

**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. 2308/Ahd/2011  
A.Y. 2007-08

The ACIT, (OSD)-I, Circle-4, Ahmedabad, Navjivan Trust Bldg., Off Ashram Road, Ahmedabad	v.	M.S.Khurana Engineering Ltd., MSK House, Near Passport Office, Ambavvadi, Ahmedabad-380015
		<b>PAN:AABCM4514F</b>
(Appellant)		(Respondent)

C.O. No.209/Ahd/2011

Arising out of ITA NO. 2308/Ahd./2011 -A.Y. 2007-08

M.S. Khurana Engineering Ltd., 2 <sup>nd</sup> Floor, MSK House Near, Jhanvi Restaurant, Panjarapole Road, Ahmedabad	v.	The ACIT, (OSD)-I, Circle-4, Ahmedabad, Navjivan Trust Bldg., Off Ashram Road, Ahmedabad
		<b>PAN:AABCM4514F</b>
(Appellant)		(Respondent)

ITA No.2352/Ahd/2011

A.Y. 2008-09

The ACIT, (OSD)-I, Circle-4, Ahmedabad, Navjivan Trust Bldg., Off Ashram Road, Ahmedabad	v.	M.S. Khurana Engineering Ltd., MSK House, Nr. Passport Office, Ambawadi, Ahmedabad
		<b>PAN:AABCM4514F</b>
(Appellant)		(Respondent)

C.O. No.210/Ahd/2011

Arising out of ITA NO. 2352/Ahd./2011- A.Y. 2008-09

M.S. Khurana Engineering Ltd., 2 <sup>nd</sup> Floor, MSK House Near, Jhanvi Restaurant, Panjarapole Road, Ahmedabad	v.	The ACIT, (OSD)-I, Circle-4, Ahmedabad, Navjivan Trust Bldg., Off Ashram Road, Ahmedabad
		<b>PAN:AABCM4541F</b>
(Appellant)		(Respondent)

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M.S. Khurana Engineering Ltd., MSK House, Nr. Passport Office, Ambawadi, Ahmedabad	v.	The ACIT, (OSD)-I, Range-4, Ahmedabad
<b>PAN:AABCM4514F</b>		
(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:**

The Revenue has filed appeals for assessment year(s) : 2007-08 and 2008-09, while the Assessee has filed Cross Objections for assessment year(s) 2007-08 and 2008-09 , as well the assessee has filed cross appeal for assessment year 2008-09. First we shall take up appeal of the Revenue in ITA No. 2308/Ahd/2011 for assessment year 2007-08 and the C.O. No. 209/Ahd/2011 arising out of ITA No. 2308/Ahd/2010 for assessment year 2007-08 filed by the assessee, which have arisen from the appellate order passed by learned Commissioner of Income-tax(Appeals) , Ahmedabad(hereinafter called "the CIT(A)") dated 11.07.2011 in Appeal No. CIT(A)-VIII/ACIT Rng-4/741/09-10 which in turn has arisen from the assessment order dated 21.12.2009 passed by ld. Assessing Office u/s 143(3) of the Income-tax Act, 1961(hereinafter called "the Act").

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2. The Revenue has raised following grounds of appeal in memo of appeal filed with the Income Tax Appellate Tribunal, Ahmedabad for assessment year 2007-08:-

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*"1. The ld. CIT(A) has erred in law and on facts in deleting the addition made of Rs. 2,95,49,667/- u/s. 80IA(4) without appreciating the fact that the assessee did not fulfill the conditions precedent and the assessee was only a contractor not a developer.*

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

*3. It is, therefore, prayed that the order of the ld. CIT(A) may be set aside and that of the Assessing Officer may be restored to the above extent."*

2b. The Assessee has raised following grounds in the Cross Objection filed with Income Tax Appellate Tribunal, for assessment year:2007-08

**CO. No.209/Ahd/2011 arising out of ITA No. 2308/Ahd./2011**  
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*"1. The learned Commissioner of Appeals-VIII, Ahmedabad erred in confirming disallowance of overheads expenses of Rs. 26,719/-.*

*2. Alternatively, Objection No.1, the learned Commissioner of Appeals-VIII, Ahmedabad erred in not adding back overhead expenses of Rs. 26,719/- while computing the deduction u/s 80IA(4) of the Income Tax Act, 1961."*

3. The brief facts of the case are that the assessee is engaged in the business of Construction. The assessee filed its return of income on 15.10.2007 declaring total income of Rs. 6,90,35,110/- and claiming deduction u/s 80IA of Rs. 2,97,41,167/-. The case of the assessee was selected by Revenue for framing scrutiny assessment. The AO issued statutory notices u/s 143(2) and 142(1) of the 1961 Act. The assessee has claimed deduction under section 80IA . The assessee has incurred

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losses in four projects. The details are reproduced by the AO in assessment order at page-2, as under:-

	TURNOVER	NET PROFIT	DEDU.U/S.80IA
AIRPORT AHMD	5800863	2535743	2505741
AUDA ADM	56425536	6346417	6054591
INDRODA	12140009	1703440	1640653
KHODIYAR	4456107	0	-23046
VMC-PL	47582093	9223158	8977069
VMCSTP	4557000	3360400	3336832
STP JASPUR	5711807	-4210016	-4239557
PATAN	99512262	9157581	8642915
VIDISHA	0	-1631133	-1631133
JOHDHPUR	367479	1002045	-1000144
AAI-SURAT	61717426	5585698	5266502
OTHER THAN INFRA	945584370	72957463	68067009
TOTAL RS.	1243854952	106030796	99597721

3.2 The AO asked the assessee to give explanation regarding its claim u/s. 80IA(4) as a developer. The assessee replied that it is eligible for deduction under section 80IA(4) as a developer. The assessee submitted that it has derived profits from an undertaking in respect of infrastructural activities being road development of Airport terminal Plant, Canal Syphone Work, Diaphragm Wall and development of Airport terminal etc., with State or Central Government. The assessee submitted that the work carried out by the assessee is in the nature of development and not as construction contract. The assessee submitted that the work of development can be executed only by qualifying tender acceptance parties. The work is of development and not a part of only construction activities. The assessee submitted that its work cannot be termed in the nature of work contract. The assessee submitted that the dictionary meaning of a developer is very exhaustive and the assessee falls in the

category of developer, and there are no indications that the work of the assessee is in the nature of contractor. The assessee submitted before the AO that the consideration is paid by respective government authorities for executing infrastructure facility as a developer and not as a contractor. The assessee submitted before the AO that it has to undertake extensive liability which lasts till the tender document conditions. It was submitted by the assessee before the AO that as per the agreement, the assessee is not only developing the project but the assessee is also responsible for the maintenance of the developed work for which no separate consideration was paid. The assessee's liability does not cease on the completion of the project work , thus there is no reasons to consider nature of activity of the assessee as a contractor.

3.3 The AO rejected the contentions of the assessee vide assessment order dated 21.12.2009 passed u/s 143(3) of the 1961 Act , by holding as under:-

*"5. After going through the reply the following point arose and on the basis of these observation his reply is found not acceptable :-*

*"1. The assessee entered into an agreement with various govt. agencies. The assessee is not the owner of the work done by him. The real ownership lies with the various govt. authorities. The assessee company has not deriving income from developing or operating and maintaining or developing, operating and maintaining any infrastructure facility and the assessee company has earned income as contract receipt and this income being a contract receipt is not eligible for 80IA(4) deduction.*

*2. The assessee company has filled tender for obtaining the aforementioned work as a contractor only.*

*a. The company has failed to established that it has a ownership of project to develop and prove that it is developer and not a work contractor.*

*b. The assessee has registered with the sales Tax authorities of Gujarat & Madhya Pradesh as "work contractor" as per the registration certificates provided by him.*

*c. The company is not in the business of development of the infrastructure project but is executing the various well-defined (by the Developer) civil*

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construction activities as per the specifications designs and plans provided by the Developer of the infrastructure project. Also the supervision of the project is undertaken by those who have given this civil construct. The assessee is bound to performed work with the drawing & specification which is part of the contract.

