

**IN THE INCOME TAX APPELLATE TRIBUNAL  
AHMEDABAD BENCHES, AHMEDABAD**

**BEFORE: SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER  
AND  
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

**ITA Nos. 2498/Ahd/2013 & 828/Ahd/2016  
Assessment Years: 2010-11 & 2011-12**

BGSCTPL – MSKEL Consortium, v. Income-tax Officer,  
2<sup>nd</sup> Floor, “MSK”, Passport Office Ward – 10(1), Ahmedabad.  
To Panjrapole Road, Ambawadi,  
Ahmedabad.  
**PAN: AAAAB7618L**  
(Appellant) (Respondent)

**ITA Nos. 829 & 830/Ahd/2016  
Assessment Years: 2010-11 & 2011-12**

JMC – MSKE (JV), 2<sup>nd</sup> Floor, v. Income-tax Officer,  
“MSK”, Passport Office Ward – 9(2), Ahmedabad.  
To Panjra Pol Road, Ambawadi,  
Ahmedabad.  
**PAN: AAAAJ5088N**  
(Appellant) (Respondent)

Assessee by : S/Sh. D.M. Rindani and  
Sh. Chintan Shah, RRs.  
Revenue by : Sh. Ashok Kumar Suthar, Sr. DR

Date of hearing : 14/08/2024  
Date of Pronouncement: 07/11/2024

**ORDER**

**PER BENCH:**

These four appeals filed by two separate assesseees have arisen from separate appellate orders passed by learned Commissioners of Income-tax (Appeals), Ahmedabad for the assessment years, 2010-11 & 2011-12.

2. Since facts and issues involved in all these four appeals are similar which is agreed to by both the rival parties before us and that these four appeals were heard together, we deem it appropriate to dispose of all these appeals by this consolidated order for the sake of brevity and convenience. We will first take up the appeal of the assessee in ITA No. 2498/Ahd/2013 for A.Y. 2010-11, and our decision in this appeal shall apply *mutatis mutandis* to remaining three appeals.

**ITA No. 2498/Ahd/2013 (A.Y. 2010-11):**

3. This appeal filed by the assessee has arisen from the appellate order dated 23.08.2013 passed by Id. CIT(Appeals)-XVI, Ahmedabad in Appeal No. CIT(Appeals)-XVI/ITO/Wd. 10(1)/272/12-13 for the assessment year 2010-11, which, in turn, has arisen from the assessment order dated 07.02.2013 passed by Assessing Officer u/s. 143(3) of the

Income-tax Act. Revised grounds raised by assessee in this appeal read as under :

“1. The Learned Commissioner of Income Tax (Appeals) XVI, Ahmedabad erred in sustaining the order of the Income Tax Officer, Ward-10(1), Ahmedabad denying claim for deduction of Rs.2,12,15,873/- u/s. 80-1A (4) of the Income Tax Act, 1961.

2. The Learned Commissioner of Income Tax (Appeals) - XVI, Ahmedabad erred in treating the appellant as a contractor of infrastructure facility and not as developer thereof, in the facts and circumstances of the nature of activities carried out by the appellant under the agreement with Airport Authority of India for the airport at Bhopal.

3. The Learned Commissioner of Income Tax (Appeals) XVI, Ahmedabad also erred in relying upon the decision of Hon'ble High Court of Gujarat in the case of Katira Construction vs. Union of India dated 04.03.2013 and further failed to appreciate that, with due respect, the said decision did not give any ruling or finding with regard to the issue of developer vs. contractor in the facts of any case, much less that of the appellant herein.

The appellant craves leave to add, amend, alter, withdraw any ground of appeal anytime up to the hearing of this appeal.”

4. Brief facts of the case are that the assessee has filed return of income on 05.10.2010 declaring income of Rs.2,18,75,320/-. Thereafter, revised return of income was filed by the assessee on 06.10.2010 declaring income of Rs.6,59,450/-. The case of the assessee was selected by Revenue for framing scrutiny assessment and statutory notices u/s. 143(2) & 142(1) were issued by the Assessing Officer to the

assessee. Assessee is a joint venture entity between M/s. B.G. Shirke Construction and Technology Pvt. Ltd. and M/s. M.S. Khurana Engineering Ltd., industrial undertaking engaged in development, operation and maintenance of infrastructure facility. Assessee is an AOP. Under the consortium Agreement, M/s. B.G. Shirke Construction Technology Pvt. Ltd. is to execute 60% of the entire work and remaining 40% of the entire work is to be executed by M/s. Khurana Engineering Ltd. , related to “Construction of a New Expandable Modular Integrated Terminal Building at Raja Bhoj Airport, Bhopal”. The only issue in this appeal is concerning claim of deduction of the assessee u/s. 80-IA(4) of the Income-tax Act. Assessing Officer is of the view that section 80-IA(4) deduction can be claimed with respect to profit derived from eligible undertaking engaged in the development of infrastructure facility, and development of airport is development of infrastructure facility as defined u/s. 80-IA(4). As per Assessing Officer, the assessee is not developer, but a works contractor and hence not eligible for deduction u/s. 80-IA(4) keeping in view Explanation substituted by Finance Act, 2009 w.e.f. 01.04.2000 below section 80-IA(13) of the Act. The Assessing Officer observed that the agreement entered into between BGSCTPL-MSKEL

Consortium and Airport Authority of India (AAI) for work of construction of New Expandable Modular Integrated Terminal Building at Raja Bhoj Airport, Bhopal is referred to as “Contract Agreement”, wherein AAI is referred as “Owner” and the assessee, M/s. BGSCTPL-MSKEL Consortium is referred as “Contractor”. Assessing Officer observed that the assessee is a contractor and has not taken any risk as per the agreement. The Assessing Officer observed that in case of cost escalation, i.e., increase in price of any material or the duty, AAI shall reimburse to the contractor such increase in price or the additional or increased duty paid by the contractor and hence, no risk is assumed by the contractor for the work as per agreement. The Assessing Officer issued show cause notice to the assessee.

