

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH

**Before: Smt. Annapurna Gupta, Accountant Member
And Shri T.R. Senthil Kumar, Judicial Member**

**ITA Nos: 1613 & 1916/Ahd/2019
Assessment Year: 2015-16 & 2016-17**

Mundra International Container Terminal Pvt. Ltd, Navinal, New Mundra Port, Post Box No. 8, Mundra Kutch, Gujarat 370421 PAN: AADCA0917C (Appellant)	Vs	The DCIT, Circle-2(1)(2), Ahmedabad (Respondent)
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**ITA Nos: 1711 & 1872/Ahd/2019
Assessment Years: 2015-16 & 2016-17**

The ACIT, Circle-2(1)(2), Ahmedabad (Appellant)	Vs	Mundra International Container Terminal Pvt Ltd., Navinal, New Mundra Port, Post Box No. 8, Mundra Kutch, Gujarat 370421 (Respondent)
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**Assessee Represented: Shri S.N. Soparkar, Sr. Adv. &
Shri Parin Shah, AR**

**Revenue Represented: Ms. Saumya Pandey Jain, Sr.D.R.
& Shri Sudhendu Das, CIT-DR**

Date of hearing : 21-06-2024

Date of pronouncement : 22-08-2024

आदेश/ORDER

PER : T.R. SENTHIL KUMAR, JUDICIAL MEMBER:-

These cross appeals are filed by the Assessee and the Revenue as against the two appellate orders both dated 30.08.2019 and 11.10.2019 passed by the Commissioner of Income Tax (Appeals)-2, Ahmedabad arising out of two assessment orders passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') relating to the Assessment Years 2015-16 and 2016-17. Since common issues are involved in all these appeals and also inter connected, therefore for the sake convenience the same are disposed of by this common order.

2. Brief facts of the case is that the assessee is a Private Limited company engaged in the business of Operating container handling terminal and container freight station operations. For the assessment year 2015-16 the assessee filed its Return of Income on 27-11-2015 declaring total income of Rs.14,09,75,340/=. The return was taken for scrutiny assessment and made the following disallowances:

2.1. **Disallowance u/s. 14A of the Act:** The assessee has earned dividend income of Rs.25,32,679/- which is exempt from tax but the assessee has not allocated any expenditure to earn the exempt income. Therefore, AO invoking the provisions of section 14A of the Act made disallowance of Rs.35,00,000/- as per Rule 8D. The assessee contended that it has not incurred any expenditure to earn the exempt income and therefore disallowance u/s. 14A is uncalled for. The assessee has further claimed that the peak investment in the mutual fund was approximately Rs.137 crores and it has got sufficient interest free fund in the form of cash profit

of Rs.284.85 crores. The assessee also submitted that the total investment is Rs.70 crores as on 31-03-2015, against which there is a total interest free fund in the form of equity and reserve and surplus of Rs.414 crores. Therefore, no disallowance is called for u/s.14A of the Act. The assessee also submitted that exempt income has been received from mutual fund and there is no opening and closing balance and therefore 0.5% of the investment will be NIL. Without Prejudice to the above, the assessee suo-moto made disallowance of Rs.35,00,000/- u/s.14A even though the exempt income is only Rs.25,32,679/-. However the Ld AO confirmed the disallowance to Rs.35 lacs invoking Rule 8D.

2.2. On appeal against this issue the Ld CIT[A] restricted the disallowance to the extent of dividend income earned by the assessee relying upon various case laws by observing as follows:

“.... I do not agree with the submission of the appellant that it has not incurred any expenditure towards the exempt income. As regard to appellant's argument that it has got its own fund to make the investment, the Assessing Officer has not made any disallowance of interest as per Rule 8D(2)(i). The AO has made disallowance as per Rule 8D(2) (ii) which is relating to administrative expenses. The appellant's argument that only 0.5% of average value of investment is to be considered for the purpose of computation of disallowance-under Rule 8D(2) (iii) is also not tenable as the average value of investment is to be considered from which income does not or shall not form part of the total income as appearing in the balance sheet of the assessee. Assessing Officer, was therefore, justified to make disallowance u/s. 14A r.w.s, 8D. However, the AO has made the disallowance as per Rule BD of Rs.35.00,000/- against the exempt income of Rs.25,32,679/- The Honourable High Court in the case of Corrtch Energy Ltd. (223 Taxaman 130) has held that the disallowance u/s.14A has held that the disallowance u/s. 14A cannot exceed the exempt income. The Honourable Supreme Court in the case of Max Opp Investment Limited (2018) [402 ITR 640] has also upheld the decision of Punjab & Haryana High Court in the case of CIT Vs. Hero Cycles where

disallowance u/s. 14A has been restricted to the exempt income. In view of the above, the disallowance u/s. 14A is restricted to exempt income i.e. Rs.25.32.679/ Relief is granted for the balance disallowance. The ground of appeal is accordingly partly allowed.