Details of various agreement are as follows:-

**NMC Patan/Khari**:- Extract from the Contract agreement:-

"... The SSNNL has accepted a tender by the contractor for constructing NMC reach 357.196 km to 361.576 km....".

The work of contractor are subject to the acceptance by SSNNL.

The payment to be made by SSNNL to the contractor as herein after mentioned, the contractor hereby covenants with the SSNNL to complete construction in conformity in all respects with the provisions of the contract.

Letter dated 1.12.2004 by Sardar Sarovar Narmada Nigam Ltd. to MSK includes:-

"...You are requested to start the work of constructing Khari-II canal Syphon on Narmada Main Canal Ch.356.422 km immediately strictly in accordance with the contractual terms, conditions, specification & relevant drawing from time to time. The work shall have to be claimed out as per the tender stipulations and under instruction & direction of Engineer-in-charge & subject to the approval in all respect and responsible to the superintending Engineer, in all contracts matter & complete & said work....."

All the conditions related to employment of labours are also mentioned as "...you shall have to submit the necessary return certificate to Engineer-in-charge from time to time & shall not engage the labourers below age 15 & submit the indemnity bond for the strictly obey of labour lows...." (Point C Sub Point 5).

**Extract from letter dated 26.10.2009**

"...You have to fulfill the condition of deploying sufficient machinery & equipment on work for time bound completion, as stipulated in tender documents."

"....You will give the undertaking that not withstanding of whatever submission made with the tender documents, you will deploy, all necessary & sufficient machineries, equipment & manpower etc. to complete the work within timeframe scheduled, without being rightful for any additional claim / financial assistance thereof from Nigam." (Point 2(iii))

## **2. INDRODA SITE PROJECT:-**

*Extract of letter dated 26.6.2003:- ".....As you have now paid the S.D & signed the tender documents, you are hereby requested to start this work under instruction & guidance of Deputy Executive Engineer, Ahmd....."*

*".....In no case excess quantity shall be executed without prior approval from competent authority & the payment of excess quantity beyond the permissible limit will be dealt as per relevant tender clause...."*

*".....It will be your personal responsibility to get yourself registered under the contract Labour Act 1970.*

*".... You should submit a detailed construction program for all the items (with all the activities) keeping in view the time specified above. Also you should report the names of technical persons / Engineers who will be available on the site work & power of attorney per return of post."*

*d. It clearly indicates that the company is mere executor of the works contracts entered by the company with the authorities and not act as a owner of the project. The ownership of the project in question is lies with main authority. Further, the assessee company has not derived the income from the said projects. It is only a income earned for rendering contract services as mentioned in the agreement /work order.*

*On perusal of P&L A/c, the assessee itself shown income as contract receipt. It appears that the assessee has earned income from contract works.*

*e. As developer of the project assessee has failed to prove that it is involved in the conceiving planning, designing and financing of the infrastructure project. But it is involved only in the carrying out the execution of certain well defined jobs, planned, specified and well laid out by the developer as work contract. The company is not conceiving the project.*

*f. The company is not planning the project but is carrying out the part of activities and raising the detailed RA bills to the developer and getting the payment for the same on supervision & certification by the developer. The company in no way is involve in financing the project as revealed by the RA bills issued & TDS certificate issued by the Executive Engineer.*

*The assessee has raised RA bills, contractor & construction work bills for the activities undertaken by it at the part rate as agreed by in the tender and work contract & collected the payment for the same.*

*g. The receipt of payment u/s.194C itself clearly indicates that the assessee company has acted as a contractor not as a developer or owner of the project.*

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*h. The assessee failed to prove that investment, risk and reward is belonging to it for the development project, which is the basic requirement of the developer. However, the assessee has incurred the operative investment, and taken risk and reward for the execution of the work/civil contracts delegated to them through tender for the very well defined & planned activities. The major risk of development of the project is with the developer only. The assessee has no post completion responsibility neither related to the repair and maintenance nor related to it's supervision. The assessee is also not providing any kind of provision for this. It clearly shows that the risk and liability of the assessee is restricted upto the defective work done by him and the cost of only this default will be borne by him.*

*i. Further from the perusal of the explanation below sec. 801A (13) which has been brought on statute by the finance Act 2007 with retrospective effect from 1.4.2000, it can be seen that any person who executes a work contract entered into with undertaking or enterprises shall not be eligible for the deduction u/s.801A of the Act. The provision of the said explanation is reproduced here under :-*

*"Explanation I for the removal of doubts, it is hereby declared that nothing contained in this section shall apply to a person who executes a works contract entered into with the undertaking or enterprise, as the case may be."*

*j. In the memorandum explaining the provisions of the finance bill 2007, the Hon'ble finance minister has clarified above mentioned explanation 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 way, highways, airports, ports and rapid urban rail transport system) which was lacking in our country. The purpose of the benefit has all along 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 contracts."*

*k. The assessee is all the meaning is a works contractor only. There is no financial stake or investment in the above projects of assessee company & the contract is for civil work which makes it in eligible for claiming 801A.*

*l. The assessee has not claimed similar deduction in the earlier year despite of same nature of contract with similar circumstances, similar facts.*

*6. It has been judicially held [Ayush Ajay Construction Ltd. Vs ITO (179 TD 21)] that the intention behind this provision was to give a "fillip of deduction against the total income of the assessee derived from the infrastructure project as the entire cost of the infrastructure was being borne by the assessee."*

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*The income on which deduction u/s. 80IA has been claimed was related to the contract works executed by the assessee and was not on BOT, BOOT, or BOLT basis. Thus works carried out by the company were not as developer but as a contractor and by virtue of agreements the company received the payments from time to time by raising the RA bills.*

7. *Thus the claim of 80IA being a developer is not rational and genuine and hence withdrawn."*

4. Aggrieved by the assessment framed by the AO, the assessee filed first appeal with Id. CIT(A) , and the assessee claimed itself to be developer of infrastructure projects rather than being merely as construction contractor. The assessee submitted that the assessee being developer of infrastructure projects is eligible for deduction u/s 80IA(4), but the AO denied the deduction u/s 80IA on the grounds that the assessee is construction contractor undertaking work contracts. The main bone of contention of the assessee on merits of the issue is that the assessee is engaged in the business of developing Road, Bridges etc., i.e. the infrastructure facilities after entering into agreement with the State / Central Government, and hence the assessee has duly fulfilled the conditions as laid down in section 80IA(4)(i)(a) and (b) of the Act. The assessee claimed that it fulfilled all the necessary conditions to be eligible for deduction u/s 80IA , and the newly inserted explanation is not applicable to the assessee. It was also submitted that the newly inserted Explanation below section 80IA(13) by Finance Act, 2009 is directly contrary to the main provision of the Act , and it cannot be derogatory to the main provision of the Act as held by Hon'ble Supreme Court in case of **S. Sundaram Pillai & Others** reported in **AIR 1985 SC 582**. The assessee submitted that the main provisions entitled an assessee to the deduction if the assessee is a Company registered in India , enters into an Agreement with the Central or State Government and undertakes to carry on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating or maintaining a new infrastructure facility and the construction of Roads, Bridges, Highway projects etc. which are all included in the definition of infrastructure as