5. In reply to show cause notice, the assessee submitted that the assessee is a joint venture entity, which came into existence with an object to bid for Construction of New Expandable Modular Integrated Terminal Building at Raja Bhoj Airport, Bhopal awarded by AAI. Assessee submitted that as per Explanation 1 to section 80-IA(4), infrastructure means a road, bridge, airport, port, inland waterways and inland ports, rail system etc., and the assessee is engaged in development of New

Expandable Modular Integrated International terminal building at Raja Bhoj Air Port, Bhopal which qualifies as the infrastructure facility as defined u/s. 80-IA(4), and hence, the assessee is eligible for claim of deduction u/s. 80-IA(4) of the Act. Assessee submitted that the assessee has filed audit report in Form No. 10CCB from the Chartered Accountants, which is duly submitted in course of assessment proceedings for claiming deduction u/s. 80-IA(4) of the Act. The assessee referred to provisions of section 80-IA(4) and submitted that it is eligible for claim of deduction u/s. 80-IA(4) as it satisfies all the conditions of section 80-IA(4). Assessee submitted that it is not a works contractor, but the assessee is a developer and is not hit by Explanation inserted below section 80-IA(13) of the Act. Assessee submitted that assessee is a developer and is deploying its own funds, equipments and has taken risk and liability from the inception of project till the project is transferred to AAI(owner of the Airport) for operating and maintaining. Thus, it clearly shows that the AAI(Owner) has not imparted all the know-how and resources to the assessee so as to brand the assessee as a “works contractor”, but considerable resources and know-how were generated and deployed in the project from the side of the assessee itself under its own acumen as an entrepreneur and

hence, the assessee is a developer and not a works contractor. Assessee referred to the decision of ITAT Mumbai Bench in the case of ACIT vs. Bharat Udyog Ltd. (ITA No. 6137/Mum/2005). It was submitted that just because the assessee is referred to as 'Contractor' in the agreement and is reimbursed price escalation it could not be said that the assessee is a contractor and not a developer and hence, the assessee is eligible for deduction u/s. 80-IA(4). Assessee submitted that the assessee did not only undertake the civil construction work but has developed full-fledged Airport with all facilities like Air Conditioning Plant, Installation of Fire Fighting Safety Measure, Full Electrification, Display System etc.. The scope of work itself shows that it was not simple construction but actually developing full-fledged Airport with all facilities as per terms mentioned in the Tender Book already submitted. The work of the assessee also involved work of highly technical and independent nature carried out by the assessee with its own technical skill and taking specific risks by deploying own resources and hence, the assessee is a developer of the said infrastructure facility and is not merely a contractor. It was also submitted that the Explanation below section 80-IA(13) cannot be derogatory or override the main provisions of the Act as held by Hon'ble

Supreme Court in the case of S. Sundaram Pillai & Ors. reported in AIR 1985 (SC) 582. The assessee submitted that it has deployed its own human resources and technical expertise/know-how and these were not supplied by AAI. It was submitted that entire planning of the work has also been designed and carried out by the assessee and the material procured by assessee was consumed in the project using its own know-how by deploying its own resources at its own risk to develop the said infrastructure facility. Thus, in nutshell, it was submitted that the assessee has duly complied with all the conditions for being entitled for deduction u/s. 80-IA(4) and hence, the deduction u/s. 80-IA(4) may be granted. The assessee relied upon the order of ITAT, Rajkot in the case of TARMAT-BEL(JV) in ITA No. 1111/RJT/2010. Assessing Officer rejected the claim of the assessee and observed that AAI has invited applications for short listing of contractors for the work of construction of New Expandable Modular Integrated Terminal Building at Raja Bhoj Airport, Bhopal and the agreement was entered into on 23.02.2018 by M/s. BG Shirke Construction Technology Pvt. Ltd. Pune and M/s. Khurana Engineering Ltd., Ahmedabad, who applied for the said work. The Assessing Officer referred to the terms of the agreement and observed that assessee is a

contractor and the contractors are bound to work as per the conditions of the contract. Assessing Officer referred to several clauses of the agreement and observed that the assessee is being paid upto 90% value of material as secured advances on supply of material as assessed by the Engineer-in-charge and thus, the assessee is not taking any risk. Further, Assessing Officer observed that AAI will reimburse the assessee for any increase in the price of material or the duty as well as the labour cost. Thus, the risk taken by the assessee is minimal. Assessing Officer also observed that the main risk is taken by AAI and there is complete control of AAI by way of supervision, inspection and AAI also has to provide all civil drawings such as plans, elevations, foundation details, slabs etc. and all drawings for electrical, staircase, fire fighting system, CCTV system, flight information display system. AAI has to finalize shades of paints, all plumbing and sanitary fixtures, roofing materials, glazing material specification. AAI has also to issue details of AC system, details of road, pavement, parking etc. The Assessing Officer observed that the rate, volume, quantity, measurement, time schedule everything is specified in the contract and the contract can be cancelled by AAI at short notice. Thus, it was observed that AAI has full control over the projects

such as supervision, grant of approvals, inspection by the AAI before any payment is made to the assessee, hence, full control is exercised by AAI over the project. Performance guarantee in the form of bank guarantee and earnest money of Rs.6,29,41,800/- was given by the assessee, which is nothing in comparison to the contract. Assessing Officer also observed that the AAI was empowered to make alteration, omission, addition or substitution in the original specification, drawings, designs and instructions as may be deemed fit by AAI. The Assessing Officer observed that the assessee has availed/opted for composition scheme under the VAT, which is applicable to works contractor. Thus, after going through all the terms and conditions and nature of the contract, the Assessing Officer was of the view that the assessee is mainly doing the work of civil construction as part of the contract and whole project is not completed individually by the assessee- AOP. The project is planned by AAI, work is completed under the supervision and direction of the AAI, payment is made in advance upto 70 to 90% and after completion of the work, final payment is made by the AAI along with cost escalation. Thus, the Assessing Officer denied deduction u/s. 80-IA(4) of the assessee.

6. Aggrieved, the assessee filed first appeal with Id. CIT(Appeals) and made elaborate submissions to justify that the assessee is a developer and is entitled for deduction u/s. 80-IA(4) of the Act. Learned CIT(Appeals), after considering the contention of the assessee rejected the claim of the assessee and held that the assessee is merely a contractor and hence, not eligible for deduction u/s. 80-IA(4).

7. Now, still aggrieved, the assessee has filed second appeal with the Tribunal and at the outset the assessee relied upon the decision of Hon'ble Gujrat High Court in the case of PCIT(Central) v. Monte Carlo Construction Ltd., (R/Tax Appeal No. 786 of 2023), wherein Hon'ble Gujarat High Court has upheld the order of the Ahmedabad-Tribunal and allowed deduction u/s. 80-IA(4). It is also submitted by the learned counsel for the assessee that it is not necessary that entire development of infrastructure facility should be undertaken by one company, and even if part of the Airport is developed, it will be covered by the provisions of section 80-IA(4). It was submitted that the assessee is not a contractor, but a developer. It was submitted that the contract was awarded by AAI in favour of the assessee for development of New Expandable Modular Integrated Terminal Building at Raja Bhoj Airport, Bhopal. Learned

counsel for the assessee drew our attention to the order of the Assessing Officer as well as CIT(Appeals). It was submitted that the assessee is a developer and not a contractor and reliance was placed on the judgment and order of Hon'ble Gujarat High court in the case of Monte Carlo Construction Ltd. (supra). Assessee has filed voluminous paper book with the Tribunal. Attention was drawn to the Tender document issued by AAI and our attention was drawn to several clauses of the said Tender document. Our attention was also drawn to the agreement entered by the assessee with AAI. Assessee also relied upon the judgment and order of Hon'ble Jammu & Kashmir High Court in the case of CIT vs. TRG Industries Pvt. Ltd. (2017) 155 DTR 109 (J&K). The Ld. Counsel for the assessee also relied upon the order of ITAT, Ahmedabad in the case of M/s. N.C.C. – M.S.K.E.L.(JV) v. ITO in ITA No. 2476/Ahd/2010 & ITA No. 231/Ahd/2012 (in which one of us- Hon'ble Judicial Member- was part of the Division Bench who pronounced the order). The Id. Counsel for the assessee also submitted that the assessee has deployed its own technical resources, manpower and invested own funds for development of the project. The assessee has also submitted fund flow statement , and claim is made that the assessee was getting secured advances for

material against Bank guarantee submitted by the assessee. The said bank guarantee can be encashed by AAI in case there is any violation by the assessee of the terms of the agreement. It was also submitted that the assessee has given EMD/performance Bank Guarantee.

