilities being an integral part of such network, which fulfils 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 established or constituted under any Central or State Act;*
- (b) *it has been approved by the Petroleum and Natural Gas Regulatory Board established under sub-section (1) of section 3 of the Petroleum and Natural Gas Regulatory Board Act, 2006 (19 of 2006) and notified by the Central Government in the Official Gazette;*
- (c) *one-third of its total pipeline capacity is available for use on common carrier basis by any person other than the assessee or an associated person;*
- (d) *it has started or starts operating on or after the 1st day of April, 2007; and*
- (e) *any other condition which may be prescribed.*

Explanation.—For the purposes of this clause, an "associated person" in relation to the assessee means a person—

- (i) *who participates directly or indirectly or through one or more intermediaries in the management or control or capital of the assessee;*
- (ii) *who holds, directly or indirectly, shares carrying not less than twenty-six per cent of the voting power in the assessee;*
- (iii) *who appoints more than half of the Board of directors or members of the governing board, or one or more executive directors or executive members of the governing board of the assessee; or*
- (iv) *who guarantees not less than ten per cent of the total borrowings of the assessee.]]*

(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made.

(6) Notwithstanding anything contained in sub-section (4), where housing or other activities are an integral part of the highway project and the profits of which are computed on such basis and manner as may be prescribed⁷⁰, such profit shall not be liable to tax where the profit has been transferred to a special reserve account and the same is actually utilised for the highway project excluding housing and other activities before the expiry of three years following the year in which such amount was transferred to the reserve account; and the amount remaining unutilised shall be chargeable to tax as income of the year in which such transfer to reserve account took place.

(7) ⁷¹[The deduction] under sub-section (1) from profits and gains derived from an ⁷²[undertaking] shall not be admissible unless the accounts of the ⁷²[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 form⁷³ duly signed and verified by such accountant.

(8) Where any goods ⁷⁴[or services] held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods ⁷⁴[or services] held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods ⁷⁴[or services] as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods ⁷⁴[or services] as on that date :

Provided that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.

⁷⁵[*Explanation.*—For the purposes of this sub-section, "market value", in relation to any goods or services, means the price that such goods or services would ordinarily fetch in the open market.]

(9) Where any amount of profits and gains of an ⁷⁶[undertaking] or of an enterprise in the case of an assessee is claimed and allowed under this section for any assessment year, deduction to the extent of such profits and gains shall not be allowed under any other provisions of this Chapter under the heading "*C.—Deductions in respect of certain incomes*", and shall in no case exceed the profits and gains of such eligible business of ⁷⁶[undertaking] or enterprise, as the case may be.

(10) Where it appears to the Assessing Officer that, owing to the close connection between the assessee carrying on the eligible business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom.

(11) The Central Government may, after making such inquiry as it may think fit, direct, by notification in the Official Gazette, that the exemption conferred by this section shall not apply to

any class of industrial undertaking or enterprise with effect from such date as it may specify in the notification.

(12) Where any undertaking of an Indian company which is entitled to the deduction under this section is transferred, before the expiry of the period specified in this section, to another Indian company in a scheme of amalgamation or demerger—

- (a) no deduction shall be admissible under this section to the amalgamating or the demerged company for the previous year in which the amalgamation or the demerger takes place; and
- (b) the provisions of this section shall, as far as may be, apply to the amalgamated or the resulting company as they would have applied to the amalgamating or the demerged company if the amalgamation or demerger had not taken place.

²⁷[(12A) Nothing contained in sub-section (12) shall apply to any enterprise or undertaking which is transferred in a scheme of amalgamation or demerger on or after the 1st day of April, 2007.]

²⁸[(13) Nothing contained in this section shall apply to any Special Economic Zones notified on or after the 1st day of April, 2005 in accordance with the scheme referred to in sub-clause (iii) of clause (c) of sub-section (4).]