3. **Disallowance u/s. 80IA(4):** The assessee claimed deduction of Rs.295,58,08,285/-u/s. 80IA(4) of the I.T. Act for operating and maintaining the infrastructure facility. The AO has disallowed the claim u/s. 80IA(4) on the ground that assessee has not satisfied the condition laid down in section 80IA(4)(i)(b) of the Act. The AO has held that there is no agreement between the assessee company and Central Government or a State Government or Local Authority or any other Statutory Body (which in this case is Gujarat Maritime Board] for developing or operating and maintaining new infrastructure facility namely Port, and therefore assessee is not eligible for deduction u/s 80IA(4).

3.1. The assessee submitted that it is engaged in the business of Operation and Maintenance of Infrastructure facility (i.e, a Port) and has filed Form No.10CCB to claim the deduction u/s. 80IA(4) of the Act. As regard to AO's objection that assessee has not entered into agreement with the Central Government, State Government or Local Authority or any other Statutory Body (Gujarat Maritime Board) for disallowing the claim u/s. 80IA(4), assessee has submitted that there was a Concession Agreement dated 17-02-2001 executed between Gujarat Maritime Board [GMB] and APSEZ erstwhile known as Gujarat Adani Port Limited. In exercise of the right granted in terms of Concession Agreement with GMB, APSEZ requested GMB vide letter dated 21-09-2002 to grant

consent for entering into Sub Concession Agreement with the assessee, in respect of container terminal and other infrastructure facility for being part of assets covered under the Concession Agreement entered into between GMB and APSEZ. The Assessee further submitted that GMB vide letter dated 30-09-2002 accorded its consent in terms of Clause 8.5(b) of the Concession Agreement entered with APSEZ for grant of sub concession for Operating and Maintaining container Port by APSEZ in favour of the assessee in relation to the assets of the container terminal, subject to their being no inconsistency with the provisions of the Concession Agreement and Sub-Concession being co-terminus with the Concession Agreement. The assessee submitted that accordingly Sub-Concession Agreement was signed between APSEZ and assessee on 07-01-2003, thus the activity of the assessee are nothing but the extension of APSEZ in respect of Operating and Maintaining for which no separate agreement was required to be entered into with GMB as was clarified by GMB vide letter dated 30-09-2002 that Sub-Concession Agreement was to be as per Clause 8.5(b) of Concession Agreement. The assessee further contended that the Sub-Concession Agreement with the APSEZ was part and parcel of Concession Agreement entered into between APSEZ and GMB and as per consent accorded by GMB as per letter dated 30-09-2002 and therefore, it is incorrect to hold that there was no agreement at between GMB and Assessee. Further the approval letter of GMB was nothing but implied agreement entered into by it with the assessee to carry out business activity in the nature of developing, operating and maintaining the infrastructure facility. Assessee has relied on the decision of Madras High Court

in the case of CIT Vs. A. L. Logistic Pvt. Ltd. [374 ITR 601] where on similar facts the Hon'ble High Court has allowed the benefit of section 80IA(4). The assessee has also relied upon the decision of Hyderabad Tribunal in the case of Ocean Sparkle Limited Vs. DCIT 199 TIJ 58] (HYD) and Hyderabad Menzies Air Cargo Pvt. Ltd. [ITA No.421, 122, 423/HYD/2015] dated 06/10/2016. The assessee has further relied upon the decision of Hon'ble Madras High Court in the case of CIT Vs Chettinad Lignite Transport Services Pvt. Ltd. in TCA No.741, 1246 of 2009 and 162 of 2015 dated 06/03/2019 in which Hon'ble High Court relying on the proviso to Section 80IA(4) has held that the proviso does not require that there should be a direct agreement between the transferee enterprises and the specified authorities for availing the benefit u/s. 80IA of the Act.

3.2. On appeal against this issue the Ld CIT[A] considered the Agreements entered between the parties and various case laws relied upon by the assessee and deleted the addition made by the AO u/s. 80IA[4] by observing as follows:

"... It is seen that Adani Port and Special Economic Zone Limited was incorporated as Gujarat Adani Port Limited (GAPL) in the year 1999 to develop a private port at Mundra on the west coast of India. The company entered into Concession Agreement with Gujarat Maritime Board for the development of port at Mundra and commenced commercial operation in October, 2001. As per Clause 8.5(b) of the Concession Agreement, Adani Port and Special Economic Zone Limited has entered into Sub-Concession Agreement with the appellant (erstwhile known as Adani Container (Mundra) Terminal Limited to operate and maintain the container terminal. The basic point of the agreement is as under:-

"A The Department of Ports and Fisheries, Government of Gujarat, announced the BOOT Policy for private sector participation in the development of the State's ports vide its Government Resolution dated 29th July, 1997;

B. Pursuant to the BOOT Policy, the licensee has been granted rights to build, own, operate and transfer a multi purpose port including both container and bulk cargo handling facilities in the port of Mundra, in terms of Concession Agreement;

C. The port of Mundra is declared to be a "minor port" within the meaning of the term under the Indian Ports Act and GMB is the statutory authority in the state of Gujarat vested with powers to regulate the development of minor ports.