8. On the other hand, learned Sr. DR has relied upon orders of the authorities below.

9. We have considered rival contentions and perused material on record including the cited case laws. We have observed that the assessee is an AOP, and is a joint venture consortium of M/s. B.G. Shirke Construction and Technology Pvt. Ltd. and M/s. M.S. Khurana Engineering Ltd., which is claimed to be formed for the purpose of Construction of *New Expandable Modular Integrated Terminal Building at Raja Bhoj Air Port, Bhopal*. The assessee has claimed itself to be engaged in the development of infrastructure facility, and has claimed that it is eligible for deduction u/s. 80-IA(4). The said Airport is owned by Airport Authority of India(AAI) who has entered into an agreement with assessee for Construction of New Expandable Modular Integrated Terminal Building at Raja Bhoj Air Port, Bhopal. Thus, the work is assigned by AAI to the assessee under the agreement entered into

between AAI and the assessee for Construction of New Expandable Modular Integrated Terminal Building at Raja Bhoj Air Port, Bhopal. The facility is to be handed over by the assessee after completion to the AAI (owner of the Airport). Assessee has filed voluminous paper book with ITAT, in which assessee has filed details such as tender documents, contract documents with AAI, fund flow statements, audited accounts, audit report etc. , which are part of the record in file. The only issue, which is before us for adjudication is the claim of deduction u/s. 80-IA(4). Before proceeding further, it will be relevant to reproduce provisions of section 80-IA, which reads as under :

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

**80-IA.** (1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

(2) The deduction 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 or develops a special economic zone referred to in clause (iii) of sub-section (4) or generates power or commences transmission or distribution of power or undertakes substantial renovation and modernisation of the existing transmission or distribution lines :

*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.

(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 an undertaking referred to in clause (ii) or clause (iv) 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 undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such 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:

*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 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 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 or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;
  - (b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;
  - (c) it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995:

*Provided* that 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:

*Provided further* that nothing contained in this section shall apply to any enterprise which starts the development or operation and maintenance of the infrastructure facility on or after the 1st day of April, 2017.

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

- (a) a road including toll road, a bridge or a rail system;
  - (b) a highway project including housing or other activities being an integral part of the highway project;
  - (c) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;
  - (d) a port, airport, inland waterway, inland port or navigational channel in the sea;
- (ii) any undertaking 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, 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 or special economic zone notified by the Central Government in accordance with the scheme framed and notified by that Government for the period beginning on the 1st day of April, 1997 and ending on the 31st day of March, 2006:  
*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 :  
*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, 2011" had been substituted;
- (iv) an 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, 2017;
- (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, 2017:  
*Provided* that the deduction under this section to an 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;
- (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, 2017.  
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;
- (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

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, 2011;

(vi) [\*\*\*]

(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, 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) The deduction under sub-section (1) from profits and gains derived from an undertaking shall not be admissible unless the accounts of the undertaking for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant, as defined in the *Explanation* below sub-section (2) of [section 288](#), before the specified date referred to in [section 44AB](#) and the assessee furnishes by that date the report of such audit in the prescribed form duly signed and verified by such accountant.

(8) Where any goods 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 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 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 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.

*Explanation.*—For the purposes of this sub-section, "market value", in relation to any goods or services, means—

- (i) the price that such goods or services would ordinarily fetch in the open market;  
or
- (ii) the arm's length price as defined in clause (ii) of [section 92F](#), where the transfer of such goods or services is a specified domestic transaction referred to in [section 92BA](#).
- (9) Where any amount of profits and gains of an 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 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:  
*Provided* that in case the aforesaid arrangement involves a specified domestic transaction referred to in [section 92BA](#), the amount of profits from such transaction shall be determined having regard to arm's length price as defined in clause (ii) of [section 92F](#).
- (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.
- (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.
- (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).**
- 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).**

9.2 On perusal of above provisions, it is discernible that the taxpayers are eligible for claim of deduction u/s. 80-IA(4), inter alia, for development of airports. It is not necessary that the taxpayers develop airport as well as operate and/or maintain itself the airport, and even if the airport is developed and handed over for operation to the owner of the infrastructure facility, it will be sufficient compliance of section 80-IA(4), which is itself clear from the language of the provisions of Section 80IA(4)(i). It is also not necessary that entire airport should be developed by a single developer, and rather the owner of the infrastructure facility being Airport, can give multiple contracts to various Developers for development of various facilities within the airport depending upon the specialization held by these developers. However, as per Explanation below section 80IA(13), works contractors who merely perform the works contract shall not be eligible for claim of deduction u/s. 80IA. There is no definition of Developer and Contractor in the Income-tax Act , and the dictionary meaning assigned to both have to be seen. In case of developer, the taxpayer takes the various risk associated with

development by deploying its own finance, manpower, machines, designs, technology and material to develop the infrastructure facility. While in case of works contractor, the contractor merely executes the contract without taking financial and other risk associated with the works under the directions of the contractee. There is a fine thin line between the two, although this line is clearly demarcated which requires investigations of facts. On perusal of the tender documents and agreement along with audited accounts etc. filed by the assessee, we have observed that the assessee has taken sufficient risk and responsibility in development of New Expandable Modular Integrated Terminal Building at Raja Bhoj Air Port, Bhopal. It is observed that the assessee has invested its own funds in giving Performance Bank Guarantee/EMD/Bank Guarantee for release of mobilisation advances etc, with respect to contract awarded in favour of assessee by AAI who is owner of the facility . It is also observed that the assessee has been given secured advance for material by AAI, however, these secured advance for material are backed by security over the unused material and also bank guarantee issued by the banks on behalf of the assessee. These secured advances for material as well mobilisation advances are adjusted

against the running bills submitted by the assessee. Thus, assessee is taking the risk and responsibility for these secured advances against material as well mobilisation advances received by the assessee from AAI. In case of any default etc. assessee will be liable to repay the same to AAI , or AAI can directly invoke the bank guarantee and recover the amount. It is contended by Revenue that the assessee is being paid promptly by AAI on submission of the bills as is evident from the fund flow statement submitted by the assessee and hence the assessee is not taking financial risks, but on perusal of the same and other terms and conditions, funds are released after certification by the Engineers-in-charge of AAI that the work has been performed as per quality specifications specified in the tender documents/agreement entered into by the assessee with AAI, and thereafter, the payments are released in timely manner, which is itself in the interest of AAI to expedite the completion of the work within the stipulated time framework to meet deadlines as well as to avoid cost escalations in case of delays. Said prompt payment does not mean that the assessee has not taken the financial risks associated with execution of development of New Expandable Modular Integrated Terminal Building at Raja Bhoj Airport,