²⁹[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).*]

7.5 Thus, as could be seen that so far as infrastructure facilities is concerned , Section 80IA(4) , inter-alia, provides that deduction shall be allowed where the total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any eligible business , at such rates as specified in the section where the assessee develops or operates and maintains or develops , operate and maintain any infrastructure facility. The enterprise carrying on the business of (i) developing or (ii) operating and maintaining or(iii) developing , operating or maintaining any infrastructure facility which fulfills all the following conditions i.e. it is owned by a Company registered in India or by consortium of such companies or by an authority or a board or a corporation of any other body established or constituted under any Central or State Act , it has entered into an agreement with Central or State Government or a local authority or any other statutory body , it has

started or starts operating and maintaining the infrastructure facility on or after the 1st April, 1995. The infrastructure facility means a road including (a) 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 water waterway, inland port or navigational channel in the sea. Explanation below sub-section 13 to Section 80IA provides that 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). This clarification was inserted by Finance Act, 2007 w.e.f. 01.04.2000 and was later modified by Finance Act, 2009. The main controversy in this appeal revolves around this explanation which was inserted below sub-section 13 to Section 80IA. The AO has held that the assessee is Contractor executing work contract, while the assessee is contending that it is not Contractor but developer. The word 'Developer', 'Contractor', 'work contract' are not defined in the 1961 Act. The word contractor refers to a person who executes contract/work order for others without taking any future risks and responsibilities of the work undertaken except normal business risk of completing the work contract successfully as directed by Contractee, while developer undertakes the project to develop and construct at its own responsibility and takes all the risks and responsibilities associated with the project awarded to it. In this execution of work order, the Contractor is given a work order by Contractee along with the designs and specification and his job is to simply execute the work order. The role and responsibility of the Contractor ends with the finishing of work order to the satisfaction of the Contractee. The Contractee provides all the designs and other instructions to the Contractor for executing the Contract. The financial investments

are done by Contractee as well major manpower , machines and material are provided by the Contractee. Say for example contract for painting of walls. Thus, Contractor act as an agent for the Contractee . While developer is broader than contractor, wherein developer is given contract for developing new infrastructure facility , wherein the Developer will act as principal. The Developer will actively participate in designing the new infrastructure facility , deploying its own financial stake/investment in development , deploying of its own men , material and machine to develop the facility/project. The developer will take charge of the existing premises/land and then complete the development as per the terms of the Contract. The developer will use its expertise and experience to develop infrastructure facility including deploying of managerial personnel's. The role and responsibility of the person who are awarded work of development does not end with completion of the work and he continues to be responsible even after completion of the work. The developer will be subjected to penal provisions for breach of any provisions of the terms of the contract. The developer shall be liable to recompense for any loss caused to the person awarding the contract for failure to adhere to various laws such as Environmental laws, Labour Laws etc. Thus, as could be seen that the line demarcating Contractor and Developer is well defined. The person who is executing a work contract in the capacity of Contractor is not eligible for deduction u/s 80IA(4) , while the Company executing the Contract as developer is eligible for deduction u/s 80IA(4) provided all other conditions as are stipulated u/s 80IA(4) are fulfilled. To identify, whether a work executed by the Contractee is in the capacity of 'Contractor' or the work undertaken is for the development of the infrastructure facility in the capacity of 'developer' requires deeper and indepth analysis of each and every work executed by the assessee wherein claim of deduction u/s 80IA(4) is made viz. the tender document issued by Government/Statutory Authority, Letter Awarding the work to successful contractor/developer, Agreement entered into by the developer/contractor with

the Government/Statutory authority , the manner in which execution of the work took place, analysis of the financial statements to identify deployment of financial resources by the Contractor/developer, deployment of men , machine and material by Developer/Contractor in executing the work awarded, PERT chart prepared, the role and responsibility of the Contractor/Developer prior to execution of work, during the execution of work and post execution of work. The provisions for claim of deduction /exemption are to be strictly construed and any ambiguity is to be decided in favour of Revenue. Reference is drawn to the judgment and order of Constitutional Bench of Hon'ble Supreme Court in the case of **Commissioner of Customs(Imports) v. Dilip Kumar & Company, reported in (2018) 95 taxmann.com 327(SC)**. The ld. Sr. Advocate has heavily relied on the judgment and order of Hon'ble Gujarat High Court in the case of **Montecarlo Construction Limited (supra)** . In this judgment and order , the Hon'ble Gujarat High Court has dismissed the appeal filed by Revenue on the grounds that there are concurrent finding of the facts by ld. CIT(A) as well ITAT, therefore, no question of law, much less any substantial question of law arises from the order of the ITAT, and the finding of facts having been elaborately discussed by ITAT and ld. CIT(A) while deciding the issue in favour of the tax-payer which finding of facts were not disturbed by Hon'ble High Court. We have observed that in the order passed by ITAT **in Montecarlo Constructions(supra)**, the ITAT has discussed the parameters distinguishing between Contractor as well Developer by analysing the specific work under taken by the tax-payer. While in the instant case before us, we have observed that the AO denied the deduction u/s 80IA(4) by holding assessee to be contractor and hit by newly inserted explanation below Section 80IA(13) . The AO has also denied the claim of the assessee for deduction u/s 80IA(4) on other grounds as mentioned in assessment order . The ld. CIT(A) did not discuss elaborately about the eligibility or otherwise of the assessee to the deduction u/s 80IA(4) vis-à-vis specific work orders executed by the assessee during the year under consideration, while