D. Pursuant to the BOOT Policy, the licensor has granted to the license the right and authority during the term of concession agreement, to develop, finance, design, construct, operate and maintain the Contracted Assets and provide services to the Port users;

E. In accordance with the terms of the concession agreement, the license may construct, operate and maintain the contracted assets and the core assets by granting sub-concessions to the third parties.

F Vide its letter dated September 20, 2002, GMB has accorded its consent in terms of Clause 8.5(b) of the Concession Agreement, for the grant of sub-concession by the Licensee in favour of the Sub-Licenser in relation to the assets of the Container Terminal including the quay wall in Navinal Creek, subject to there being no inconsistency with the provision of the Concession Agreement and the sub-concession with the Concession Agreement

G. The Licensee has developed the Project and the Sub-Licensee has agreed to operate and maintain the Container Terminal. In this agreement, the parties wish to record the terms and conditions upon which the Sub-Licensees shall have the right to finance, design, operate and maintain the Contract Assets and provide Services to the Users.

H. The Licensee has agreed to grant to the Sub-Licensee rights under this Agreement to operate and maintain the Container

Terminal in accordance with and subject to the terms and on the conditions provided herein."

The Assessing Officer has disallowed the claim of 80IA(4) only on the ground that condition provided in section 80IA(4)(i)(b) that appellant should have entered into agreement with the Central Government, State Government or Local Authority or any other Statutory Body has not been satisfied. Appellant has contended that sub concession agreement was in continuation and part of concession agreement between GMB and APSEZ, and therefore, in view of decision of Madras High Court in the case of CIT Vs. A.L. Logistic Pvt. Ltd. [374 ITR 601], appellant is eligible for deduction u/s. 80IA(4). However, it is seen from the sub concession agreement that port was developed by Adani Port Special Economic Zone and it was handed over to the appellant company to operate and maintain the container terminal as per Clause (G) & (H) of Sub-Concession Agreement. The Assessing Officer has denied the claim of 80IA(4) without considering the proviso of Section 80IA(4) which is tis under:-

"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 (hereinafter referred to in this section as the transferor enterprise) to another enterprise thereafter 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 of statutory body, the provisions of this section shall apply to the transferee enterprise, as if it was of 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."

I agree with the Assessing Officer that there is no agreement between the appellant and GMB as envisaged in section 80IA[4](b). However, the proviso to section 80IA(4) provides that where infrastructure facility is transferred by an enterprise which developed such infrastructure facility for the purpose of operating and maintaining the infrastructure facility on his behalf in accordance with the agreement with the Central Government, State Government or Local Authority or any other Statutory Body (GMB), the provision of section 80IA(4) shall apply to the transferee enterprises and the deduction from profit and gains would be available to

such transferee enterprises for the unexpired period during which the transferee enterprises would have been entitled to deduction. The Honourable Madras High Court in the case of CIT VS. Chettinad Lignite Transport Services Pvt. Ltd. in TCA No.741, 1266 of 2009 and 162 of 2015 dated 06/03/2019 upholding the decision of Hyderabad ITAT in the case of Ocean Sparkle Limited has held as under:-

"5. The relevant findings of the learned Tribunal in this regard are quoted below for ready reference:

"8. On a careful consideration of the rival submissions advanced by the parties and from a careful perusal of the orders of the authorities below and the documents placed on record including the precedents relied upon we find that the Department had rejected the assessee's claim for relief u/s 80IA on the ground that the assessee has not satisfied the requirement of sub sec.(4) to sec.80IA. According to the authorities below the assessee had not entered into an agreement with the Central or State Government, local majority or any statutory body for developing or operating and maintaining or developing operating and maintaining a new infrastructure facility. For rejecting the assessee's claim another reason adopted by the Department is that operation and maintenance of the Lignite Transport System is not an infrastructure facility eligible for relief u/s 80IA and further that the assessee had only an agreement with ST-CMS and therefore it is not entitled to sec. 80IA relief. However, while going through the orders of the authorities below particularly with regard to the contract with Railways, the Department concluded that there was only approval from the Railway authorities to put up the rail track, sidings etc. notwithstanding the fact that the Railways has recognised the assessee as a contractor. Impliedly the Department has accepted the fact that the assessee has provided "Infrastructure facility" to the specified authority. The only doubt in the mind of the Department was that there was no existence of direct contract between the assessee and the Railways. The Department proceeded further to conclude that there was no contract as envisaged under sec.80IA. As rightly pointed out by the lid. Counsel for the assessee, the proviso was never attempted to be deliberated upon whereas the assessee relies only on the proviso to claim the relief u/s 80IA as if no transfer had taken place. To maintain a rail system and operating and maintain such infrastructure facility as defined and the original ST-CMS agreement will hold good to were of the