Bhopal. It is also observed that the assessee has not merely carried out construction, but also installed Air conditioning plant, Fire Fighting safety measure, Electrification, Display system etc. within the building developed by the assessee. The assessee has filed copies of agreement entered into by the assessee with AAI, who is the owner of the infrastructure facility being Raja Bhoj Airport, Bhopal , and the assessee has to construct New Expandable Modular Integrated Terminal Building at Raja Bhoj Airport, Bhopal. This agreement is placed in three voluminous paper books filed by the assessee and this agreement/contract No. AAI/Bhopal/W14/Engg./C/ 2008 dated 07.10.2008 stipulates that the assessee is responsible for providing Performance Guarantee equivalent to 5% of contract value for due and proper execution of the contract from the Nationalized Bank/Scheduled Bank (Para-34 of the tender document). 50% of the performance bank Guarantee shall be released by AAI after satisfactory completion of the work, while balance 50% shall remain valid till satisfactory completion of defect liability period as mentioned in Schedule E at S.No. 27 which is 12 months. As per the schedule-C annexed to the tender submitted by the assessee, it is clearly stipulated that no tools and plants will be issued departmentally by AAI. Further, as

per Schedule-E, assessee is required to submit an Earnest Money Deposit of Rs.1,40,40,000/- and there is stipulation of security deposit to the tune of 10% to be deducted from running bills (Schedule-E). It is clearly stipulated in para 14 of General Conditions of Contract (GCC) that the contractor shall arrange at its own expenses all tools, plants and equipments required for execution of the work except the items listed in Schedule-C, which will be given to the assessee on hire by AAI at the rates shown in Schedule itself. It is also stipulated that the assessee shall be responsible for care and custody of the AAI tools and plants and any damage to any of the equipments except fair wear and tear, shall be made good by the assessee to the satisfaction of AAI. It is also provided in para 15 that the assessee shall, at its own expenses, provide all materials required for the works other than those which are to be supplied by AAI. Assessee is required to deposit royalty and obtain necessary permit for collection of stone, sand, red Bajri, Kankar etc. from the Local Authority. It is also stipulated that all materials are to be provided by the assessee in conformity with the specification laid down in the contract. Even it is stipulated that if there is any infringement of any intellectual property rights or any violation of patent etc., the assessee shall be liable for the same

and indemnify AAI for the damages suffered by AAI. It is also stipulated that all charges on account of Octroi, Terminal or Sales Tax and other duties on materials obtained for the construction shall be borne by the assessee. No doubt, some of the materials as provided in para 15(b) is to be provided by AAI as is listed in Schedule-B. All costs of loading, transportation, unloading etc. has to be borne by the assessee. The material, which is supplied by AAI, shall be incorporated in the work and accordingly billed to AAI for which AAI shall make deduction while making payment for the material supplied by AAI. There are other deductions from the running bills such as mobilisation advance released by AAI, secured advance released by AAI and amounts are withheld towards security deposits. The assessee is also made to comply with all the laws relating to employment of labour for the purpose of completion of awarded work and all risks associated such as accidents, damages, claims, violation of any Rules and Regulations shall be borne by the assessee. The assessee, as per clause 25.1 of GCC is required to employ technical staff for the execution of the work. The assessee is also liable to pay liquidated damages for failing to maintain the required progress or complete the work as stipulated in the contract as per para 32 of GCC. The assessee

is also liable to make good and remedy at his own expenses for any defect in the work. It is true that the assessee has to work as per watch and supervision as well instructions of AAI , and has no authority to order any work involving any extra payment by AAI nor to make any variation in work as stipulated in para 27, but all that will not derogate from the fact that the assessee has onerous responsibilities under the contract to develop the facility within the scope of work awarded to it by AAI , but such restrictions are imposed by AAI with a view to maintain quality standards and completion of work within the stipulated specifications , and the progress has to be monitored and controlled by AAI to ensure that airport is developed as per approved plans and specifications as several facilities are to be integrated to make it operational as per the specifications and quality standard. The development of facility of Airport requires approvals from several authorities such as Director General of Civil Aviation, Government of India, Environmental Clearances , Security Clearances etc. and hence the Airport has to be developed by following strict prescribed specifications and quality standards, and there is no scope of variation or compromise on quality standards etc. keeping in view sensitive nature of the facility, and hence strict monitoring , supervision

and control is required over the development by the owner of the Airport. The assessee is also liable for damages, defects or imperfection or rectification as provided in para 42 of GCC. As per para 51, the assessee is eligible for secured advance to the tune of 75% of the assessed value of any material, which are non-perishable, non-fragile and non-combustible and are in accordance with the contract and which have been brought on the site in connection therewith and are adequately stored and protected against damage by weather or other causes but which have not at the time of advance been incorporated in the work. For cement & Bitumen, the assessee is eligible for 90% of the assessed value of the material and the assessee is required to submit comprehensive insurance cover for the cost of material and there is a provision for providing bank guarantee by the assessee to the AAI, which is by way of performance guarantee to the tune of 5% of the contract value issued by Nationalized/Scheduled bank. It is also seen from the fund flow statement that the assessee has been timely paid by AAI on submission of bill, but that does not derogate from the fact that the assessee has taken onerous responsibility and such timely payments are in the interest of AAI itself for timely completion of the work and maintaining strict time schedules and

quality specifications and standards. The assessee is also eligible to get mobilisation advance not exceeding to 10% of the contract (upto Rs. 5 crores) against bank guarantee from the Nationalized/Scheduled banks, which advance carries the rate of interest mentioned at Sl. No. 30 of Schedule-E of NIT, which will be utilized for the purpose of contract only. Thus, the mobilisation advance released by AAI is not free of cost but carries interest costs which is to be borne by the assessee apart from being accountable for such mobilisation advance in case of any deficiency or defect in performance .This mobilisation advance is also a secured advance by way of bank guarantee and it is the assessee who is taking responsibility and liability for the said mobilization advance in favour of AAI. This mobilisation advance is adjusted against the bills submitted by the assessee. This also clearly indicates that the assessee is taking financial risks/responsibility/liability in execution of this contract.

9.3 As per Special conditions of contract (SCC)-Civil work, the assessee has to undertake following civil work :

### **“3. SCOPE OF WORK**

#### **3.1 Civil Work**

i) Construction of New expendable modular Integrated Terminal Building i/c basement floor.