provided in the Section 80IA The assessee also raised Constitutional challenge to the explanation inserted in Section 80IA. The assessee also challenged introduction of the Explanation being retrospective w.e.f. 1.4.2000. The assessee further submitted that the project executed by the assessee falls in the category of Section 80IA(4) i.e. Roads, Highways, Sewerage system , Irrigation projects, Airports etc., and assessee has fulfilled all the conditions to claim deduction under section 80IA (4). The projects are owned by State Governments, Central Government , wholly owned undertakings of which the owner is the State. The Government has conceived the project, the alignment, location of the project, specification for the project on the basis of need as well required resources. The Government has pre-qualified and identified the agencies who are experienced in such work , and they are experts for micro planning, designing, various structural elements, the design of re-enforcement, the concrete mix design, design of shuttering etc., are done by the developer during the course of execution. They also identifies proper labour contractors for various types of work, provide the entire plant and machinery, provide the Engineering core groups, and ultimately give complete shape to the project and fully implement the project to the satisfaction of the owner. Thus, merely because assessee has acted under Government contract, it cannot be denied deduction under section 80IA(4) and nor it can be held that it has acted only as work contractor. The role of the developer is much larger than that of the contractor which includes planning, designing, know how, funding, risks, human resource planning, execution in time which are carried out at the sole risk of the assessee. It was submitted before Id. CIT(A) that it was not merely the construction of a particular infrastructure facility but developing the facility and hence developing the State. The assessee also referred to its financial statement and submitted that the assessee has made huge financial investments, human resources, technical expertise etc.. The assessee possesses its own technical knowledge of how to develop and lay roads, dams, bridges etc., and it

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has its own technical as well managerial pool of manpower for the same. The assessee has purchased and employed its own material for development of the infrastructure facility .Thus, the assessee submitted that the entire planning of the business as well as methodology of the executing the work has been done by the assessee and not by the Government authority.

4.2 The assessee claimed that department in the earlier years had accepted that the assessee is a developer and merely because Explanation is now inserted in the statute, the assessee on the same set of facts and with identical kind of business cannot be held to be not a developer and merely a work contractor . The assessee submitted that the Act does not stipulate that the facility should be owned by the assessee and the person who takes the risk and reward on his shoulder constituted developer and the assessee is engaged in the development of infrastructure facility. The assessee referred to the following decision of ld. CIT(A) wherein deduction under section 80IA(4) was allowed, and prayed that the assessee should also be allowed deduction under section 80IA(4). The assessee relied upon the following decision of ld. CIT(A), which reads as under:-

*"i. Sadbhav Engineering Limited.  
In Appeal No. CIT(A)XIV/Jt. CIT R.8/06/10-11  
ii. M/s Aqua fill Polymers Co. Pvt. Ltd.  
In Appeal No. CIT(A)-VI/TO-1/304/09-10  
iii. Rajkamal Builders Infrastructure Pvt. Ltd.  
In Appeal No. CIT(A)-XI/819/08-09"*

4.3 The assessee relied upon the decision of ITAT, Pune larger Bench, wherein the claim of allowability of deduction u/s 80IA(4) of the Act was allowed and which overruled the decision of B.T. Patil, and the assessee claimed that the facts in its case are similar to the decision of ITAT, Pune Bench.

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4.4 The assessee also submitted chart showing project-wise details as under:-

M.S.KHURANA ENGINEERING LTD. INFRASTRUCTURE PROJECTS ELIGIBLE FOR 80 IA BENEFIT FOR THE PROJECTS EXECUTED DURING FINANCIAL YEAR 2006-2007					
SR NO	NAME OF PROJECT	NAME OF CLIENT	BRIEF DESCRIPTION OF PROJECT	TURNOVER	PROFIT & LOSS 80IA CLAIM
1	Airport Surat	Airport Authority of India	Construction of terminal Building at Surat Airport, Turn - Key Work including Civil, Electrical, HVAC & Firefighting work.	61717426	5266502
2	Airport Ahmedabad	Airport Authority of India	Construction of New Terminal Building at SVPI Airport Ahmedabad, Turn-Key. Work including Civil, Electrical, HVAC & Firefighting work.	5800863	2505741
3	Auda ADB Road Work	Ahmedabad Urban Development Authority	Construction of Town planing Ring Road complete all civil work including Bituminious macadam and seal coat with Ashphalt plant and paver and other Road Machinery.	56425536	6054591
4	Indroda Sant Sarovar	Ahmedabad Irrigation Department	Construction of Work of Weir Across River Sabarmati at Indroda, Gandhinagar	12140009	1640653
5	Patan Khari Canal	Sardar Sarovar Narmada Nigam Ltd.	Construction of Canal Syphon Across the River Khari II @ CH 356.420 of Narmada Main Canal - The entire work done with Machinery like Batching Plant, Transit Mixers, Ropway etc	99512262	8642915
6	STP - Jashpur	Capital Project Division Gujrat state Govt.	Turnkey work including Designs & Construction 76 MLD Sewerage Treatment Plant Complete with Maintaining and Running the Plant for 3 years.	5711807	-4239557
7	MRRDA - Vidisha	Madhya Pradesh Rural Road Development Project	Construction/Upgradation of Rural Road and PMGSY Package MP 4502	0	-1631133
8	VMC- Pipeline	Vadodara Municipal Corporation	Construction of 1800 MM RCC Graviety Trunkline from Shrenik Cross Road to Atadra Sewage Treatment Plant+D4.	47582093	8977069
9	Jodhpur Pipeline	Rajasthan Urban Infra. Develop. Project	Providing Laying Jointing and Commissioning of sanitary sewer in Pal III Zone including construction of manholes, serive connection along with restoratin of roads in jodhpur city.	367479	-1003946
10	VMC- STP	Vadodara Municipal Corpn	SWERAGE TREATMENT PLANT Turnkey Plant with Designing & Construction, Testing and commissioning 66 MLD STP at Gajarawadi and also Operation and Maintenance 66 MLD STP at Gajarawadi.	4557000	3336832
<b>TOTAL</b>				<b>293814475</b>	<b>29549667</b>

4.4 The Id. CIT(A) granted relief to the assessee vide appellate order dated 11.07.2011, by holding as under:-

*"2.3.. I have carefully considered the facts on record, findings of the A.O as well as submissions of the appellant and various legal citation relied upon.*

*The appellant is a Limited Company engaged in the business of Construction and development of project. For the year under consideration, the appellant filed its return of income on 15/10/2007 declaring total income at Rs.6,90,35,110/-. For the year the Appellant also claimed deduction of Rs.2,95,49,667/- u/s 80IA of the Act. During the course of assessment proceedings, the A.O asked the appellant to justify the claim of deduction u/s 80IA(4) of the Act. In this connection, the Appellant submitted and explained to the AO that the Appellant Company is engaged in development of infrastructural facilities and has complied with the conditions laid down under the provisions of Section 80IA(4) of the Act and therefore eligible for deduction u/s 80iA(4) of the Act. It was also submitted and explained to the Id. AO that the Appellant is working in the capacity of developer and not merely the construction contractor. However, the AO contended that the Appellant Company is not developer but merely a construction contractor and accordingly the AO withdrew the claim made u/s 80iA(4) of the Act and made addition of Rs.2,95,49,667/- to the total income of the Appellant..*

*2.3 Before, me the appellant submitted that it is engaged in the business of development of infrastructure facilities. The appellant has given an elaborate written submission in this regard. The Ld. A.R of the appellant strongly argued that in view of the factual and legal position as stated above, the appellant having fulfilled all the conditions prescribed under the Act, and it is legitimately entitled to the deduction u/s 80iA(4) of the Act even after the amended explanation introduced by the Finance (No.2) Act 2009.*