proviso to sec 80IA(4). This proviso has to be read along with CBDT Circular dated 14.09.1999 cited supra, clearly brings the assessee as one entitled to claim deduction u/s. 80IA of the Act particularly in view of proviso to sub-are (4) The performed the contract according to the terms agreed upon is not in dispute. Once we are satisfied that the services rendered by the arrester were on integral and inseparable part of operation and maintenance of a Lignite Transport System and therefore, the assessee's claim that it had complied with the requisite conditions specified under the proviso, and is entitled to deduction under sec. 80-IA in terms of proviso to sub-sec (4) accepted. As rightly claimed by the Ld. Counsel for the assessee the decision of the Hon'ble Supreme Court in the case of Bajaj Tempo Ltd. (supra) is squarely applicable the facts of the present case and would come to the assessee's rescue. For coming to the conclusion that the assessee is eligible for deduction under sec 501A in terms of proviso to sec. 8014(4), we also derive support from the decision of the Hyderabad Bench of the Tribunal in the case of Ocean Sparkle Lid. v. DCIT, 99 TTJ (Hyd) 582, wherein under similar set of facts the Tribunal concluded as under

"Proviso to sec.801A(4) does not require that there should be a direct agreement between the transferee enterprise and the specified authority, the assessee-company engaged in operation and maintenance of port infrastructure which was transferred by the developer to the assess in accordance with the agreement with the specified authorities was eligible for deduction under sec.80IA." Under the above circumstances, we set aside the orders of the authorities below and direct the AO to allow the claim of the assessee for deduction under sec 80IA of the Act

"9. The learned Tribunal, however, in our opinion, rightly applied the Proviso to Sec 80IA(4) of the Act and held that since the Assessee was recognized as contractor for these railway sidings, which undoubtedly fell under the definition of infrastructure facility, a was entitled to the said benefit under Section 80IA of the Act. The grounds on which the Assessing Authority denied the said benefit to the Assessee ignoring the effect of Proviso to Section 80IA(4), therefore, could not be sustained. The learned Tribunal, in our opinion, has rightly held that the Proviso does not require that there should be a direct agreement between the transferee enterprise and the specified authority for availing the benefit under

Section 80IA of the Act. There is no dispute before us that the Assessee was duly recognised as transferee or assignee of the principal contractor Mis ST-CMS Company Private Limited and was duly so recognised by the Railways to operate and maintain the said railway sidings at Vadalur and Uthangalmangalam Railway Stations The findings of fact with regard to the said position recorded by the learned Tribunal are therefore, unassailable and that clearly attracted the first Proviso to Section 80IA (4) of the Act."

In view of the above, the appellant is eligible for deduction as per proviso to section 80IA(4). AO is, therefore, directed to allow the claim according to proviso to section 80IA(4). The ground of appeal is accordingly allowed.

4. Disallowance of depreciation on the Infrastructure Usage

Facility: The Assessing Officer has made the disallowance of claim of depreciation of Rs.4,27,45,839/- on the "Infrastructure Usage Facility' on the ground that depreciation is being claimed by the assessee/Lessee as well as the Lessor/M/s. Adani Port and Special Economic Zone Limited for the same assets. Assessee has submitted that it has acquired Infrastructure Usage Facility rights from APSEZ to Operate its container operation in Mundra Port area in the Financial Year 2003-04 relevant to Asst. Year 2004-05. Assessee further submitted that Infrastructure Usage Facility rights as acquired by the assessee became part of block assets of intangible assets, since then and depreciation is being claimed on Written Down Value [WDV] methods on such block of assets of intangible assets. Assessee further contended that depreciation has been allowed by the CIT(A) in the immediately preceding year in A.Y. 2014-15 and earlier years, which were confirmed by the Coordinate Bench of the Tribunal in the Departmental appeal for A. Y. 2012-13 to 2014-15 in ITA No.1117, 2171 & 2172/Ahd/2017 vide

order dated 28/06/2019 has dismissed the departmental appeal allowing the depreciation.

4.1. On appeal against this issue the Ld CIT[A] has held that it is seen that the depreciation on Infrastructure Usage Facility rights has been allowed in all the preceding years by Ld. CIT(A) and Hon'ble ITAT, and therefore the issue is covered in the favour of assessee. In view of the above, the disallowance made by the Assessing Officer is deleted. The ground of appeal is accordingly allowed.