- ii) Construction of new car park area.
- iii) Construction of Substation, A/C plant room and related services
- iv) Construction of connecting corridor of Aerobridges.

### 3.2 Electrical Work

- i) Internal & External Electrification.
- ii) Internal wiring & conduiting for Sub-Station & AC Plant Building.
- iii) Fighting, Fire Detection & Alarm System.
- iv) Fire HVAC/BMS
- v) Conveyors, FIDS, CCTV and PA system
- vi) Singnages, escalators and Elevators.”

As could be seen that the assessee is not merely doing civil construction work but an integrated development work of New Expandable Modular Integrated Terminal Building at Raja Bhoj Airport at Bhopal.

9.4 The assessee as per SCC para-19 is required to set up at its own cost fully furnished and adequately equipped field laboratory at site and maintain the same by providing adequate technical staff for upkeep of the said laboratory and the specifications of the equipment's for laboratory are stipulated in para 19 of the SCC and it is set up for the purpose of Engineers-in charge of AAI to do necessary testing of the samples to check and verify that it meets stipulated specifications and quality standards. Assessee is also required to make its own arrangement for storage of materials, machines etc. at his own cost.

9.5 Similarly, as stipulated in SCC-Electrical, the assessee is required for construction of Integrated Terminal Building for Domestic/International Operations at Bhopal Airport with following special condition:

“This tender is for providing Integrated Terminal Building for Domestic/International Operations at Bhopal Airport. SH: Civil, Sanitary Plumbing, Internal & External Electrification, sub station equipments, HVAC with BMS, PA & CCTV System, FIDS System, Escalators & Elevators, Conveyor Belts etc.”

9.6 It is also stipulated in para-4 of SCC-Electrical that on award of work, the assessee shall prepare and furnish the shop drawings for approval to the Engineer-in-charge before execution as stipulated as under :

**“4. DRAWINGS**

On award of work, the successful tenderer shall prepare and furnish the shop drawings for approval to the Engineer-in-charge before execution. Such drawings shall be based upon item specifications, local laws and regulations for the following works.

- a) Internal & External Electrification including UPS system.
- b) Air-conditioning & BMS system.
- c) Fire Alarm, Fire fighting including sprinkler system
- d) Public Addressing System
- e) FIDS System
- f) CCTV System
- g) Conveyors Belts, Escalators & Elevators
- h) Sub station equipments

The shop drawings for complete systems shall be submitted within one month of placement of work order. The contractor shall not proceed with the installation works until the drawings are approved.”

9.7 The assessee has to hand over four sets of “AS – Built” drawings to AAI on completion of work as stipulated in para 27 of SCC-Electrical. It is also stipulated in para 42 that the assessee shall be continued to be liable for 12 months from the date of handing over of site for all types of equipments and installation to be free from defective workmanship or materials and the assessee is liable to rectify any defect/replace material at its own cost. The materials to be supplied by the assessee shall be in conformity with various standards prescribed by Govt. Authorities such as BS, ISI etc.

9.8 The assessee has also submitted its audited accounts along with audit report in Form No. 10CCB and copy of ITR filed with the Revenue. Perusal of the same will reveal that the contribution of the Members of AOP as on 31.03.2010 is of Rs.83,91,879/- while there are loans to the tune of Rs.4,23,33,194/-. The loans were by way of secured advances from AAI to the tune of Rs.4,23,33,194/-. We have already seen that the secured advances were released by AAI to the assessee against security of the material which is brought to site by the assessee, and further there are bank guarantee furnished by the assessee from Nationalised/Scheduled Bank in favour of AAI. Thus, the assessee is responsible and liable for

these secured advances received from AAI. Copies of bank guarantee of Rs.5 crore(Rs. 1 crores each) for lump sum advance, issued by IDBI Bank Limited in favour of AAI on behalf of the assessee is placed in paper book at page No. 79-96. Copies of two performance bank guarantee of Rs.3,14,70,900 each, issued by IDBI Bank Limited in favour of AAI on behalf of the assessee is placed in paper book at page No. 72-76. Thus, the assessee has taken the responsibility for the secured advances/mobilisation advances released by AAI in favour of the assessee as well for performances under the contract. It is also stipulated in the agreement entered into by the assessee with AAI that no construction, equipment will be supplied by the AAI and the assessee has to arrange for all. Even DG sets and pumps and generators will also be provided by the assessee at the site. Even water and power has to be arranged/ supplied by assessee at its own cost. The assessee has placed on record fund flow statement, which is summary of running account bill and amounts received from AAI at page 248 of the paper book. On perusal of the same, it is observed in brief that the assessee has been given mobilisation advance by AAI as well as secured advance, but these advances are secured advances and the assessee is taking full financial

risks and responsibility for these advances. Further, these mobilisation/secured advances are adjusted against the running bills submitted by the assessee. We have also perused the running bills as well as the ledger account submitted by the assessee in the paper book.

9.9 The assessee has also relied upon the judgment and order of Hon'ble Gujarat High Court in the case of *PCIT(Central) v. Monte Carlo Construction Limited R/Tax Appeal 786 of 2023*, wherein Hon'ble Gujarat High Court dismissed the appeal of Revenue and upheld the order of ITAT, Ahmedabad in the case of Monte Carlo Construction Limited in *ITA no. 1544/Ahd/2008* wherein Ahmedabad-Tribunal allowed the deduction u/s 80IA(4) by holding that the taxpayer is a developer, wherein Hon'ble Gujarat High Court held that no substantial question of law arises and dismissed the appeal of the Revenue and allowed the deduction u/s 80IA(4) ,by holding as under:

3.7. The Tribunal after considering the submissions of the assessee and after analysing the facts of the case arrived at the following conclusion:

"11.16 On the detailed analysis of the above project, we find that the assessee meets the criteria laid down for the developer as discussed above. As such, the assessee was to make detailed drawings, design calculations/fabrication etc. at its own cost. Further, the assessee is also responsible for arranging methods of the execution of work along with detailed drawings, sketches, furnishing the details of sufficient plants, equipment, and labor. The assessee has to arrange the land for a temporary site office, office laboratory, parking yard, store yard,

labor camp, workshop etc. The assessee was duty bound to protect the environment on and off the staff site and avoid the damage or nuisance etc. to the persons or to the property of the public. The assessee was to maintain at its own cost sufficient experienced supervisory staff required for the work and arrangement of their housing. The assessee was to have the field laboratory for the purpose of testing materials. The assessee has to arrange electric power and water supply. The assessee was also under the obligation to provide traffic safety arrangements like sign board, speed limit speed breakers, diversion board, etc. Besides the above, the assessee was to pay the liquidated damages in case of delay in the completion of project and other defaults.