*2.3.1 The Ld. A.R. drew my attention towards the decision of the Hon'ble Rajkot ITAT in the case of M/S TARMAT BEL (JV.) KCL, RAJKOT V/S ITO in ITA No. 1111/ RJT/2010, delivered on 23/09/2010 on the very same issue and similar facts and allowed the deduction u/s 80IA(4) of the Income Tax Act, 1961. The observation of the Hon'ble ITAT on various issues relating to deduction u/s. 80IA(4) are as under-*

*"We find force in the argument of the A.R. before us that entering into a contract and that too with the Govt. only is a pre-condition u/s. 80IA(4) and hence merely because there is a contract between the Govt. and the assessee, that does not make the assessee a contractor for the purpose of a works contract only. Any person carrying on business may be required to carry out some work or the other in the course of pursuing its overall*

*business objectives. But what does not mean that such a person does not or cannot carry out something more than such work only. In the present case, we have already held that although the appellant entered into a contract with the Govt., the contract is part of the primary conditions of Sec. 80IA(4) and further the nature of work carried out shows that the appellant not only directly (and not indirectly) carried out work as per the contract but it employed various resources of its own by way of machineries, technical knowledge, technical and other manpower, materials etc. and also funded the same out of its own capital and borrowings. The appellant was required to furnish guarantees including free maintenance of the infrastructure facilities. All these factors combined clearly go to show that the appellant also assumed considerable risk in the capacity of a businessman and the such tasks as undertaken, although under a contract as mandated by the section, would required skills of planning of work, employing technical know-how to execute the work and to face the consequences of attendant risks. We find that the risks are upon the assessee and not upon the Govt. These elements are generally missing in the case of a sub-contractor. Here the appellant is directly engaged in performing its functions. Further, in the case of Om Metals Infraprojects Ltd. (supra), it is held that it is the assessee mobilizing people, plants, technical expertise etc. the assessee can be said to be a developer and that the assessee cannot be denied deduction from the profits of developing the infrastructure facility though it may not operate or maintain the same, particularly in view of the insertion of the word "or" in Sec. 80-IA(4).*

*9. Considering the totality of the facts on record as also the development of law concerning the granting of deductions from gross total income, we are of the considered view that the appellant is entitled to deduction u/s. 80IA(4) of the Act as it has been found to have fulfilled all conditions of eligibility. Accordingly, we direct that the deduction as claimed be allowed. In the result, both the grounds of appeal are allowed",*

*The ITAT had in that case categorically held that the explanation does not in any way create artificial fiction about the nature of the business undertaking, but it only states that no deduction shall be admissible in the case where an assessee carries on the business in the nature of subcontract.*

*In the present case of the appellant it is an undisputed fact that it is an undertaking engaged in development of infrastructure facilities on its own. It is not a subcontractor. The ratio of the said judgment is squarely applicable to the appellant's case.*

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*It is significant to mention here that the ITAT in the above case, had considered the judgment of the ITAT Mumbai bench in the case of B.T. PATIL & SONS Belgaum Construction Pvt.Ltd V/S ACIT reported in 126 TTJ 577. The ITAT observed that facts in the case of B.T Patil & sons are quite different. In that case, the assessee was employed as a subcontractor to carry out civil work and that a portion of the contract was assigned to that assessee who carried out the assigned work in the capacity of a subcontractor.*

*The ITAT held that in the case of the present assessee (Tarmet), the facts are totally different. The appellant itself is the developer. It is not a subcontractor. Therefore, the ratio of the judgment in the case of B.T. PATIL & SONS Belgaum Construction Pvt.Ltd is not applicable to the present case.*

*2.3.2 It is further, stated by the Ld. A.R. that even after the amendment brought to the statute book vide Finance (No. 2) Act, 2009 with retrospective effect from 01/04/2000, various CIT(A)'s had also considered the similar matter with identical set of facts and circumstances and deleted the addition made by the AO. The Ld. A.R. put three cases on records, wherein the Ld.CIT(A) have deleted the addition made by the AO on account of 80IA(4) and allowed the claim of the assessee regarding deduction. Which are as under:*

*1. SADBHAV ENGINEERING LIMITED*

*in Appeal No. CIT(A) XIV/Jt.CIT R.8/06/10-11*

*2. M/s. AQUAFILL POLYMERS CO. PVT. LTD*

*in Appeal No. CIT(A)-VI/ITO-1/304/09-10*

*3. RAJKAMAL BUILDERS INFRASTRUCTURE PVT. LTD.*

*in Appeal No CIT(A)-XI/819/08-09*

*The relevant extracts of the above judgments are as under:--*

*1. SADBHAV ENGINEERING LIMITED in*

*2. Appeal No.CIT(A) XIV/Jt.CIT R.8/06/10-11*

*In view of the facts and circumstances of the case as mentioned above and keeping in view the principle of consistency and also the fact that the appellant being a developer of infrastructure facilities in its own rights and the business of the appellant in respect of which deduction u/s 80IA(4) had been claimed is not in the nature of a work contract, I am inclined to hold that the appellant is entitled to deduction u/s 80IA(4) in respect of the income derived by it from the eligible units. Respectfully following the judgment of the ITAT in the case of M/S TARMAT BEL (JV)KCL. RAIKOT V/S ITO in ITA No. 1111/RJT /2010, it is*

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*held that the AO is not justified in denying the appellant the benefit of deduction u/s 801A(4). Therefore, the AO is directed to allow the deduction u/s 801A(4) in respect of the income derived by the appellant from the units eligible for such deduction.*

*2. M/s. Aquafill Polymers Co. Pvt.Ltd.*

*In Appeal No.CIT(A)-VI/ITO-1/2304/09-10*

*Honorable ITAT held that if assessee assumes the risk of project, plan the project work, employ technical skills, mobilize people, funds and resources then assessee cannot be denied the deduction from the profit of developing infrastructure. Appellant's case is identical since, in respect of these three projects appellant designed the infrastructure projects, took risk of the project, commissioned the project and conducted trial run, deployed its own resources. In the light of these facts appellant cannot be termed as mere contractor. Since appellant perform all those tasks which is performed by a developer, appellant cannot be denied the benefit available to the developer. All the arguments of the assessing officer have been met by the appellant in detailed submissions quoted earlier. Respectfully following the recent decision of IT AT Rajkot bench which squarely applies to the facts of the appellant's case, assessing officer is directed to allow deduction under section 80 IA of IT act in respect of the three projects, namely GWSSB-ADB project. GWSSB- Gondal and MPAKVN project.*

**3. *Rajkamal Builders Infrastructures (Pvt.) Ltd. Appeal No.CIT(A)-XI/819/2008-09***

*"2.5 I have given my careful consideration to the provisions of section 80IA(4), the facts of the case, the A.O's findings and the written submissions of the appellant.in accordance with the provisions of section 80 IA(4), any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing. operating and maintaining any infrastructure facility will be eligible for deduction subject to fulfilment of certain conditions. In the instant case, the issue for consideration is whether the appellant is developing any infrastructure facility or whether he is a mere contractor. Going by the nature of works carried on, I am inclined to accept the contention of the appellant that their business is one of developing infrastructure facilities. There is force in the contention of the appellant that initial capital investment (by way of security deposit with government, purchase of materials, payment to labour, Margin money Fixed deposit with bank for obtaining bank guarantee etc.) is made by them and the payment is received step by step on approval and availability of money with government authorities/local body. For getting deduction u/s, 80IA(4) ownership of infrastructure facility is not at all a requirement The appellant is not entitled to any fixed remuneration. Therefore, AO's findings*