5. Aggrieved against the appellate order both the parties are in appeal before us. The Grounds of Appeal raised by **the Assessee in ITA No.1613/Ahd/2019 relating to the Asst Year 2015-16** reads as under:

1 That in the facts and circumstances of the case as well as in law, Hon'ble CIT(A) ought not to have upheld the disallowance to the extent of Rs.25,32,679/- u/s 14A of the IT Act, 1961.

2 That in the facts and circumstances of the case as well as in law Hon'ble CIT(A) has erred in confirming the view of the ld. AO that the Appellant has not entered into an agreement with the GMB as per the requirement of section 80IA(4)(1)(b) of the IT Act.

5.1. The **Additional Grounds of Appeal raised by the Assessee** reads as under:

On the facts and in the circumstances of the case and in law, the Appellant prays that:

1. The Dividend Distribution Tax ('DDT') paid under section 115-O of the Income-tax Act, 1961 ('Act) on dividends declared and paid by the Appellant to its parent foreign shareholder who is a tax resident

of Mauritius, is in excess of the rate provided under Article 10 of the India-Mauritius DTAA.

2. The Assessing Officer be directed to grant refund in respect of the tax paid under section 115-0 of the Act in excess of the rate prescribed under the India-Mauritius DTAA.

3. The Assessing Officer be directed to grant refund of the excess DDT paid by the Appellant, since as per the provisions of Section 237 of the Act read with Article 265 of the Constitution of India, only legitimate tax could have been retained.

6. The Grounds of Appeal raised by **the Revenue ITA No.1711/Ahd/2019 relating to the Asst Year 2015-16** reads as under:

1. The Ld. CIT(A) has erred in law and on facts in holding that the depreciation on the "Infrastructural facility was to be allowed in Assessment year since it had been allowed in earlier assessment year.

1.1 The Ld. CIT(A) has erred in law and on facts in allowing depreciation on Infrastructural usage facility @ 25% treating it as intangible asset when it was not an intangible asset as described in Section 32 of IT Act and thus deleting the addition of Rs.4,27,45,839/- made by the Assessing Officer.

1.2 Without prejudice to the above, the Ld. CIT(A) has erred in law and on facts in allowing depreciation on asset of which the assessee is not an owner without considering the fact that actual owner i.e. Adani Port & SEZ Ltd. has also claimed depreciation on the asset resulting in double deduction of depreciation on the same assessee.

2. The Ld CIT(A) has erred in law and on facts in deleting the disallowance of Rs. 35,00,000/- u/s 14A of the IT Act

2.1 The Ld. CIT(A) has failed to appreciate that the onus lies on the assessee to demonstrate that it had interest free funds available with it for making such investment and no other way around.

3. The Ld.CIT(A) has erred in law and on facts in allowing the deduction u/s 80IA(4) of the Act to the assessee amounting to Rs 295,58,08,285/-which was not allowed to the assessee by the Assessing Officer.

4. *The appellant craves leave to amend alter any ground or add a new ground, which may be necessary.*

7.1. The **Additional Grounds of appeal raised by the Revenue** reads as under:

1. *The Ld. CIT(A) has erred in directing the A.O. to allow the claim of deduction u/s. 801A(4) according to the proviso to section 801A(4), thus effectively setting aside the issue to the Assessing Officer although the CIT(A) has no power to set aside any order of the Assessing Officer.*

2. *The Ld. CIT(A) has erred in holding that the appellant is eligible for deduction as per proviso to sec. 801A(4) as a transferee without appreciating the following facts:*

(i) *that the proviso is applicable only to the cases where infrastructure facility is transferred by the transferor only after the facility has been developed by the transferor as held by the Hon'ble Gujarat High Court in the case of PCIT Vs. Nila Baurat Engineering Limited (2017) 399 ITR 242, wherein the Hon'ble High Court held that as per the proviso, the transferee would step in the shoes of the transferor for the limited purpose of operation and maintenance and that this provision itself envisages that in a given project the developer and person who maintains and operates may be different.*

(ii) *that in the appellant's case the transferor M/s. Gujarat Adani Port Ltd. had not developed the infrastructure facility and the development was to be done by the transferee.*

(iii) *that the appellant is involved not only in operating and maintaining the infrastructure facility but has also developed the same as is evident from the letter dated 30-09-2002 of Gujarat Maritime Board to GAPL and from the replies of the appellant filed during the course of assessment proceedings.*

(vi) *that the appellant itself admitted that it was the developer of the infrastructure facility by submitting that the assessee company has commenced its business during FY 2003-04 and it is eligible to claim deduction for the entire period of 10 years out of 15 years commencing from FY 2003-04 being the initial assessment year and this submission is also reproduced on page 42 of the order of CIT(A).*

3. The Ld. CIT(A) has erred in holding that the appellant is eligible for deduction as per proviso to sec.80IA(4) as a transferee even for AY 15-16 without appreciating that the concept of initial assessment year only applies to the developer and not to the transferee and that the deduction from profits and gains would be available to such transferee enterprise only for the unexpired period during which the transferor enterprise would have been entitled to the deduction, if the transfer had not taken place and as such as a transferee, in any case, the appellant could not have claimed the deduction beyond AY 2013-14.