11.17 The purpose for which the provisions of section 801A (4) were brought under the statute were achieved in the given facts and circumstances. Thus, the fact that the assessee deploys its resources (material, machinery, labour etc.) in the construction work clearly exhibits the risks undertaken by the assessee. Further, the tender document as discussed above has clearly demonstrated the various risks undertaken by it. The assessee was to furnish a security deposit to the employer and indemnify at the same time for any losses/damage caused to any property/life in course of execution of works. Further, the assessee was responsible for the correction of defects arising in the works at its own cost. For that purpose, the MPRDCL retained the money payable to the assessee as a measure to ensure the quality of the work and to make liable the assessee in the event of a defect, if any. Thus, it cannot be said that the assessee had not taken any risk in the given facts and circumstances especially when the assessee has undertaken the project as a whole for the development of the road right from the beginning till the end. Thus, on perusal of the terms and conditions in the tender documents furnished by the assessee, it is clear that the assessee was not a works contractor simply but a developer and hence, the explanation to section 80- IA(13) does not apply to the assessee.”

3.8. The Tribunal also dealt with the contention raised on behalf of the Revenue with regard to the issue of award of contract by the MPRDCL, a nodal agency being wholly owned undertaking of the Government of Madhya Pradesh as such contention was raised that the assessee was only awarded the works contract and therefore no development was undertaken by the assessee. The Tribunal observed as under:

“11.25. The next aspect of the case is that the impugned project for the road development as discussed above was awarded by the MPRDCL- a nodal agency being a wholly owned undertaking of the Government of Madhya Pradesh. MPRDCL in its books of accounts will not record the payment made to the assessee in the form of expenses. It is because MPRDCL against such expenditure has not shown any income. It also appears that MPRDCL is not claiming any deduction under section 801A(4) of the Act. At the time of hearing, a question was raised to the learned DR but he failed to provide any information

with respect to the deduction claimed by MADC u/s 801A(4) of the Act. Thus, the question arises who will claim the deduction under section 801A(4) of the Act. As such, we are of the view that the provisions of section 801A(4) should not be read in a way to make it redundant or irrelevant. Accordingly, we are inclined to grant the benefit to the assessee under the provisions of section 801A(4) of the Act.”

3.9. With regard to the contention raised by the Revenue to the effect that the explanation to below Subsection 13 of Section 80IA of the Act is applicable and in response to such contention, the Tribunal analysed the scope of the explanation to below Subsection 13 of Section 80IA of the Act as under:

“11.6. Subsequently, an Explanation to section 80-IA of the Act was inserted by the Finance Act, 2007 and later on amended by the Finance (No.2) Act, 2009 but the same was made applicable with retrospective effect i.e. 1-4-2000. This explanation denies the benefit of deduction under section 80-IA(4) of the Act to a person who executes a project which is in the nature of works contract. At this juncture, it is pertinent to refer the provisions of the Explanation attached below section 80- IA(13) of the Act as reproduced below:

"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 subsection (1)."

3.10. Thus there are concurrent findings of fact arrived at by the CIT (Appeal) as well as the Tribunal that the assessee has undertaken the development of infrastructure facility and is eligible to claim the deduction under Section 80IA(4) of the Act.

3.11. Section 80IA of the Act provides for deduction from the gross total income of the assessee which includes any profit and gains derived by an undertaking or an enterprise from any business referred to in Subsection 4 of the Act as eligible business by providing deduction of an amount equal to the 100% of the profit and gains derived from such business for 10 consecutive assessment years. Subsection 4 of Section 80IA of the Act reads as under:-

“(4) This section applies to— (i) any enterprise carrying on the business 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 or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;

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

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

3.12. Explanation below Subsection 13 of Section 80IA of the Act was introduced by the Finance (No.2) of the Act, 2009 with effect from 01.04.2000, reads as under:

"[Explanation. For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub-section (1).]"

Both the explanations basically emphasizes on the non allowability of deduction u/s 801A(4) to an enterprise merely executing "works contract" awarded by what so ever person including the Central or State Government. Accordingly any person who executes the Infrastructure facility related work in capacity of a "Developer" shall only be allowed deduction u/s 801A(4) of the Act.

Therefore, for claiming the deduction u/ s 801A(4) after the insertion of above explanation, the Assessee has to pass the test of "being Developer of infrastructure facilities", accordingly the Assessee was asked to prove & establish its capacity of "Developer of infrastructure facilities", accordingly the Assessee has made a detailed submission narrating the following facts & points to prove & establish its capacity as a "Developer of infrastructure facilities"

3.13. Sub-clause 1 of Sub-section 4 of Section 80IA of the Act provides that Section 80IA applies to any enterprise carrying on the business of "(1)developing, or (2)operating and maintaining or (3) developing operating and maintaining" any infrastructure facilities which fulfills the condition prescribed therein. In the facts of the case as held by the CIT (Appeals) as well as the Tribunal on giving a factual finding to the effect that the assessee has undertaken a work of development of infrastructure facilities by execution of the contract awarded to it as per the terms of the contract as enumerated by the CIT (Appeal) as under:-

"To examine whether the project assigned to this Appellant was in the capacity of a "Contractor" or the Appellant has executed the work as a "Developer" with respect to the ROAD PROJECTS, I have perused the

terms of some of the agreements. My attention has been drawn on agreements with "Madhya Pradesh Road Development Corporation Limited", from which the Appellant have been awarded two Road Projects, wherein the scope of the work has been defined as follows:-

Sl. No.	Name of Road	Approx. Length Km	Scope of Bid/Development work
1	Package-1: Chindwara - Amarwara-Narsingpur" Road Project: SH 47	103.3	Rehabilitation, Widening, Upgradation & Strengthening
2	Package-14: "LakhnadonMandla-Dindori" Road Project: SH 11 & 40	149.8	

18 The Appellant has drawn my attention to the relevant clauses of the Tender Documents in support of its contention of being "Developer of the Infrastructure Facilities"

3.14. The CIT (Appeal) has further examined as to whether the project assigned to the assessee was in capacity of a contractor or the same was executed as a developer with respect to the canal projects, agreements were entered into by the assessee was analysed and tendered documents containing the terms and conditions of the project were taken into consideration with respect to the following aspects as to the entire investment in the project was to be made by the assessee. Interim payment to the tune of estimated contract value in respect of the development work done for each month after retention and other adjustments were to be made, security deposit was to be paid by the assessee, there was a penalty for delay, procurement of the material was the responsibility of the assessee, procurement of land for camp, for shop, labour camp etc. also the employment of qualified engineers, action and compensation in respect of bad work, defect liability of the accidents to persons in relation to Workman Compensation Act, indemnity insurance of the workmen employed. The CIT (Appeal) and the Tribunal considering such aspects of the tendered agreement, concurrently held that the assessee has entered into a development of infrastructure facility agreement and not the works contract.

4. In view of the above concurrent finding of the facts, we are of the opinion that no question of law, much less any substantial question of law arises from the impugned order of the Tribunal. The appeal therefore being devoid of any merit is accordingly dismissed."

9.10 The assessee has also relied upon the order of ITAT, Ahmedabad in ITA no. 2476/Ahd/2010 & ITA no. 231/Ahd/2012 in the case of NCC-MSKEL(JV) (supra) , in which one of us being Hon'ble Judicial Member was part of the Division Bench who pronounced the said order, wherein the ITAT,Ahmedabad held as under:

"8. The first issue for consideration before us is that whether contracts given by Airports Authority of India (AAI) are eligible for grant of deduction under Section 80-IA(4) of the Act.

9. For A.Y. 2007-08, the Ld. CIT(A) held that one of the reasons why the assessee is not eligible for claim of deduction under Section 80- IA(4) of the Act is that the assessee has not entered into a contract with Government of India towards construction of new Domestic Arrival Terminal at Ahmedabad Airports. The issue for consideration therefore is that whether contracts granted by Airports Authority of India would be eligible for claim of deduction under Section 80-IA(4) of the Act.

10. We observe that Section 80-IA(4)(i)(b) of the Act states that the assessee can enter into an agreement with Central Government or a State Government or a Local Authority or any Statutory Body for development of new infrastructure facility. The relevant extracts of Section 80-IA(4) of the Act are reproduced for ready reference:-

"(4) This section applies to--

.....

(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;"

11. The Government of India constituted the International Airports Authority of India (IAAI) in 1972 to manage the nation's international airports while the National Airports Authority of India (NAAI) was constituted in 1986 to look after domestic airports. Both the above M/s. N.C.C-M.S.K.E.L. (JV) vs. ITO Asst. Years -2007-08 & 2008-09 organizations were merged in April 1995 by an Act of Parliament, namely, the Airports Authority of India Act, 1994 and has been constituted as a Statutory Body

and was named as Airports Authority of India (AAI). Therefore, AAI is a statutory body and in terms of the plain language of Section 80-IA(4) of the Act, and if other conditions of eligibility are satisfied by the assessee, it would be eligible for claim of deduction under Section 80-IA(4) of the Act, if the assessee has entered into an agreement with any statutory body for carrying out development work. Therefore, in our considered view, claim of deduction under Section 80-IA(4) of the Act cannot be denied to the assessee only on the ground that since the assessee has entered into a contract with AAI, which does not constitute as a Central / State Government, the assessee is not eligible for claim of deduction under Section 80-IA(4) of the Act.

Other conditions for eligibility of claim of deduction under Section 80-IA(4) of the Act

13. Now we shall proceed to analyze whether other conditions for eligibility of claim of deduction under Section 80-IA(4) of the Act are satisfied in assessee's set of facts.

14. The first issue for consideration before us is whether the assessee qualifies as a "developer" or the assessee is a "works contractor" within the meaning of Explanation to Section 80-IA of the Act.

Our attention was drawn to the case of PCIT vs. Montecarlo Construction Ltd. in Revenue Tax Appeal No. 786 of 2023 wherein M/s. N.C.C-M.S.K.E.L. (JV) vs. ITO Asst. Years -2007-08 & 2008-09 the Gujarat High Court vide order dated 19.12.2023 has given a concrete finding that if conditions of eligibility are made, then assessee who is engaged in development work is eligible for claim of deduction under Section 80-IA(4) of the Act. In the above referred case, the assessee was engaged in business of construction and development of infrastructure projects like irrigation canals, road construction etc. and the issue for consideration was whether the assessee was eligible for claim of deduction under Section 80-IA(4) of the Act. The Gujarat High Court held that the CIT(Appeals) has given a detailed factual finding that the projects assigned to the assessee were executed in the capacity of a "developer". The Ld. CIT(A) gave a categorical finding that entire investment in the project was to be made by the assessee, interim payment to the tune of estimated contract value in respect of the development work done for each month after retention and other adjustments, were to be made to the assessee, security deposit was to be paid by the assessee, there was penalty for delay by the assessee in completion of the project, procurement of the material was the responsibility of the assessee, procurement of land for camp, for shop, labour camp etc. and also the employment of qualified engineers, action and compensation in respect of bad work, defect liability of the accidents to persons in relation to Workman Compensation Act, indemnity insurance of the workmen employed etc. were all the responsibility of the assessee. Accordingly, the Gujarat High Court held that the Ld. CIT(A) and Tribunal considering such aspects of the tender agreement, concurrently held that the assessee had entered into a contract for "development" of infrastructure facility agreement and not a "works contract" and was eligible for claim of deduction under Section 80-IA(4) of the Act.

16. In the instant facts we have to firstly see whether the assessee is engaged in "development" for any "new infrastructural facility" or is engaged only in carrying out repair works or other incidental works, not amounting to development of a new infrastructural facility. In order to be eligible for claim of deduction under Section 80-IA(4) of the Act and to qualify as a "developer", the assessee should be engaged in "development" of a new infrastructural facility and mere "repairs and maintenance" or "upkeep" or "revamp" work of existing facility and other incidental works would not qualify for deduction under Section 80-IA(4) of the Act, being primarily in the nature of "works contract" only. Once the essential threshold of assessee being engaged in "development" of a "new infrastructural facility" is satisfied, as a subsequent step, we need to analyze whether the "other conditions" for qualifying as a "developer" are satisfied i.e. the assessee has taken the necessary financial and entrepreneurial risk associated with development of a new project, so as to qualify as a "developer".

17. In this case, we observe that the assessee entered into contract a contract for construction of new domestic arrival block at Sardar Vallabhbhai Patel International Airport, Ahmedabad (refer Pages 144- 145 of Paper Book and Pages 27,28-30 of CIT(Appeals) order). It is observed that Ld. CIT(A) at Page 28 of his order observed that the assessee was awarded a contract for full-fledged development of an Airport along-with all facilities like AC, flight information display system, full electrification etc. Therefore, evidently the contract has not been awarded to the assessee for carrying out any repairs, maintenance or upkeep etc. of existing airport facility, but the assessee has been awarded contract for bringing into existence a new infrastructural facility M/s. N.C.C-M.S.K.E.L. (JV) vs. ITO Asst. Years -2007-08 & 2008-09 in place being new domestic arrival block at Sardar Vallabhbhai Patel International Airport. Accordingly, the assessee in our view is has been entrusted the responsibility of bringing into existence and "new infrastructure facility" being a new domestic arrival block at Sardar Vallabhbhai Patel International Airport.