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*that the appellant is only a contractor is contrary to the facts of the case. Appellant's reliance, on the case of Patel Engineering Ltd. Vs. DCIT 84 TIJ 666 (Mumbai) is well placed. Therefore, respectfully following the findings of my predecessor for the assessment year 2005-06 (refer para 2.3 above) I hold that the appellant is entitled to deduction u/s, 80IA(4) in respect of the projects other than the one mentioned at Sr. No. (xii) of para 2.2., viz. Rajkot - Gondal- Jetpur Bridge. In respect of this project, the learned A.R conceded that the agreement was with West Gujarat Express Ltd., which is not a government body and hence no deduction is allowable. The quantum of deduction u/s. 80IA(4) will be subject to my findings in the succeeding paras regarding the eligibility of interest income for deduction".*

*"2.3.3 The appellant also stated that in the recent decision of Laxmi Civil Engineering (Pvt) Ltd. Vs. ACIT, the Hon'ble ITAT, Pune in ITA No. 766/PN/09, 254/PN/ 08, 431 /PN/07 and 435/PN/07 dated 8.6.2011 decided the case in favour of the appellant on similar set of facts.*

*2.3.4 I have carefully considered the entire facts and material available on record in this regard and various legal citations. The Ld. A.R. strongly argued that in view of the decision of Hon'ble Rajkot ITAT in the case of M/s. Tarmat Bel (JV)KCL, Rajkot v/s. ITO which is almost on the similar facts, the claim of the appellant u/s.80IA(4) should be allowed. I have also gone through the appellate orders of other CIT(Appeals) in this regard. It is observed that the Hon'ble ITAT Rajkot held that if assessee assumes the risk of project, plan the project work, employ technical skills, mobilize people, funds and resources then assessee cannot be denied the deduction u/s. 80IA(4) for the eligible projects of developing infrastructure. The appellant in his elaborate submission demonstrated and established that they are complying with all the terms and conditions of developer. The Ld. A.R. submitted that the projects undertaken by the appellant are highly technical and specialized. The appellant is required to carry out survey regarding those projects. The appellant is also required to make investment in key equipments and manpower apart from financial investments. The Ld. A.R. also submitted that the development of infrastructure facility involved huge risk, as well and for that the appellant is required to give security and performance guarantee. The appellant is also liable for liquidated damages.*

*2.3.5 In my considered opinion the appellant's case is identical to the case of M/s. Tarmat Bel (JV) KCL. Rajkot decided by the Hon'ble ITAT, Rajkot. The appellant has claimed the deduction u/s. 80IA(4) for the 10 (Ten) projects as reproduced in para 2.2.4 of this appellate order. From the written submissions as well as oral argument of the Id. A.R. it is observed that all the ten projects for which deduction has been claimed the appellant took*

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*the entire risk of the project and deployed its own resources. In the light of these facts the appellant cannot be termed as mere contractor. Since the appellant performed all those tasks which is performed by the developer, the appellant cannot be denied the benefit available to the developer. It is also observed that all the arguments of the A.O have been replied satisfactorily by the appellant in the written submissions of the Id. A.R as reproduced supra.*

*2.3.6 Respectfully following the recent decision of the ITAT Rajkot bench quoted supra which is squarely applies to the facts of the appellant's case, the A.O is directed to allow deduction u/s. 801A(4) of the I.T Act in respect of the 10( ten) projects as reproduced in para 2.2.4 of this appellate order."*

5. Aggrieved by the appellate order passed by Id. CIT(A), the Revenue has filed an appeal before the Tribunal , and the assessee has filed CO, for assessment year 2007-08. The Id. Sr. DR, Shri Chetram Meena submitted that the assessee is merely a Contractor and is not a developer. The assessee is undertaking work contract as construction contractor. The Id. Sr. DR, Shri Chetram Meena drew our attention to the assessment order passed by the AO and to the Explanation inserted after sub-section (13) of Section 80IA . It was submitted by Id. Sr. DR, Shri Chetram Meena that there was an explanation inserted after sub-section (13) of Section 80IA, and keeping in view the aforesaid explanation the assessee is a work contractor as the assessee is executing a work contract, and hence the assessee is not eligible for deduction u/s 80IA. The Id. Sr. DR, Shri Chetram Meena reiterated that the assessee is not a developer and is a work contractor, and hence the AO has rightly denied deduction u/s 80IA to the assessee. The Id. Sr. DR, Shri Chetram Meena relied upon the assessment order passed by the AO.

5.2 On the other hand, the Ld. Sr. Advocate Shri S.N. Soparkar submitted that the assessee is a developer and not merely a work-contractor. The assessee is eligible and entitled for deduction under section 80IA(4). The Id. Sr. Advocate , Shri S.N. Soparkar relied upon the order dated 28.06.2023 **of ITAT, Ahmedabad in ACIT v.**

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**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. Advocate Shri S N Soparkar also referred to and relied upon the following orders of Tribunal , as under:-

Sr. No.	Case Law	Citation	Judicial Forum
1.	Vijay M Mistry Construction Pvt. Ltd.	2938/Ahd/2011	Ahmedabad
2.	Katira Construction Ltd.	185 ITD 173	Rajkot
3.	Patel Infrastructure Pvt. Ltd.	627/Rjt/2014	Rajkot
4.	Rajkamal Builders Infrastructure Pvt. Ltd.	118/ahd/2009 & Others	Ahmedabad

6. The issue involved in the C.O. filed by the assessee is with respect to disallowance of expenditure of Rs. 26,719/- by the AO which disallowance stood confirmed by the ld. CIT(A). The assessee has claimed transaction tax of Rs. 24,710/- which was disallowed by the AO in the absence of any satisfactory reply. So far as claim of the assessee of Rs. 70,830/- as income tax expenses is concerned, the assessee submitted that the assessee has already disallowed Rs. 68,824/- , and the AO disallowed the remaining amount of Rs. 2009/- and added the same back to the income of the assessee. Aggrieved by the assessment order passed by the AO, the assessee filed first appeal with ld. CIT(A). The ld. CIT(A) rejected the claim of the

assessee. Aggrieved by the appellate order passed by Id. CIT(A), the assessee has filed Cross Objection before the Tribunal and the Id. Senior Advocate Shri S N Soparkar submitted, at the outset, that there is a disallowance of Rs. 26,719/- which is added to the income of the assessee by the AO which disallowance was later confirmed by Id. CIT(A), and by virtue of section 80IA(4), since the income of the assessee has gone up by Rs. 26,719/- owing to aforesaid disallowance, and consequently deduction under section 80IA(4) will also go up. The Id. Sr. DR, Shri Chetram Meena submitted that this contention raised by the Id. Senior Advocate is not raised in the grounds of CO filed by the assessee with ITAT, that the amount added to the income of the assessee will lead to the increase in deduction under section 80IA(4).

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. 6,90,35,110/- and claiming deduction of Rs. 2,97,41,167/- 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 Construction. The assessee claimed that it is a developer engaged in the infrastructure activities being road development of airport terminal plant, development of Airport Terminal Building, Canal Syphone Work, Diaphragm Wall 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 it 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 newly inserted Explanation below Section 80IA(13) of the 1961 Act which was inserted by Finance Act, 2007 effective from 01.04.2000, and

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hence the assessee is not eligible for deduction u/s 80IA(4). The AO observed that the assessee has entered into an agreement with various government agencies, The assessee is not owner of the work done by him and the real ownership lies with various government authorities. The assessee has not derived income from developing or operating and maintaining or developing, operating and maintaining any infrastructure facility , and the assessee company has earned income as contract receipt and the income being a contract receipt is not eligible for deduction u/s 80IA(4). The assessee company has filled tender for obtaining the work as contractor only. The assessee is registered with sales tax authorities of Gujarat and Madhya Pradesh as 'work contractor' as per the registration certificates. The assessee failed to prove that it has ownership of project to develop . The assessee is executing civil construction activities as per the specifications designs and plans provided by the Developer of the infrastructure project. The supervision of the project is undertaken by those who have given the civil construction work to the assessee. The assessee is bound to perform work with the drawing specification which is part of the contract. The AO then discussed in the assessment order at page number 5-8 about two of the work orders executed by the assessee. The Id. CIT(A) granted relief to the assessee with respect to 10 projects on the grounds that the assessee is a 'Developer' and not a 'Contractor'. The Id. CIT(A) observed that the assessee has taken the entire risk of the project and deployed its own resources ,and in view of the above, the assessee cannot be categorized as Contractor. We have elaborated in the preceding para's of this order , the findings/observations of both the AO as well Id. CIT(A). We are not repeating the same. 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.<sup>32</sup>**

**80-IA.** <sup>33</sup>[(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 <sup>34</sup>[or develops <sup>35</sup>[\*\*\*] a special economic zone referred to in clause (iii) of sub-section (4)] or generates power or commences transmission or distribution of power <sup>36</sup>[or undertakes substantial renovation and modernisation of the existing transmission or distribution lines <sup>37</sup>[<sup>37a</sup>[or lays and begins to operate a cross-country natural gas distribution network]]] :

<sup>38</sup>**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.]