4. The Ld. CIT(A) has erred in holding that the appellant is eligible for deduction as per proviso to sec. 80IA(4) by observing that the infrastructure facility was developed by Adani Port SEZ Ltd and it was handed over to the appellant company to operate and maintain the container terminal which fact is in contradiction to the appellant's own submission that on perusal of letter dated 30th September, 2002 of Gujarat Maritime Board it is evident that all structures and assets for development of container terminal and other infrastructure facilities are to be created by the assessee company on its own and further submitted that on perusal of audited financial statements, it is evident that the assessee company owns the container terminal port and related infrastructure at Mundra and has been operating and maintaining the same since F.Y.2003-04, which submission has also been reproduced on page 43 of the appellate order.

8. Since the Grounds raised by both the parties are inter connected the same are disposed by considering the issue wise grounds as follows:

9. First issue is Disallowance u/s. 14A of the Act: The assessee has earned dividend income of Rs.25,32,679/- which is exempt from tax but the assessee has not allocated any expenditure to earn the exempt income. Therefore, AO invoking the provisions of section 14A of the Act made disallowance of Rs.35,00,000/- as per Rule 8D. On appeal Ld CIT[A] restricted the disallowance to the extent of dividend income earned by the assessee.

10. This issue is no more res-integra since this issue is settled by the Hon'ble Supreme Court in the case of Max Opp Investment Limited (2018) [402 ITR 640] has also upheld the decision of Punjab & Haryana High Court in the case of CIT Vs. Hero Cycles where disallowance u/s.14A has been restricted to the exempt income. In view of the above, the disallowance u/s. 14A is restricted to exempt income of Rs.25,32,679/= only. **Thus the Ground No.1 raised by the Assessee and Ground No.2 raised by the Revenue are hereby dismissed.**

11. **Second issue is Disallowance u/s. 80IA(4):** The assessee claimed deduction of Rs.295,58,08,285/-u/s. 80IA(4) of the I.T. Act for operating and maintaining the infrastructure facility. The AO has disallowed the claim u/s. 801A(4) on the ground that assessee has not satisfied the condition laid down in section 80IA(4)(i)(b) of the Act. Ld CIT[A] after considering various orders passed by the Tribunal and High Courts allowed the issue in favour of the assessee.

11.1. Ld Senior Counsel for the assessee submitted that this issue is also covered in favour of the assessee by the High Court of Madras in the case of CIT Vs. A.L. Logistic Pvt. Ltd. [374 ITR 601] and CIT -Vs- Chettinad Lignite Transport Services Pvt. Ltd. in TCA No.741,1266 of 2009 and 162 of 2015 dated 06-03-2019 upholding the decision of Hyderabad ITAT in the case of Ocean Sparkle Limited wherein it was held that assessee is eligible for deduction u/s.80IA(4) of the Act. Per contra Ld CIT DR appearing for the

Revenue supported the order passed by the AO and requested to uphold the addition.

12. We have given our thoughtful consideration and perused the materials available on record. Ld CIT[A] considered the issue in detail including the Sub-Concession Agreement entered between the parties and held that the Port was developed by Adani Port Special Economic Zone and it was handed over to the assessee company to Operate and Maintain the Container Terminal as per Clause (G) & (H) of the Agreement. The Assessing Officer has denied the claim of without considering the proviso of Section 80IA(4) of the Act. Sub Concession Agreement was in continuation and part of Concession Agreement between GMB and APSEZ, and therefore, in view of decision of Madras High Court in the case of CIT Vs. A.L. Logistic Pvt. Ltd. judgement dated 23-12-2014 reported in 374 ITR 601 and later judgement dated 12-03-2019 of the Hon'ble High Court of Madras in the case of CIT -Vs- Chettinad Lignite Transport Services Pvt. Ltd. reported in 415 ITR 0107 (Mad) wherein it was held as follows:

"... 8. From a reading of the aforesaid Provisos to Section 80IA(4), it is clear that the Legislature intended to extend the said benefit under Section 80IA of the Act to an enterprise involved in (i) developing or; (ii) operating and maintaining or; (iii) developing, operating and maintaining any infrastructure facility. The term "infrastructure facility" has been defined in the Explanation and the same includes a toll road, a bridge ora rail system, a highway project, etc. These are, obviously, big infrastructure facilities for which the enterprise in question should enter into a contract with the Central Government or State Government or Local Authority. However, the Proviso intends to extend the benefit of the said deduction under Section 80IA of the Act even to a transferee or a contractor who is

approved and recognised by the concerned authority and undertakes the work of the said development of infrastructure facility or only operating or maintaining the same. The Proviso to sub-section (4) stipulates that subject to the fulfillment of conditions, the transferee will be entitled to the said benefit, as if the transfer in question had not taken place. It has been found by the Assessing Authority himself, in the present case, that the present Assessee M/s.Chettinad Lignite Transport Services Private Limited under an Agreement dated 16.04.2002, captioned as Lignite Transport System with M/s.ST-CMS Electric Company Private Limited, had undertaken the work of developing the said railway sidings and was operating and maintaining the same. The only ground on which, the Assessing Authority denied the said benefit was that the Assessee himself did not enter into any such contract with the Railways or with the Central Government.