18. The next issue for consideration is whether the assessee has undertaken the necessary financial and entrepreneurial risk so as to qualify as a "developer", or is it a case that the assessee is merely acting on the directions of AAI wherein complete responsibility for finance, man-power, scope of work, penalty provisions etc. are to be borne by AAI and assessee is only working at the behest and under the control and directions of AAI. In this case, we observe that the assessee has furnished bank guarantee to AAI (refer Pages 51-61 of the Paper Book), the assessee has furnished detailed program and CPM work diagram to AAI for its approval (refer Pages 51-61 of the Paper Book), the assessee has prepared and submitted electrical layout drawing for site office (refer Pages 69-70 of Paper Book), the assessee has prepared various other designs like curtain glazing wall (refer Pages 72-98 of Paper Book), honey comb panels designs (refer Pages 99-103 of Paper Book), design for air handling unit Duct & Pipe (refer Pages 104-124 of the Paper Book) etc. Further, the assessee has also undertaken to provide all materials for the project at it's own expenses (other than those which are supplied by AAI) (refer Pages 131 and 06 of Paper Book). The

assessee has also undertaken to indemnify AAI employees against action for claim or proceedings relating to infringement or use of any patent or design etc. (refer Pages 132 of Paper Book). Accordingly, looking into the facts of the instant case, it is observed that the assessee has M/s. N.C.C-M.S.K.E.L. (JV) vs. ITO Asst. Years - 2007-08 & 2008-09 undertaken to bring into existence a new infrastructure facility being new domestic arrival block at Sardar Vallabhbai Patel International Airport, Ahmedabad and further the assessee is also undertaken various financial and entrepreneurial risks required to be borne by a "Developer" of a project viz. providing bank guarantee to AAI, procurement of certain materials by the assessee at its own cost during the construction phase, preparation of various architectural designs relating to the project for approval of AAI etc. which all support the fact that the assessee is in the instant facts is a "developer" within the meaning of Section 80-IA of the Act and is eligible for claim of deduction under Section 80-IA(4) of the Act. We observe that Ld. CIT(A) undertook a detailed analysis of the scope of work undertaken by the assessee and the various risks and responsibilities undertaken by the assessee and then came to conclusion that assessee qualifies as a "developer" and is eligible to claim of deduction under Section 80-IA(4) of the Act. Accordingly, we find no infirmity in the order of CIT(Appeals) so as to call for any interference."

9.11 Thus, in the instant case before us also , a new infrastructure facility by way of construction of New Expandable Modular Integrated Terminal Building at Raja Bhoj Airport, Bhopal has come into existence , as in the above case of NCC-MSKEL JV, a new infrastructure facility by way of a new domestic arrival block at Sardar Vallabh Bhai Patel International Airport at Ahmedabad has come into existence , and Tribunal has allowed the claim of deduction u/s 80IA(4). Further, in the aforesaid case of NCC-MSKEL(JV(supra), the said AOP also developed part of the Airport being new domestic arrival block at Sardar Vallabh Bhai Patel International Airport at Ahmedabad and not the complete airport being Sardar Vallabh

Bhai Patel International Airport at Ahmedabad to claim deduction u/s 80IA(4) and Tribunal allowed the claim.

9.12 The assessee has also relied upon various case laws as detailed herein to support its contention that the assessee is eligible for deduction u/s. 80-IA(4) :

- (i). Patel Infrastructure Pvt. Ltd. (ITA Nos. 627/Rjt/2014 dated 30.07.2020 (2020) 59 CCH 266-ITAT Rajkot.
- (ii). M/s. Katira Construction Ltd. (ITA Nos. 88, 89/Rjt/2015 and 555/Rjt/2012 dated 30.07.2020 (2020) 59 CCH 264- ITAT, Rajkot.
- (iii). M/s. Ketan Construction (ITA No. 219 to 222/Rjt/2015 & 1999 to 202/Rjt/2015 dated 03.06.2020 – ITAT Rajkot.
- (iv). M/s. KCL – BEL Tarmat (JV) (ITA No. 192, 193/Rjt/2011, 214/Rjt/2011 and 485/Rjt/2014 dated 03.12.2018 – ITAT Rajkot.
- (v). Welspun Projects Ltd. Projects Ltd. (ITA No. 1864/A/2013 & 225/A/2014 dated 08.10.2018 (2018) 54 CCH 70 – ITAT, Ahmedabad.
- (vi). M/s. BBELSTPL(JV) (ITA No. 507/Rjt/2012 dated 28.10.2016- ITAT Rajkot.
- (vii). TARMAT – BEL (JV) (ITA No. 1111/Rjt/2010 dated 23.09.2010 – ITAT Rajkot
- (viii). Hon'ble Jammu & Kashmir High Court judgment and order in the case of CIT vs. TRG Industries Pvt. Ltd. (2017) 155 DTR 109 (J & K HC)
- (ix). DCIT v. M/s. Simplex Infrastructure (2017) 49 CCH-88 - ITAT, Kolkata.
- (x) Hon'ble Delhi High Court judgment and order in CIT v. VRM India Limited ITA No. 2069 & Ors. , dated 18.03.2015
- (xi) ITAT , Ahmedabad order in the case of Sugam Construction Pvt Limited v. ITO, reported in (2012) 34 CCH 0383
- (xii) ITAT, Hyderabad order in the case of GVPR Engineers Limited (2012) 32 CCH 0296

(xiii) ITAT, Pune Bench order in the case of Laxmi Civil Engineers Private Limited v. Addl CIT in ITA no. 766/PN/09 &Ors.

(xiv) ITAT, Hyderabad Bench order in the case of Gayatri Projects Limited v. ACIT in ITA no. 211/Hyd/2008 & Ors.

(xv) ITAT Hyderabad order in the case of Koya & Co. Construction Private Limited v. ACIT (2012) 32 CCH 0043

(xvi) ITAT, Mumbai Bench, order in the case of Pratibha Industries Limited v. ACIT in ITA No. 2197 to 2199/Mum/20008 dated 19.12.2012

9.13 All these documents filed by the assessee which are part of record, contentions raised before us as well case laws relied upon the assessee, clearly point out that the assessee is a developer and not merely works contractor and is eligible and entitled for deduction u/s. 80-IA(4) of the Act. Thus, keeping in view the aforesaid facts and circumstances of the case and judicial pronouncements relied upon by the assessee, we hold that the assessee is a developer within the meaning of section 80-IA(4) and is eligible for deduction u/s. 80-IA(4). Thus, we allow the claim of the assessee for deduction u/s 80IA(4). We order accordingly.

10. In the result, appeal filed by the assessee in ITA no. 2498/Ahd/2013 for assessment year 2010-11 stands allowed.

**ITA Nos. 828, 829 & 830/Ahd/2016 (A.Yrs. 2010-11 & 2011-12):**

11. As already mentioned and also that both the parties agreed before us that the facts and issue in these appeals are similar to those of ITA No. 2498/Ahd/2013, our decision reached in ITA No. 2498/Ahd/2013 will apply *mutatis mutandis* in these three appeals too. In the result, these appeals also stand allowed. In the case of ITA no. 829-830/Ahd/2016, the assessee namely M/s JMC-MSKE JV carried out the work of Construction of New International Terminal Building(Phase II) and Inter Terminal link at SVPI Airport, Ahmedabad.

Order pronounced in the open court on 07.11.2024

Sd/-

**(SIDDHARTHA NAUTIYAL)**  
**JUDICIAL MEMBER**

Sd/-

**(RAMIT KOCHAR)**  
**ACCOUNTANT MEMBER**

Dated: 07.11.2024

\*aks/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Assistant Registrar  
ITAT Ahmedabad