granting relief to the assessee . The ld. CIT(A) has not discussed elaborately and did not record finding of facts w.r.t. each of the project undertaken by the assessee whether it meets all the parameters to hold the assessee as developer of the project. The AO has also observed that separate audit report in Form No. 10CCB as provided u/r 18BBB sub clause 2, of the Income-tax Rules, 1962 is not furnished by the assessee with respect to several projects under taken by the assessee. The ld. CIT(A) did not address this issue. The AO has also observed that in some of the projects executed by the assessee , the work was awarded to erstwhile partnership firm Ajay Engineers, which it is claimed by the assessee got converted into the assessee company . The assessee claimed that all the Contractees have all been notified and they accepted the assessee as the person to implement the project. The ld. CIT(A) did not record specific finding of fact w.r.t. each project under taken by the assessee as to accepting of the assessee by the Contractee in place of the erstwhile partnership firm , bit rather general finding is given by ld. CIT(A) that the assessee was accepted by the Contractees in place of erstwhile partnership firm. The appellate order of ld. CIT(A) are appealable orders before ITAT, and it is incumbent on ld. CIT(A) to record detailed finding of fact based on evidence on record , before deciding the issue, so that higher appellate authority has the benefit of seeing the reasoning of ld. CIT(A) to arrive at the decision. We have also observed that the assessee is claiming that it is a developer who has built roads, flyovers, Road over bridges(ROB), railway systems ,water intake well etc. wherein a claim is made by the assessee that the new infrastructure facility was created, and we have also observed that the assessee total receipts are to the tune of Rs. 26.60 crores which is not substantial keeping in view the claim of the assessee having been involved in execution of new infrastructure facilities by way of bridges, roads, Road over bridges , flyovers , water intake well, etc. . Thus, It is all the more necessary to analyse as to the role and responsibilities of the assessee in execution of these projects and other parameters as culled out above, in order to arrive at conclusive

finding whether the assessee has created a new infrastructure facility as a Developer or have undertaken a contract work to execute work order as a Contractor. We could have decided the issue ourselves as these appeals are old appeal pending for almost 7-10 years, but the material filed before us vide paper books are not sufficient for us to decide the issue . Even evidences such as tender documents, agreements with the Government for executing the work, details of the work executed vis-à-vis creation of new infrastructure facility created, PERT chart, financial statements, Men, material and machines deployed by the assessee , the roles and responsibilities performed by the assessee, details of deployment of funds, details of statutory clearances obtained , penal provisions in the agreements etc. were all not provided in the paper book filed by the assessee. The brief summary of the project is submitted which is not sufficient to adjudicate this issue. Each and every project requires detailed and indepth analysis on several parameters as culled out above, before holding whether the assessee is a developer or contractor. Thus, keeping in view facts and circumstances of the case, it would be fit and appropriate in the interest of justice and fair play that the matter be restored back to the file of Id. CIT(A) for fresh adjudication of this issue after making detailed analysis of all the specific work executed by the assessee in which the assessee has claimed that it acted as developer and claimed to be eligible for deduction u/s 80IA(4). The assessee as well the AO shall be given opportunity of being heard by the Id. CIT(A), keeping in view principles of natural justice. The evidences filed shall be admitted by Id. CIT(A) in accordance with law, and Id. CIT(A) shall give its finding of fact on all the objections raised by the AO while denying claim of deduction u/s 80IA(4) to the assessee. The appeal of the Revenue on this issue is allowed for statistical purposes. We order accordingly.