<sup>39</sup>[(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 <sup>40</sup>[an <sup>41</sup>[undertaking]referred to in <sup>42</sup>[clause (ii) or] clause (iv) <sup>43</sup>[<sup>43a</sup>[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 <sup>44</sup>[undertaking] which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such <sup>44</sup>[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:

<sup>45</sup>**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 <sup>46</sup>[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 <sup>47</sup>[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 <sup>48</sup>[or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;]
  - <sup>49</sup>[(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.

<sup>50</sup>[*Explanation.*—For the purposes of this clause, "infrastructure facility" means—

- (a) a road including toll road, a bridge or a rail system;
- (b) a highway project including housing or other activities being an integral part of the highway project;
- (c) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;
- (d) a port<sup>51</sup>, airport, inland waterway <sup>52</sup>[, inland port or navigational channel in the sea];]

<sup>53</sup>[(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, <sup>54</sup>[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 <sup>55</sup>[or special economic zone]notified<sup>56</sup> by the Central Government in accordance with the scheme framed<sup>56</sup> and notified<sup>57</sup> by that Government for the period beginning on the 1st day of April, 1997 and ending on the 31st day of March, <sup>58</sup>[2006]:

<sup>59</sup>[**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 :

<sup>60</sup>[**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, <sup>60a</sup>[2011]" had been substituted;]

(iv) an <sup>61</sup>[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, <sup>62</sup>[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, <sup>62</sup>[2011] :

**Provided** that the deduction under this section to an <sup>63</sup>[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;

- <sup>64</sup>[(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, <sup>65</sup>[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;]

- <sup>66</sup>[(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 notified<sup>67</sup> 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, <sup>68</sup>[2011];]

- <sup>69</sup>[(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 prescribed<sup>70</sup>, 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) <sup>71</sup>[The deduction] under sub-section (1) from profits and gains derived from an <sup>72</sup>[undertaking] shall not be admissible unless the accounts of the <sup>72</sup>[undertaking] for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant, as defined in the *Explanation* below sub-section (2) of [section 288](#), and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form<sup>73</sup> duly signed and verified by such accountant.

(8) Where any goods <sup>74</sup>[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 <sup>74</sup>[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 <sup>74</sup>[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 <sup>74</sup>[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.

<sup>75</sup>[*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 <sup>76</sup>[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 <sup>76</sup>[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.

<sup>77</sup>[(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.]

<sup>78</sup>[(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).]

<sup>79</sup>[*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).]

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 1<sup>st</sup> 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 wef 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 as major manpower, machines and material are provided by the Contractee. Say for example contract for painting of walls. Thus, Contractor acts 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 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), but while granting relief to the assessee, 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 . The ld. CIT(A) has made general and balled observations while granting deduction to the assessee u/s 80IA(4) , which general and balled observations are not sufficient to hold in favour of the assessee. We could have decided the issue ourselves as these appeals are old appeal pending for last more than 12 years, but the material filed before us vide paper books are not sufficient for us to decide the issue . Even tender documents, agreements with the Government for executing the work, PERT chart, financial statements, Men, material and machines deployed , 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. 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 ld. 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. The appeal of the Revenue on this issue is allowed for statistical purposes. We order accordingly.

7.2 W.r.t. the issue raised by the assessee in the CO filed, regarding dis-allowability of deduction of the expenses to the tune of Rs. 26,719/- both by the AO as well by Id. CIT(A) . The assessee has claimed that once deduction u/s 80IA(4) is allowed, then even if the income increases owing to disallowance of aforesaid expenditure , the deduction u/s 80IA(4) shall go up and hence disallowance is tax-neutral.This contention of the assessee is consequential to the issue of grant of deduction u/s 80IA(4) , and we have already set aside and restored the matter to the file of Id. CIT(A) for adjudicating afresh issue of allowability of deduction u/s 80IA(4) in the preceding para's of this order, and hence this issue of disallowability of expenses to the tune of Rs. 26,719/- is also restored back to the file of Id. CIT(A) to be adjudicated afresh after adjudicating the first issue. The Id. CIT(A) shall give proper opportunity of being heard to both the AO as well the assessee. We order accordingly.

8. Thus, both the Revenue Appeal and CO filed by the assessee for assessment year 2007-08 are allowed for statistical purposes. We order accordingly.

9. The Revenue has raised following grounds of appeal in memo of appeal filed with the Income Tax Appellate Tribunal, Ahmedabad for assessment year 2008-09:-

**ITA No.2352/Ahd/2011-Revenue Appeal**  
**A.Y.2008-09**  
**Grounds of appeal**

ITA No.2308/Ahd/2011  
CO. No.209/Ahd/2011  
AYs:2007-08  
ITA No.2352/Ahd/2011  
CO. No.210/Ahd/2011 &  
ITA No.2357/Ahd/2011  
Khurana Engineering Ltd.

*"1. The ld. CIT(A) has erred in law and on facts in deleting the addition of Rs. 1,67,41,257/- made on account of disallowance of deduction u/s 80IA(4) without appreciating the fact that the assessee did not fulfill the conditions precedent and the assessee was only a contractor not a developer.*

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

*3. It is, therefore, prayed that the order of the ld. CIT(A) may be set aside and that of the Assessing Officer may be restored to the above extent."*

10. The issue raised by Revenue in its appeal filed with ITAT in ITA No. 2352/Ahd/2011 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 2007-08 in Revenue's appeal, and even grounds of appeal are similar. Our decision in ITA No. 2308/Ahd/2011 for assessment year 2007-08 as adjudicated above in preceding para of this order shall apply *mutatis mutandis* to the appeal of the Revenue for assessment year 2008-09 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. 2308/Ahd/2011 for assessment year 2007-08. The appeal of the Revenue is allowed for statistical purposes. We order accordingly.

**Assessee's Appeal in ITA No.2357/Ahd/2011**  
**A.Y.2008-09**

11. The appeal filed by the assessee in ITA No. 2357/Ahd/2011 is delayed by one day beyond the time stipulated u/s 253(3) for filing the appeal. The ld. counsel of the assessee has filed condonation application stating that July and August have 31 days each and hence there is one additional day which was not kept in mind while filing the appeal which has resulted into a delay of one day in filing the appeal for assessment year 2008-09 beyond the time provided u/s 253(3) of the 1961 Act.

ITA No.2308/Ahd/2011  
CO. No.209/Ahd/2011  
AYs:2007-08  
ITA No.2352/Ahd/2011  
CO. No.210/Ahd/2011 &  
ITA No.2357/Ahd/2011  
Khurana Engineering Ltd.