9. The learned Tribunal, however, in our opinion, rightly applied the Proviso to Section 80IA(4) of the Act and held that since the Assessee was recognised as contractor for these railway sidings, which undoubtedly fell under the definition of "infrastructure facility", it was entitled to the said benefit under Section 80IA of the Act. The grounds on which the Assessing Authority denied the said benefit to the Assessee ignoring the effect of Provisos to Section 80IA(4), therefore, could not be sustained. **The learned Tribunal, in our opinion, has rightly held that the Proviso does not require that there should be a direct agreement between the transferee enterprise and the specified authority for availing the benefit under Section 80IA of the Act.** There is no dispute before us that the Assessee was duly recognised as transferee or assignee of the principal contractor M/s.ST-CMS Company Private Limited and was duly so recognised by the Railways to operate and maintain the said railway sidings at Vadalur and Uthangalmangalam Railway Stations. **The findings of fact with regard to the said position recorded by the learned Tribunal are, therefore, unassailable and that clearly attracted the first Proviso to Section 80IA(4) of the Act."**

12.1. Thus the findings arrived by the LdCIT[A] following High Court judgements does not require any interference.

12.2. Next let us consider **Additional Ground raised by the Revenue** namely the assessee company has commenced its business during FY 2003-04 and it is eligible to claim deduction for the entire period of 10 years out of 15 years commencing from FY 2003-04 being the initial assessment year and the **assessee could not have claimed the deduction beyond AY 2013-14.**

12.3. The assessee submitted even before the AO that the assessee commenced commercial operations during F.Y. 2002-04 and submitted copy of first invoice raised by it showing proof of business commenced. Assessee is eligible to claim deduction for 10 years out of 15 years commencing from A.Y. 2003-04. However assessee has not claimed the deduction in the initial year due to negative gross total income on account of unabsorbed depreciation. However for the present A.Y. 2015-16 since there was positive income the assessee claimed the deduction and drawn to the Form No. 10 CCB along with relevant Annexures issued by Chartered Accountant showing calculation of claim of deduction u/s.80IA of the Act. We do not find any merits in this Ground raised by the Revenue, since the assessee submitted all the required details and relevant statutory Form No.10 CCB along with the Return of Income and the claim is made within outer line of 15 years, the above submissions are very much recorded in page 20 and 21 of the assessment order passed by the Ld AO. **Therefore the above additional grounds raised by the Revenue are devoid of merits and liable to be rejected.**

12.4. In the result the Ground No.2 raised by the Assessee is allowed and the Ground No.3 and Additional Grounds raised by the Revenue are hereby dismissed.

13. Third issue is Disallowance of depreciation on the Infra Structure Usage Facility: The Ld AO made disallowance of the claim of depreciation of Rs.4,27,45,839/- on the "Infrastructure Usage Facility' on the ground that depreciation is being claimed by the Assessee/Lessee as well as the Lessor/M/s. APSEZ Ltd for the same assets. Ld Senior Counsel for the assessee submitted that this issue is covered in favour of the assessee in assessee's own case by the Co-ordinate Bench in ITA Nos. 1117, 2171 & 2172/Ahd/2017 vide order dated 28.06.2019 wherein held as follows:

7. We have heard both the sides and perused the material on record. The assessee has claimed depreciation of Rs. 10,13,23,469/- on infrastructure usages facility on written down value of Rs. 405,23,93,877/- treating the same as intangible asset. The assessee company was using infrastructure facility developed by Mundra Port and Special Economic Zone on account of exclusive right has been given to the assessee company to carry out its terminal operation work. It is further noticed that right from the inception of the assessee company for i.e. assessment year 2004-05 till assessment year 2011-12 the same claim of depreciation has been allowed to the assessee company since assessment year 2004-05. The assessee has entered into aforesaid asset into the block of plant and machinery as intangible asset. The assessee has acquired infrastructure usages facility right from Mundra Port Trust to operate its container operation in Mundra area in the F.Y. 2003-04 relevant to assessment year 2004-05. It is noticed that infrastructure usages facility is a sort of license given by Mundra Port to the assessee company to operate its container operation in Mundra Port area. The assessee has got the right to use and maintain services of certain infrastructural facilities as set out in the infrastructure usages agreement. The assessee has