8. In the result appeal of the Revenue in ITA no. 2118/Ahd/2013 for assessment year 2009-10 is allowed for statistical purposes. We order accordingly.

ITA No.2302/Ahd/2014-Revenue Appeal
A.Y.2010-11-Ajay Engineering Infrastructure Private Limited

9. The Revenue has raised following grounds of appeal in Memo of Appeal filed with Income Tax Appellate Tribunal, Ahmedabad Bench, Ahmedabad in ITA No. 2302/Ahd/2014 for assessment year 2010-11 , which reads as under:-

"1. The learned CIT(Appeals) has erred in law and on facts in deleting the disallowance made by the AO u/s 80IA(4) amounting to Rs. 4,04,67,850/-.

2. On the facts and circumstances of the case the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.

It is therefore prayed that the order of the learned CIT(Appeals) may be set aside and that of the A.O. be restored to the above extent. "

10. The issue raised by Revenue in its appeal filed with ITAT in ITA No. 2302/Ahd/2014 is concerning the claim of deduction under section 80IA(4) of the Act which was denied by the AO but later allowed by the ld. CIT(A) . Similar issue arose in assessment year 2009-10 in Revenue's appeal in ITA No. 2118/Ahd/2011, and even grounds of appeal are similar. Both the parties have agreed before us that our decision in Revenue's appeal for assessment year 2009-10 shall be applicable for assessment year 2010-11, as facts and issues in appeal are similar. Our decision in ITA No. 2118/Ahd/2013 for assessment year 2009-10 as adjudicated above in preceding para of this order shall apply *mutatis mutandis* to the appeal of the Revenue for assessment year 2010-11 in ITA No. 2302/Ahd/2014 on this issue. Thus , this issue is restored back to the file of the ld. CIT(A) for fresh adjudication with similar observations as were made by us as in ITA no. 2118/Ahd/2013 for assessment year 2009-10. The appeal of the Revenue is allowed for statistical purposes. We order accordingly.

11. In the result appeal of the Revenue in ITA no. 2302/Ahd/2014 for assessment year 2010-11 is allowed for statistical purposes. We order accordingly.

ITA No.2303/Ahd/2014-Revenue Appeal
A.Y.2011-12-Ajay Engineering Infrastructure Private Limited

12. The Revenue has raised following grounds of appeal in Memo of Appeal filed with Income Tax Appellate Tribunal, Ahmedabad Bench, Ahmedabad in ITA No. 2303/Ahd/2014 for assessment year 2011-12 , which reads as under:-

"1. The learned CIT(Appeals) has erred in law and on facts in deleting the disallowance made by the AO u/s 80IA(4) amounting to Rs. 2,04,98,905/-.

2. On the facts and circumstances of the case the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.

It is therefore prayed that the order of the learned CIT(Appeals) may be set aside and that of the A.O. be restored to the above extent. "

13. The issue raised by Revenue in its appeal filed with ITAT in ITA No. 2303/Ahd/2014 is concerning the claim of deduction under section 80IA(4) of the Act which was denied by the AO but later allowed by the Id. CIT(A) . Similar issue arose in assessment year 2009-10 in Revenue's appeal in ITA No. 2118/Ahd/2011, and even grounds of appeal are similar. Both the parties have agreed before us that our decision in Revenue's appeal for assessment year 2009-10 shall be applicable for assessment year 2011-12, as facts and issues in appeal are similar. Our decision in ITA No. 2118/Ahd/2013 for assessment year 2009-10 as adjudicated above in preceding para of this order shall apply *mutatis mutandis* to the appeal of the Revenue for assessment year 2011-12 in ITA No. 2303/Ahd/2014 on this issue. Thus , this issue is restored back to the file of the Id. CIT(A) for fresh adjudication with similar observations as were made by us as in ITA no. 2118/Ahd/2013 for assessment year 2009-10. The appeal of the Revenue is allowed for statistical purposes. We order accordingly.

14. In the result appeal of the Revenue in ITA no. 2303/Ahd/2014 for assessment year 2011-12 is allowed for statistical purposes. We order accordingly.

ITA No.1231/Ahd/2016-Revenue Appeal
A.Y.2013-14-Ajay Engineering Infrastructure Private Limited

15. The Revenue has raised following grounds of appeal in Memo of Appeal filed with Income Tax Appellate Tribunal, Ahmedabad Bench, Ahmedabad in ITA No. 1231/Ahd/2016 for assessment year 2013-14 , which reads as under:-

“i.) On the facts and circumstances of the case , the Ld. Commissioner of Income-Tax(appeals) has erred in law and on facts by allowing deduction of Rs. 5,72,96,557/- u/s 80IA(4) of the I.T. Act, 1961 which was disallowed by the Assessing Officer after full and proper justification of the facts , therefore the order of the Assessing Officer is required to be upheld.

ii.) On the facts and circumstances of the case, the Ld. Commissioner of Income-Tax(appeals) ought to have upheld the order of the Assessing Officer.

iii.)It is therefore prayed that the order of the learned Commissioner of Income-Tax(Appeals) may be set aside and that of the Assessing Officer be restored. “

16. The issue raised by Revenue in its appeal filed with ITAT in ITA No. 1231/Ahd/2016 is concerning the claim of deduction under section 80IA(4) of the Act which was denied by the AO but later allowed by the Id. CIT(A) . Similar issue arose in assessment year 2009-10 in Revenue’s appeal in ITA No. 2118/Ahd/2011, and even grounds of appeal are similar. Both the parties have agreed before us that our decision in Revenue’s appeal for assessment year 2009-10 shall be applicable for assessment year 2013-14, as facts and issues in appeal are similar. Our decision in ITA No. 2118/Ahd/2013 for assessment year 2009-10 as adjudicated above in preceding para of this order shall apply *mutatis mutandis* to the appeal of the Revenue for assessment year 2013-14 in ITA No. 1231/Ahd/2016 on this issue. Thus , this issue is restored back to the file of the Id. CIT(A) for fresh adjudication with similar observations as were made by us as in ITA no. 2118/Ahd/2013 for assessment year 2009-10. The appeal of the Revenue is allowed for statistical purposes. We order accordingly.

17. In the result appeal of the Revenue in ITA no. 1231/Ahd/2016 for assessment year 2013-14 is allowed for statistical purposes. We order accordingly.

ITA No.1621/Ahd/2017-Revenue Appeal
A.Y.2014-15-Ajay Engineering Infrastructure Private Limited

18. The Revenue has raised following grounds of appeal in Memo of Appeal filed with Income Tax Appellate Tribunal, Ahmedabad Bench, Ahmedabad in ITA No. 1621/Ahd/2017 for assessment year 2014-15 , which reads as under:-

“i.) The Ld. CIT(A) has erred in law & on facts by allowing deduction of Rs. 10,42,40,977/- u/s 80IA(4)(i) of the I.T.Act, 1961 which was disallowed by the Assessing Officer.

ii.) On the facts and circumstances of the case, the Ld. Commissioner of Income-Tax(appeals) ought to have upheld the order of the Assessing Officer.

iii.)It is therefore prayed that the order of the learned Commissioner of Income-Tax(Appeals) may be set aside and that of the Assessing Officer be restored. “

19. The issue raised by Revenue in its appeal filed with ITAT in ITA No. 1621/Ahd/2016 is concerning the claim of deduction under section 80IA(4) of the Act which was denied by the AO but later allowed by the ld. CIT(A) . Similar issue arose in assessment year 2009-10 in Revenue’s appeal in ITA No. 2118/Ahd/2011, and even grounds of appeal are similar. Both the parties have agreed before us that our decision in Revenue’s appeal for assessment year 2009-10 shall be applicable for assessment year 2014-15, as facts and issues in appeal are similar. Our decision in ITA No. 2118/Ahd/2013 for assessment year 2009-10 as adjudicated above in preceding para of this order shall apply *mutatis mutandis* to the appeal of the Revenue for assessment year 2014-15 in ITA No. 1621/Ahd/2017 on this issue. Thus , this issue is restored back to the file of the ld. CIT(A) for fresh adjudication with similar observations as were made by us as in ITA no. 2118/Ahd/2013 for assessment year 2009-10. The appeal of the Revenue is allowed for statistical purposes. We order accordingly.

20. In the result appeal of the Revenue in ITA no. 1621/Ahd/2017 for assessment year 2014-15 is allowed for statistical purposes. We order accordingly.

ITA No.1650/Ahd/2017-Revenue Appeal
A.Y.2014-15-Ajay Protech Private Limited

21. The Revenue has raised following grounds of appeal in Memo of Appeal filed with Income Tax Appellate Tribunal, Ahmedabad Bench, Ahmedabad in ITA No. 1650/Ahd/2017 for assessment year 2014-15 , which reads as under:-

“i.) On the facts and circumstances of the case , the Ld. CIT(A) has erred in law and on facts by allowing deduction of Rs. 2,10,78,457/- u/s 80IA(4)(i) of the I.T. Act, 1961 which was disallowed by the Assessing Officer after full and proper justification of the facts , therefore the order of the Assessing Officer is required to be upheld.

ii.)It is therefore prayed that the order of Ld. CIT(A) may be set aside and that of the Assessing Officer be restored to the above extent.

22. The issue raised by Revenue in its appeal filed with ITAT in ITA No. 1650/Ahd/2016 for assessment year 2014-15 in the case of the assessee Ajay Protech Private Limited is concerning the claim of deduction under section 80IA(4) of the Act which was denied by the AO but later allowed by the ld. CIT(A) . Similar issue arose in assessment year 2009-10 in Revenue’s appeal in ITA No. 2118/Ahd/2011 in the case of the assessee Ajay Engineering Infrastructure Private Limited, and even grounds of appeal are similar. Both the parties have agreed before us that our decision in Revenue’s appeal for assessment year 2009-10 in the case of the assessee namely Ajay Engineering Infrastructure Private Limited shall be applicable for assessment year 2014-15, as facts and issues in appeal are similar. Our decision in ITA No. 2118/Ahd/2013 for assessment year 2009-10 as adjudicated above in preceding para of this order shall apply *mutatis mutandis* to the appeal of the Revenue for assessment year 2014-15 in ITA No. 1650/Ahd/2017 on this issue. Thus , this issue is restored back to the file of the ld. CIT(A) for fresh adjudication with similar observations as were made by us as in ITA no.

ITA Nos.2118/Ahd/2013, 2302/Ahd/2014,
2303/Ahd/2014, 1231/Ahd/2016 & 1621/Ahd/2017
AYs2009-10, 2010-11, 2011-12, 2013-14, 2014-15
Ajay Engineering Infrastructure Pvt. Ltd.

ITA No. 1650/Ahd/2017 Ajay Protech Private Limited AY:2014-15

2118/Ahd/2013 for assessment year 2009-10 in the case of the assessee namely Ajay Engineering Infrastructure Private Limited. The appeal of the Revenue is allowed for statistical purposes. We order accordingly.

23. In the result appeal of the Revenue in ITA no. 1650/Ahd/2017 for assessment year 2014-15 is allowed for statistical purposes. We order accordingly.

24. In the result , all the six appeals of the Revenue adjudicated by us vide common order viz. ITA No. 2118/Ahd/2013 for assessment year 2009-10, ITA no. 2302/Ahd/2014 for assessment year 2010-11, ITA No. 2303/Ahd/2014 for assessment year 2011-12, ITA no. 1231/Ahd/2016 for assessment year 2013-14 and 1621/Ahd/2017 for assessment year 2014-15 in the case of the assessee namely Ajay Engineering Infrastructure Private Limited are allowed for statistical purposes. The appeal of the Revenue in ITA no. 1650/Ahd/2017 for assessment year 2014-15 in the case of the assessee namely Ajay Protech Private Limited is also allowed for statistical purposes. We order accordingly.

Order pronounced in open court at Ahmedabad on 19.04.2024

Sd/-

[MADHUMITA ROY]
JUDICIAL MEMBER

DATED: 19/04/2024

Sh

Sd/-

[RAMIT KOCHAR]
ACCOUNTANT MEMBER

True Copy

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1. Appellant -
2. Respondent -
3. CIT DR , ITAT,
4. CIT,
5. The CIT(A)