It was submitted that it was unintentional and prayer was made to condone the delay. The Revenue does not have serious objection to the condonation of delay of one day by assessee in filing its appeal with ITAT. After hearing both the parties, we condone the delay of one day beyond the limitation as provided u/s 253(3) of the 1961 Act. If justice is pitted against technicalities, the Courts will lean towards advancement of justice rather than technicalities. We order accordingly.

12. The assessee has raised following grounds in CO in memo of CO filed with ITAT, Ahmedabad Bench, Ahmedabad, which is listed as CO No. 210/Ahd/2011 for assessment year 2008-09 :-

**Grounds in C.O. raised by Assessee-CO No. 210/Ahd/2011 arising out of ITA no. 2352/Ahd/2011 for assessment year 2008-09.**

- “1. The learned Commissioner of Appeals- VIII, Ahmedabad erred in confirming addition to the extent of Rs. 66,86,461 made by the Assessing Officer by way of disallowance of expenses u/s 14 A r.w. rule 8 (d) of Income tax Rules.*
- 2. The learned Commissioner of Appeals- VIII, Ahmedabad erred in directing the Assessing Officer to exclude expenditure of Rs.6,25,967 as qualifying expenditure for the purpose of deduction u/s 35 D of the Income tax Act, 1961 by way of expenditure on increasing the authorized Share capital of the Company.”*

12.2 At the outset ld. Counsel for the assessee , Senior Advocate Shri S N Soparkar stated that the CO is not pressed as the assessee has filed an appeal listed as ITA No. 2357/Ahd/2011 for assessment year 2008-09 raising similar ground in the appeal itself. The department has no objection, if the CO is dismissed. After hearing both the parties. CO No.210/Ahd/2011 for assessment year 2008-09 arising out of ITA no. 2352/Ahd/2011 stands dismissed. We order accordingly.

13. The assessee has raised following grounds of appeal in memo of Appeal listed as Appeal No. 2357/Ahd./2011 for assessment year 2008-09, filed with the Income Tax Appellate Tribunal, Ahmedabad , for assessment year 2008-09:-

**Grounds of Appeal raised by Assessee in Appeal in ITA no. 2357/Ahd/2011 for assessment year 2008-09.**

*“1. The learned Commissioner of Appeal erred in law and on the facts of the case in confirming the disallowance to the extent of Rs. 66,86,461 made by the Assessing officer u/s 14A r. w. rule 8D of the Income Tax Act, 1961.*

*2. The learned Commissioner of Appeal erred in law and on the facts of the case in confirming the addition to the extent of Rs. 1,25,194 out of claim of Rs. 13,40,328 u/s 35 D of the income Tax Act, 1961.*

*3. The appellant crave leave to add, alter, edit, delete, modify, change or amend all or any of the grounds of appeal at the time or before the hearing of the appeal.”*

13.2 The issue involved in this appeal filed by the assessee is concerning the disallowance under section 14A of the 1961 Act read with Rule 8D of the Income-tax Rules, 1962 , as well disallowance under section 35D of the Act.

13.3 First, we shall take up disallowance made u/s 14A of the 1961 Act read with Rule 8D of the 1962 Rules. During the course of assessment proceedings, the AO observed that the assessee has earned dividend income to the tune of Rs. 13,118/- which is claimed by assessee as exempt from tax. The AO further observed that the assessee has also earned exempt income from various joint ventures to the tune of Rs. 9,01,43,693/-. The assessee is also claiming deduction under section 80IA(4), wherein the income of various projects subject to section 80IA(4) was claimed as an exempt income. The AO observed that the assessee has not made any disallowance under section 14A of the Act with respect to earning of such exempt income. The assessee submitted that the assessee has made investment in the earlier years of Rs. 7,21,490/- in the equity share of Union Bank of India which was made prior to

01.04.2004. It is a public listed company and shares are traded on the recognized stock exchange . The assessee submitted that the company has not done or carried out any activities in the investment nor has incurred any expenditure for earning the dividend income and as such provision of section 14A are not applicable. It was further submitted that the assessee has paid up Share Capital of Rs. 10,78,14,000/- while Reserves and Surplus are to the tune of Rs. 45,92,60,310/- , aggregating to Rs. 56,70,74,310/-. The assessee submitted that there are other funds available with the assessee also which do not carry any interest expenditure . The AO observed that the assessee has earned dividend income of Rs. 13,118/- exempt from tax. The assessee has also exempt income from joint venture of Rs. 9,01,43,693/- which is more than the income earned by the assessee. Apart from this, the assessee is also claiming deduction under section 80IA from various projects subject to 80IA, which is also claimed exempt. The AO observed that the assessee has made investment in shares of joint ventures where the income claimed is exempt and the assessee has invested in joint ventures. The assessee has raised investment this year in various JV's and shares. The AO observed that total available fund has been increased by Rs. 30.8 cr. while the increase in asset is only 13.2 cr and investments have increased by 13.6 cr. Thus, the assessee has utilized interest bearing funds for earning exempt income. The AO observed that the interest bearing funds have been utilized for earning exempt income. The interest free funds have increased by 11 cr. but loans and advances given by the assessee has increased by 18.6 cr. . The AO observed that the assessee has utilized interest bearing funds for earning exempt income and the interest free funds are not enough to finance the various additions to assets. The AO observed that the assessee is not able to prove the nexus between interest free funds and exempt income. The AO made addition to the tune of Rs. 85,12,705/- to the income of the assessee under section 14A r.w.r. 8D, details of the same are as under:-

Thus, the computation of the expenditure incurred in relation to earning dividend income as per the provisions of section 14A of the Act in the manner as prescribed under Rule 8D of the Act is as under:-

<b>Rule 8D (2)(i)</b>		
The amount of expenditure directly relating to income which does not form part of total income		NIL
<b>Rule 8D(2)(ii)</b>		
Expenditure incurred by way of interest during the previous year which is not directly attributable to any particular income of receipt but directly or indirectly relating to earning exempt income as per the formula namely :-  A X B/C  Where A = expenditure by way of interest other than amount of interest included in (i)  B = average value of investment income from which does not form part of the total income  C = average value of total assets as appearing in the Balance Sheet  Here, A = 38078274/-  $B = \frac{247618365 + 111201333}{2} = 179409849/-$  $C = \frac{1049673222 + 731616418}{2} = 890644820/-$  A X B/C $\frac{38078274 \times 179409849}{890644820} = 7615655/-$		Rs. 7615655/-
<b>Rule 8D(2)(iii)</b>		
Half percent of the average value of investment income from which does not form part of the total income = 179409849 X 0.5%		Rs. 897050/-
<b>Total</b>		<b>Rs. 8512705/-</b>

13.4 The assessee filed first appeal with ld. CIT(A) challenging additions as were made the AO u/s 14A read with Rule 8D. The ld. CIT(A) confirmed the additions as were made by ld. AO but reduced the disallowance by excluding bank guarantee commission to the tune of Rs. 58,64,606/- and bank charges to the tune of Rs. 24,64,381/- and stamp paper/legal charges to the tune of Rs.1008885/- , which were earlier included by AO as part of interest expenditure paid by the assessee. Thus, the disallowance Section 14A u/r 8D(2)(b) stood reduced to Rs.57,89,411/- as against Rs. 76,15,655/- made by the AO. The ld. CIT(A) confirmed the additions of Rs. 8,97,050/- as was made by the AO by invoking Section 14A of 1961 Act read with Rule 8D(2)(c) of 1962 Rules.

13.5. Aggrieved by decision of ld. CIT(A) , the assessee filed second appeal with ITAT, and the ld. Senior Advocate Shri S N Soparkar submitted that the additions are to be restricted to the exempt income earned by the assessee. It was submitted that exempt income from dividend is merely Rs. 13,118/. Further, it was submitted that even if the same was added to the income , then deduction u/s 80IA shall go up. Further, it was submitted that owned funds are more than the investment and hence no disallowance of interest expenditure by invoking Section 14A read with Rule 8D are warranted. While ld. DR supported the orders of the authorities below.

13.5 We have considered rival contentions and perused the material on record. We have observed that the assessee has earned exempt income to the tune of Rs. 13,118/- from dividend income from UBI and Rs. 9,01,43,693/- from Joint Ventures. The AO has invoked Section 14A read with Rule 8D, to make disallowance of Rs.76,15,655/- u/s 14A read with Rule 8D(2)(b) and Rs. 8,97,050/- u/s 14A read with Rule 8D(2)(c). The ld. CIT(A) partially confirmed the additions by excluding bank guarantee commission, legal/stamp duty charges and bank charges which were added by the AO in the interest expenses . We have observed that the assessee has owned interest free funds available to the tune of Rs. 56,70,74,310/- , by way of

share capital to the tune of Rs. 10,78,14,000/- and Reserves and Surplus to the tune of Rs. 45,92,60,310/-. The average funds invested by the assessee in securities/JV yielding exempt income were to the tune of Rs. 17,94,09,849/- , while the owned interest free funds are much higher at Rs. 56,70,74,310/-. Thus, presumption will apply that the assessee has invested own interest free funds in the securities/JV which yield exempt income. Thus, no disallowance u/s 14A read with Rule 8D(2)(b) is warranted, as available owned interest free funds with the assessee are much higher than the investments made by the assessee which yield exempt income. Reference is drawn to the decision of Hon'ble Supreme Court in the case of **PCIT v. Sintex Industries Limited (2018) 93 taxmann.com 24(SC)** wherein Hon'ble Supreme Court dismissed SLP arising from Hon'ble Gujarat High Court judgment and order in **CIT v. Sintex Industries Limited (2017) 82 taxmann.com 171(Guj.HC)**. So far as disallowance u/s 14A read with Rule 8D(2)(c) to the tune of Rs. 8,97,050/- as was made by AO and later confirmed by Id. CIT(A) is concerned, we do not find any infirmity in the order passed by Id. CIT(A). So far as contention of the Id. Senior Advocate that if disallowance u/s 14A is confirmed by ITAT , then the assessee will be entitled for higher deduction u/s 80IA(4), we have already restored the issue of disallowance u/s 80IA(4) to the Id. CIT(A) for fresh adjudication, and hence, in the fitness of the things and fair play keeping in view facts and circumstance of the case, this issue to the extent of confirmation of addition u/s 14A read with Rule 8D(2)(c) by us as is confirmed by us vis-à-vis higher deduction u/s 80IA(4) , is restored to the file of Id. CIT(A) for fresh adjudication. We order accordingly.

### **Preliminary Expenses**

14. The next issue concerns with disallowance of Preliminary expenses to the tune of Rs. 13,40,328/- u/s 35D. The AO observed that the assessee has written off

preliminary expenses of Rs. 13,40,328/- under section 35D of the Act. The assessee was asked to explain the working of the preliminary expense. The AO observed that these are the expenses incurred by the assessee company in the preceding years for increase in the authorized share capital of the company. The AO referred to the decision of Hon'ble Supreme Court in the case of **Brooke Bond India Ltd. v. CIT 225 ITR 798 (SC)**. The AO referred to provisions of Section 35D and observed that Preliminary expenses incurred for increase in authorized capital are not even mention in sub-section 2 of Section 35D. The AO disallowed the expenses to the tune of Rs. 13,40,328/- both under Section 35D as well under section 37 of the Act.

14.2 The assessee filed first appeal before the ld. CIT(A) challenging the additions as were made by the AO. The ld. CIT(A) observed that partly expenses were incurred for public issue and the assessee has claimed deduction u/s 35D to the tune of 20% , which the assessee is entitled to claim deduction which stood allowed by ld. CIT(A). However, so far expenses to the tune of Rs. 6,25,967/- claimed to be incurred for increase in authorized capital is concerned, the ld. ld. CIT(A) observed that the assessee has not filed details for Rs. 6,25,967/- and these expenses are hit by decision of Hon'ble Supreme Court in the case of Brooke Bond(supra). The assessee having claimed 20% of the total expenses of Rs. 6,25,967/- as preliminary expenses in the year under consideration, stood disallowed by ld CIT(A) to the tune of Rs. 1,25,194/- .

14.3 Aggrieved by the decision of ld. CIT(A), the assessee has filed an appeal with ITAT. The ld. Senior Advocate Shri S N Soparkar submitted that regarding disallowance u/s 35D , if the ITAT confirms the additions , then the deduction u/s 80IA(4) will go up. It was submitted by ld. DR that the AO has disallowed the expenses being incurred for increase in authorized capital which are rightly

confirmed by the ld. CIT(A). The ld. DR relied upon the decision of Hon'ble Supreme Court in the case of **Brooke Bond India Ltd.** (supra).

14..4 We have considered rival contentions and perused the material on record. We are of the considered view that the disallowance of Rs. 1,25,194/- was rightly confirmed by ld. CIT(A) as the same was claimed to have been incurred for increase in authorized capital , which has been held to be capital in nature by Hon'ble Supreme Court in the case of **Brooke Bond India Limited and PSIIDC**. Further, the assessee has not submitted any details of these expenses. We donot find any infirmity in the order passed by ld. CIT(A) so far as disallowance of Rs. 1,25,194 is concerned. So far as remaining preliminary expenses are concerned, the AO has observed that these expenses were incurred for increase in authorized capital and also that no details were furnished. The assessee has filed details with ld. CIT(A) , but ld. CIT(A) did not call for the remand report from the AO. There is a breach of Rule 46A of the 1962 Rules. The Rule 46A is not an empty formality. The matters needs to go back to the file of ld. CIT(A) for fresh adjudication , after giving AO as well the assessee , opportunity of being heard in accordance with principles of natural justice. So far as contention of the ld. Senior Advocate that if disallowance u/s 35D is confirmed by ITAT , then the assessee will be entitled for higher deduction u/s 80IA(4), we have already restored the issue of disallowance u/s 80IA(4) to the ld. CIT(A) for fresh adjudication, and hence, in the fitness of the things and fair play keeping in view facts and circumstance of the case, this issue to the extent of confirmation of addition u/s 35D by us as well partly setting aside to the file of ld. CIT(A) for fresh adjudication vis-à-vis higher deduction u/s 80IA(4), is restored to the file of ld. CIT(A) for fresh adjudication. We order accordingly.

ITA No.2308/Ahd/2011  
CO. No.209/Ahd/2011  
AYs:2007-08  
ITA No.2352/Ahd/2011  
CO. No.210/Ahd/2011 &  
ITA No.2357/Ahd/2011  
Khurana Engineering Ltd.

15. In the result, the Appeal of Revenue for assessment year 2008-09 is allowed for statistical purposes, the CO filed by the assessee for assessment year 2008-09 is dismissed and the appeal filed by the assessee for assessment year 2008-09 is partly allowed for statistical purposes, as indicated above

16 Thus, in nut-shell, the Appeal of Revenue for assessment year 2007-08 and CO filed by the assessee for assessment year are allowed for statistical purposes. The appeal of the Revenue for assessment year 2008-09 is allowed for statistical purposes, the CO filed by the assessee for assessment year 2008-09 is dismissed and the appeal filed by the assessee for assessment year 2008-09 is partly allowed for statistical purposes, as indicated above

Order pronounced in open court at Ahmedabad on 19.04.2024

Sd/-

**[MADHUMITA ROY]  
JUDICIAL MEMBER**

DATED: 19/04/2024

Sh

Copy forwarded to:

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

Sd/-

**[RAMIT KOCHAR]  
ACCOUNTANT MEMBER**

True Copy