been showing this right on the asset side of the balance sheet and claimed the same as intangible asset on which the depreciation was claimed. With the assistance of Id. representatives, we have gone through the various judicial pronouncements referred by the Id. counsel. Co-ordinate Bench of the ITAT vide ITA No. 1253/Ahd/2016 in the case of assessee itself pertaining to assessment year 2009-10 while adjudicating the order passed u/s. 263 by the Pr. CIT for disallowing the claim of depreciation on the similar issue has held that claim of the assessee for depreciation on infrastructural facility existed since 2004-05 should not be disturbed after referring a number of judicial pronouncements. In the case of ACIT vs. S.K. Patel Family Trust 33 taxman.com 678, the Hon'ble Gujarat High Court has held that wherein depreciation on certain asset had been allowed in earlier years could not be disallowed merely on the ground that such assets were not put to use during the year under consideration. In the case of HSBC Asset Management India Pvt. Ltd. vs. Deputy Director of Income Tax vide ITA No. 2028/ Mum/2019, the ITAT Mumbai has held that the assessing officer cannot dispute the opening WDV of block asset after having allowed the depreciation in the immediately preceding years and does not open to the assessing officer to take different stand. In the light of the judicial findings and the facts reported in the finding of Id. CIT(A), we do not find any infirmity in the decision of Id. CIT(A). Accordingly, this ground of appeal of the revenue is dismissed.

14. Ld CIT DR could not contravene the above submissions of the Assessee Counsel and also not placed any decision or stay order or judgement changing the above decision passed by the Co-ordinate Bench of this Tribunal. Therefore respectfully following the above judicial precedents the **Ground No.1 raised by the Revenue is devoid of merits and liable to be dismissed.**

15. Next issue is Additional Ground raised by the Assessee namely Dividend Distribution Tax [herein after referred as DDT] paid u/s.1150 to parent foreign shareholder, who is a tax resident of

Mauritius, is in excess of rate provided under Article 10 of India-Mauritius DTAA and consequently assessee prays to direct the AO to grant refund of excess DDT paid u/s.115O of the Act.

15.1. Ld Senior Counsel Mr. S.N. Soporkar appearing for the assessee fairly submitted that this is covered against the assessee by the decision of the Special Bench of ITAT in the case of DCIT Vs- Total Oil India [P] Ltd. reported in [2023] 149 taxmann.com 332 [Mum Spl Bench] wherein it was held that DTAA does not get triggered at all when a domestic company pays DDT u/s.115O, where contracting states to a treaty intend to extend treaty protection to domestic company paying DDT, only then, domestic company can claim benefit of DTAA, if any. However to keep this alive the assessee has raised this Additional Ground before us. Since Special Bench decision is in favour of the Revenue, respectfully following the same, **Additional Grounds raised by the Assessee is hereby dismissed.**

16. In the combined result the appeal filed by the Assessee in ITA No.1613/Ahd/2019 is partly allowed and the appeal filed by the Revenue in ITA No.1711/Ahd/2019 is dismissed.

17. ITA No.1916/Ahd/2019 filed by the Assessee and ITA No. 1872/Ahd/2019 filed by the Revenue for the Asst. Year 2016-17. Solitary Ground by the assessee and Ground No.3 by the Revenue is relating to claim of deduction u/s.80IA[4] of the Act. This issue is already as dealt by us in paragraph 11 to 12.4 of this common order, further there is no change in facts but change only in the figures. Respectfully following the above decision **Ground No.1**

raised by the Assessee is allowed and the Ground No.3 and Additional Grounds raised by the Revenue are hereby dismissed.

18. **Ground No.2 raised by the Revenue** is the disallowance u/s. 14A of Rs.48,27,755/- was deleted since no dividend income earned by the assessee. Ld. CIT(A) followed Jurisdictional High Court Judgment in the case of Cortech Energy Pvt. Ltd. wherein it was held that no disallowance is called for when there is no exempt income by the assessee. Respectfully following the above decision **Ground No.2 raised by the Revenue are hereby dismissed.**

19. **Ground No.1 raised by the Revenue** is the disallowance of depreciation on the Infra Structure Usage Facility. This issue is already dealt by us in paragraph 13 and 14 of this common order, further there is no change in facts but change only in the figures. Respectfully following the above decision **Ground No.1 raised by the Revenue are hereby dismissed.**

20. In the combined result the appeal filed by the Assessee in ITA No. 1916/Ahd/2019 is partly allowed and the appeal filed by the Revenue in ITA No.1872/Ahd/2019 is dismissed.

Order pronounced in the open court on 22-08-2024

Sd/-
(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER True Copy
Ahmedabad : Dated 22/08/2024

Sd/-
(T.R. SENTHIL KUMAR)
JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue

3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद