

आयकर अपीलीय अधिकरण, कटक न्यायपीठ, कटक
IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH CUTTACK

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND
SHRI MANISH AGARWAL, ACCOUNTANT MEMBER

IT(SS)A No.77/CTK/2023
ITA No.296/CTK/2023
ITA No.88/CTK/2023
ITA No.89/CTK/2023

(निर्धारण वर्ष / A.Yrs : 2011-2012, 2013-2014, 2016-2017 & 2017-2018)

M/s Shree Balaji Engicons Limited Belpahar, Jharsuguda-768217	Vs	DCIT, Central Circle-1(1), Sambalpur
PAN No. : AAGCS 4292 P		

AND

ITA No.320/CTK/2023
ITA No.141/CTK/2023
ITA No.142/CTK/2023
ITA No.13/CTK/2023

(निर्धारण वर्ष / A.Yrs : 2011-2012, 2016-2017, 2017-2018 & 2018-2019)

DCIT, Central Circle-1(1), Sambalpur	Vs	M/s Shree Balaji Engicons Limited Belpahar, Jharsuguda-768217
PAN No. : AAGCS 4292 P		

AND

Cross Objection No.02/CTK/2023
(Arising out of ITA No.13/CTK/2023)

(निर्धारण वर्ष / Assessment Year : 2018-2019)

M/s Shree Balaji Engicons Limited Belpahar, Jharsuguda-768217	Vs	DCIT-1(1), Sambalpur
PAN No. : AAGCS 4292 P		

(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
-------------------------	----	---------------------------

राजस्व की ओर से /Revenue by	:	Shri Saroj Kumar Dubey, CIT-DR
निर्धारिती की ओर से /Assessee by	:	Shri Satyanarayan Agrawal, CA
सुनवाई की तारीख / Date of Hearing	:	07/01/2025
घोषणा की तारीख/Date of Pronouncement	:	07/01/2025

आदेश / ORDER

Per Bench :

These are the cross appeals filed by the assessee and revenue against the separate orders of Id. CIT(A)-2, Bhubaneswar for the assessment years 2011-2012, 2013-2014, 2016-2017, 2017-2018 & 2018-2019, respectively. The assessee has also filed cross objection

arising out of appeal of the revenue in ITA No.13/CTK/2023 (AY: 2018-2019).

IT(SS)A No.77/CTK/2023 & ITA No.320/CTK/2023 (AY:2011-2012)

2. The assessee in its appeal for A.Y.2011-2012 in IT(SS)A No.77/CTK/2023, has raised the following grounds :-

1. *That on the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in up-holding the additions made in assessment order passed under section 153A of the Act even in absence of any incriminating documents.*
2. *That on the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in not allowing additional claim of deduction of Rs. 35,80,390/-u/s-80-IA of the Income-tax Act, 1961 as lodged during the course of appellant proceedings in respect of income earned from work done as a member on behalf of its Joint Ventures, M/s Balaji ARSS (JV) and SBEPL-GRIL (JV) even when the appellant was eligible for deduction u/s 80-IA of the Act in respect of profit earned from work undertaken by the appellant as a member of the consortium in respect of the projects undertaken by the joint ventures/consortiums*
3. *That on the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in maintaining the disallowance of claim of deduction of Rs. 47,15,405/- under section 801AB of the Income Tax Act, 1961 without properly appreciating the facts of the case and submission made before him.*
4. *The appellant reserves the right to add, alter and modify the grounds of appeal as taken by it.*

3. The revenue in its appeal for A.Y.2011-2012 in ITA No.320/CTK/20023 has raised the following grounds of appeal :-

1. *The Ld. CIT(A) erred in law in allowing deduction u/s 801A (4) to the assessee when the assessee doesn't satisfy the requisite conditions to be eligible to get the deduction u/s 801A (4) of the Act.*
2. *The Ld. CIT(A) ought to appreciate that in the facts and circumstances of the case the meaning of 'works contract' as in Explanation to Section 801A as borrowed from section 194C applies only to labour contract and not to a composite contract of construction of an infrastructure facility.*

3. *The Ld. CIT(A) was not correct in holding that the infrastructure facility executed by the assessee (Contractor) can be considered to be owned by it within the meaning of item (a) of clause (i) of sub section (4) of Section 801A.*
 4. *The Ld. CIT(A) erred in treating the Contract receipts received by assessee- company in lieu of execution of contract work be considered as profit and gains of business for deduction u/s 801A.*
 5. *The deduction u/s 801A as per the condition in item (c) of clause (i) of sub section (4) of Section 801A can be availed only after the infrastructure facility has started (i.e got completion Certificate). However, the assessee being a contractor does not get any compensation after completion of project. In view of above, whether the CIT(A) was justified in holding the eligibility of assessee company for deduction u/s 801A on receipts accrued prior to completion of the project.*
 6. *Any other ground of appeal that may arise at time of hearing.*
4. Brief facts of the case are that the assessee is a private limited company and the return of income for the year under appeal was filed declaring total income of Rs.7,70,37,400/- which includes additional income of Rs.5 crores based on search and seizure operation carried out in the case of the assessee on 24.05.2012. The assessment for the year under appeal was completed u/s.153A/143(3) of the Act dated 30.03.2015 wherein after making various additions/disallowances total income was assessed at Rs.9,90,98,410/-. In first appeal, the Id. CIT(A) allowed part relief to the assessee against which assessee and revenue are in appeal before us.
5. During the course of hearing, the assessee has withdrawn the ground No.1. Thus, the same is dismissed as withdrawn.
6. Ground No.2 is relating to the claim of deduction u/s.80IA(4) of the Act at Rs.35,80,590/- which was firstly claimed by the assessee before the

Id. CIT(A). It was the claim of the assessee before the Id. CIT(A) that it has earned profits on the infrastructure facilities developed by it as a constituent of two Joint Ventures (JVs), namely M/s Balaji ARSS (JV) and SBEPL-GRIL (JV). The assessee claimed that since it has exclusively carried out the execution work of developing the infrastructure facility, therefore, it is eligible for the deduction u/s.80IA(4) of the Act on such profits. In support of the same, the necessary audit report along with relevant documents were filed before the Id. CIT(A), who has not allowed such claim of the assessee by holding that the assessee is not the enterprises as defined u/s.80IA(4) of the Act for claiming the deduction. Against such action of the Id. CIT(A), the assessee is in appeal before us.

7. Ld. AR of the assessee submitted that during the year under appeal, the assessee has entered into two separate Joint Ventures, firstly in the name of M/s Balaji ARSS (JV), wherein JV was awarded contract for construction of Railway Over Bridge for East Coast Railway, Sambalpur from which the assessee has earned a profit of Rs.2,02,535/-. Other Joint Venture was namely M/s SBEPL-GRIL (JV), wherein the contract for construction and widening of roads work was awarded by Chief Engineer, National Highway, Bhubaneswar and assessee has earned Rs.33,77,855/- from such work. The Id. AR of the assessee submitted that in terms of MOU executed between the assessee and ARSS Infrastructure Pvt. Ltd., a joint venture was formed under the name and style of M/s Balaji-ARSS (JV) to participate in the tender for construction of railway over bridge awarded east coast railways and on successful bid of the tender, a joint

venture agreement was made and executed on 4th October, 2010 between the parties. According to this agreement the assessee was the lead partner having 70% share and the responsibility of 100% financial and 70% of the execution and share in profit/loss and remuneration was of 70%. The other joint venture constituent namely, M/s ARSS Infrastructure Pvt. Ltd. was having 30% share with responsibility of 100% technical with 30% execution with share and profit and loss at 30%. The said joint venture participation and joint venture agreement was placed at page book at pages 511 to 538. The Id. AR submitted that as per this agreement the assessee was having responsibility of execution of 70% of the work and accordingly the work was executed by it and since the assessee has executed the work on behalf of the joint venture, therefore, it is eligible for deduction u/s.80IA(4) of the Act being infrastructure facility developed by it and he placed reliance on the detailed submission made in this regard also relied upon various judicial pronouncements which are part of this submission and is reproduced as under :-

3] GROUND NO. 2 [APPELLANT]: CHALLENGING THE ACTION OF THE LD CIT(A) IN NOT ALLOWING ADDITIONAL CLAIM OF DEDUCTION OF RS. 35,80,390/- U/S 80-IA OF THE ACT AS LODGED DURING THE COURSE OF APPELLATE PROCEEDINGS IN RESPECT OF INCOME EARNED FROM WORK DONE AS A MEMBER OF BEHALF OF ITS JOINT VENTURES, M/S BALAJI ARSS (JV) AND SBEPL-GRIL (JV)

3.1) The appellant in this ground of appeal has challenged the action of the Ld CIT(A) in not allowing additional claim of deduction of Rs. 35,80,390/- u/s 80-IA of the Act as lodged during the course of appellate proceedings in respect of income earned from work done as a member on behalf of its Joint Ventures, M/s Balaji ARSS (JV) and SBEPL-GRIL (JV).

3.2.1] The appellant entered into two joint ventures for carrying out eligible infrastructural projects as per section 80IA of the Act. Detail of such joint ventures entered into by the appellant is as under:

S. No	Name of the JVs	Name and shares of the members	Profit earned by the appellant from the said project [in Rs.]
1	M/s Balaji ARSS (JV)	1. M/s Shree Balaji Engicons Pvt. Ltd. (Presently known as M/s Shree Balaji Engicons Limited) - 70% 2. M/s ARSS Infrastructure Projects Limited -30%	2,02,535
Nature of work to be undertaken - Construction of ROB at km 530.269 RCC T-beam Girder and			
other allied works in connection with setting up Alumina smelter plant at Lapanga Station (Deposit work)(Two Packet System) awarded by East Coast Railway Construction Organisation			
2	M/s SBEPL-GRIL (JV)	1. M/s Shree Balaji Engicons Pvt. Ltd. (Presently known as M/s Shree Balaji Engicons Limited) - 70% 2. M/s G R Infraprojects Limited - 30%	33,77,855
Nature of work to be undertaken - Widening and single/intermediate strengthening of existing 104/0 and km 117/0			
lane with geometric improvement to two lane carriage way from km 89/0 to 131/0 of N.H.-200 awarded by Chief Engineer NH, Orissa			
	Total		35,80,390

3.2.2] Summary of profit as earned by the appellant in respect of work done on behalf of JVs and profit as earned by the JVs is as under:

Amount in Rs.

S. No	Name of the JVs	Gross contract value of JV	Net profit earned by JV	Amount of development work done by the appellant on behalf of JV	Profit earned by the appellant	Effective net profit earned on project allocated to JV
1.	M/s Balaji ARSS (JV)	3,95,85,143	9,80,149	51,54,366	2,02,535	11,82,684
2.	M/s SBEPL-GRIL (JV)	13,55,52,489	24,52,354	8,55,00,000	33,77,855	58,30,209
	Total	17,51,37,632	34,32,503	9,06,54,366	^35,80,390	70,12,893

3.2.3] Copy of following documentary evidences as filed during the course of appellate proceedings so as to justify that the projects carried on by the JVs were eligible infra structural projects and were therefore eligible for claiming the benefit of deduction u/s 80IA of the Act are also already been annexed along with paper book as filed before the Hon'ble Bench:

S. No	Brief description of documents	Page No. of Paper Book
1	Documents related to M/s Balaji-ARSS [JV]:	
1.1	Copv of audited final accounts for the year ended 31st March, 201 1	323-328
	Agreement with East Coast Railway for construction of ROB at km 530.269	
1,2	RCC T-beam Girder and other allied works in connection with setting up Alumina smelter plant at Lapanga Station (Deposit work) awarded by East Coast Railway Construction Organisation	329-524
	Joint-Venture (JV) Agreement entered into by M/s Shree Balau Eneicons Pvt. Ltd.. the appellatant with M/s ARSS Infrastructure Projects Limited for	
1.3	formation of JV in the name of M/s Balaji-ARSS (JV) after awarding of tender by East Coast Railway	525-538
	COPY of Memorandum of Understanding entered between M/s Shree Balaji	
1.4	Eneicons Pvt. Ltd.. the appellatant and M/s ARSS Infrastructure Projects Limited	539-541
1.5	Copy of supporting invoice raised by the appellatant to M/s Balaji-ARSS (JV)	542-543
	COPY of audit report in Form No. 10CCB issued by independent chartered	
1.6	accountant in respect of work done by the appellatant eligible for <u>deduction</u> under section 80-IA of the Act	544-548

1.7	<i>Copy of Profit and Loss account for the year ended 31st March, 2011 in respect of income earned and expenses incurred by the appellant for work done on behalf of the joint-venture, M/s Balaji-ARSS (JV)</i>	549
	<i>Copy of acknowledgement of income-tax return alone with computation of</i>	
	<i>income of M/s Balaji-ARSS (JV) as filed under section 139 of the Income-Tax</i>	
1.8	<i>Act, 1961 for the Assessment Year 2013-14 wherein deduction under section</i>	550-556
	<i>80-IA of the Act was claimed along with copy of audited final accounts of M/s</i>	
	<i>Balaji-ARSS (JV1 for the year ended 31st March 2013</i>	
2	<i>Documents related to M/s SBEPL-GRIL (JV):</i>	
2.1	<i>Copv of audited final accounts for the year ended 31st March, 2011</i>	557-562
	<i>Agreement with Executive Engineer, N.H Division. Jharsuguda for widening</i>	
2.2	<i>and strengthening of existing single/ intermediate lane with geometric improvement to two lane carriageway</i>	563-743

	<i>Joint Bidding Agreement entered into by M/s Shree Balaji Engicons Pvt.</i>	
2.3	<i>Ltd., the appellant with M/s G R Infraprojects Limited for formation of JV in</i>	744-748
	<i>the name of M/s SBEPL-GRIL (JV)</i>	
	<i>Copy of Memorandum of Understanding between M/s Shree Balaji Engicons</i>	
2.4	<i>Pvt. Ltd., the appellant and M/s G R Infraprojects Limited</i>	749-752

2.5	Copy of supporting invoice raised by the appellant to M/s SBEPL-GRIL (JVI)	753
	•	
	CODV of audit report in Form No. 10CCB issued by independent chartered	
2.6	accountant in respect of work done by the appellant eligible for deduction	754-758
	under section 80-IA of the Act	
2.7	Copy of <u>Profit and Loss account</u> for the year ended 31st March, 201,1 in respect of income earned and expenses incurred by the appellant for work done on behalf of the joint-venture, M/s SBEPL-GRIL (JVJ)	759
	Copv of acknowledgement of income-tax return along with computation of	
2.8	<u>income of M/s SBEPL-GRIL (JV) as filed under section 139 of the Income-tax Act, 1961 for the Assessment Year 2013-14 wherein deduction under section</u>	760-766
	80-IA of the Act was claimed alone with audited final accounts of M/s SBEPL-	
	GRIL (JV) for the year ended 31 st March 2013	
	Copy of Ld CIT(A)'s order dated 31-05-2023 passed in the case of M/s SBEPL-	
2.9	GRIL (JV) for Assessment Year 2013-14 wherein claim of deduction under	767-818
	section 80-IA of the Act was allowed to the JV	

3.2.4] On perusal of the tables reproduced hereinabove, **it shall be quite clear that the projects undertaken by the JVs were eligible infrastructural projects as per section 80IA of the Act.**

3.3.1] Before going into the main issue regarding allowability of deduction u/s 80IA of the .members of the JV, it is imperative to understand the status and legal position of "Joint Venture" vis-a-vis Income Tax Act. The Joint Ventures are not be governed by the provisions of the 'Indian Partnership Act, 1932.' It is also a known fact that there is no statute which governs a Joint Venture. Hence, **the**

issue regarding the relationship between the members and also between the members and the Joint Venture has to be decided on the basis of the terms agreement entered between the parties which generally fall in the category of Association of Persons” (AOP) under the Act.

3.3.2 Further, in our country, the implementation of infrastructure projects is taking place on massive scale. In this connection, global tenders Invited. Hence, two or more business enterprises join hands by forming a consortium of Joint Venture in order to get qualified for participating in tender process. Once the project or contract is awarded to the joint venture or the consortium, it is executed by its constituents or the joint ventures in a ratio agreed upon by the parties For all practical purposes, it is the constituents/ members of the joint venture who execute the project awarded to the joint venture

3.4] In the facts of the present case, it is an undisputed fact that the appellant entered into Joint ventures with other parties with the sole purpose of fulfilling the eligibility criteria for obtaining the contract from Government bodies. Further, it is also an uncontroverted fact that constituents of the joint venture Le, appellant and the other party, actually executed the project awarded to the joint venture and that they were solely responsible for the performance of its scope of work and would also bear all technical, commercial and facing risk involved in performing its scope of work

Relevant extract of few of the judicial precedents wherein it is held that the members of the JV are eligible for deduction under section 80-1A of the Act in respect of work executed by them are reproduced hereunder for ready reference of the Hon'ble Bench:

3.5.1] The Hon'ble High Court of Allahabad in the case of CIT v. PNC Construction Co. Ltd reported in [2015] 55 taxmann.com 21 (Allahabad) has approved the findings of the Hon'ble ITAT Agra Bench in the case of PNC Construction Co. Ltd v. DCIT reported in [2013] 37 taxmann.com 361 (Agra Trib.) wherein the Hon'ble ITAT Agra Bench has categorically held that the appellant is eligible for deduction in respect of work executed by it on behalf of JV.

Relevant facts of the case:

- A joint venture was created between PNC Construction Co. Limited and Nagarjuna Construction Company in the name of NCC PNC (JV) for execution of infrastructure project awarded by the Government of Madhya Pradesh
- Entire amount of work was executed by PNC Construction Co. Limited for and on behalf of NCC PNC (JV).

- PNC Construction Co. Limited has claimed deduction of Rs. 80,99,435/- under section 80- IA of the Act in respect of "Sagar Beena Project work executed by it on behalf of JV, NCC- PNC (JV).
- The issue in depute is regarding allowability of deduction Rs. 80,09,435 under section RO-IA of the Act as claimed by M/s PNC Construction Co. Limited in respect of "Sagar Beena Project work executed by it on behalf of JV, NCC-PNC JV

Findings as laid down by Hon'ble ITAT Agra, Bench in the case of PNC Construction Co. Ltd DCIT reported in (2013) 37 taxmann.com 361 (Agra Trib) are reproduced hereunder for ready reference of the Hon'ble Bench

13. In respect of Sagar Beena Project, the Id Authorised Representative submitted that it is an infrastructure project awarded by the Government of Madhya Pradesh entered between NCC-PNC (JV). The Id. Authorised Representative submitted that as per terms of tender, only consortiums can enter into contract, therefore, a joint venture was created between PNC Construction Co. Ltd. (assessee) and Nagarjuna Construction Company (NCC) and, therefore, a supplementary agreement was entered through which entire work was carried out by PNC Construction Company, the assessee. The Id. Authorised Representative referred various pages of Paper Book i.e.. 97, 98, 61 & 100, page no.6 of Assessment Order and submitted that M/s. PNC Construction Co. Ltd., the assessee, was solely responsible for execution of the work and liable to M.P. Government. The Id. Authorised Representative submitted that in such circumstances, claim under section 801A(4) is allowable. The Id. Authorised Representative in support of his contention relied upon following decisions:-

- (i) ACIT v. JSR Constructions (P.) Ltd. (IT Appeal No.898/Bang/2009 order dated 29.03.2011).*
- (ii) Dy. CIT v. Transstroy (India) Ltd. (IT Appeal No. 325 & 326/Viz/2011 order dated 13.04.2012).*

22. The objection of the CIT(A) in allowing deduction under section 801A of the Act in respect of Sagar-Beena Project is that the assessee did not satisfy the conditions laid down under section 801A(4)(b) of the Act. The objection of the CIT(A) is that there is nothing to suggest on record that the assessee had entered into any agreement with the Central Government or a State Government or a local authority or any other statutory body. He further noted that the assessee has entered into agreement with M/s. Nagarjuna Construction Company Limited, an entity which is not mentioned in section 801A(4)(b) of the Act. To examine the case of the CITA), we would like to refer the word 'consortium of such companies in section 801A(a) of the Act. The Section 801A[4](a) provides that infrastructure facility as approved in (1) is owned by consortium of such companies. The consortium word has not been defined in section 801A(4) of the Act. If we consider the dictionary meaning of

that word, according to the New International Webster's Comprehensive Dictionary it is Lichens, (fellowship) Lau Coalition, union, as of incorporated companies. As per SAHNI Advanced Dictionary (English English-Hindi), the meaning of consortium is a combination of financial institutions, capitalists, etc. for carrying into effect some financial operation requiring large resources of capital.

25. With this back ground of discussions, if we consider the facts of the case under consideration, we find that the infrastructure project was awarded by the Government of Madhya Pradesh, a copy of the agreement has been placed in assessee's Paper Book at page no 56. This agreement was in between the Government of Madhya Pradesh and NCC-PNC (Joint Venture), Agra. A supplementary agreement of Nagarjuna Construction Company Limited dated 10.08.2004 between M/s Nagarjuna Construction Company Limited and M/s. PNC Construction Company Limited, the assessee, wherein it is stated that both the parties have formed a Joint Venture called the "NCC-PNC JV by virtue of Agreement dated 08.04.2004, with the sole purpose to submit a joint bid for Sagar- Beena Road Project. M/s. PNC Construction Co. Limited was offered for the entire works of joint venture and shall be liable for all taxes including income tax solely liable to government of Madhya Pradesh. The agreement with Government of Madhya Pradesh and NCC-PNC joint venture accepted the concept of Joint Venture vide clause no.27.1 which is at page no.95 of assessee's Paper Book. On perusal of agreements and supplementary agreement, we notice that the CIT(A) failed to consider the relevant provision of section 80IA(4)(i)(a) which provides that the prescribed infrastructure project in section 80IA(4)(i) is owned by company registered in India or by a consortium of such companies. The CIT(A) has considered only clause 80IA(4)(i)(b) of the Act without considering section 80IA(4)(i)(a) of the Act. If we read both the clauses of sub-section (4)(i)(a) and (b), we find that the project agreement was with the Madhya Pradesh Government and it was owned by consortium of companies registered in India i.e., NCC- PNC. Thus, in the light of above discussions and in view of the decisions of the I.T.A.T. in the case of JSR Constructions (P) Ltd (supra) and Transstroy (India) Ltd.(supra) we find that the assessee has satisfied the conditions laid down in section 80IA(4)(i)(a)(b) of the Act. We are, therefore, of the view that the assessee is entitled for deduction under section 80IA(4) of the Act in respect of Sagar Beena Project."

(Emphasis supplied

3.5.2] The Hon'ble ITAT Bangalore Bench 'A' in the case of the ACIT v. M/s JSR Constructions (P) Ltd. (ITA No. 898/Bang/2009] has held that:

"3. Brief facts of the case are that the assessee company, engaged in the business of civil engineering works and construction of national highways. filed its return of income on 31.10.2005 declaring NIL income and claiming deduction of Rs. 2,25,13,170/- u/s 80IA of the IT Act. The assessee company had also shown a book profit of Rs.3,64,09,495/-u/s 115JB of the Act. During the assessment proceedings u/s 143(3) of the Act, from the profits and loss account

filed along with the return of income, the AO observed that the assessee had shown the total contract receipts at Rs. 50,71,06,783/- whereas as per the TDS certificates, the total contract receipts works out to Rs.50,72,62,959/-. Thus, there is a difference of Rs. 1,56,176/- between the total contract receipts as per the TDS certificates and as shown in the profit and loss account. He further observed that the assessee has undertaken sub-contract works from M/s ECSB-JSR Constructions (JV) Private Limited and received income of Rs. 26,55,66,961/- (as per the TDS certificates) and has received the remaining balance of Rs.24,16,95,998/- from the other contract works undertaken by the assessee company. He observed that the deduction u/s 801A of the Act would not be available to a person who executes a works contract entered into with an undertaking or enterprise as the case may be. As the assessee has undertaken the sub-contract works with the joint venture of M/s ECSB-JSR Construction Private Limited, he held that the assessee company is not eligible to claim deduction w/s BOLA of the Act. He further observed that the works contract undertaken by the assessee company are not new, but it is the same contract undertaken as in earlier years including sub-contract works from its sister concern. He therefore disallowed the entire claim of deduction of Rs 2,25,13,170/- u/s 80IA of the Act and assessed the same as the business income of the assessee company.

6. After appreciating the above evidence, the CIT(A) came to the conclusion that the assessee was a member of the consortium that bid for and was awarded the contract in question and it is only thereafter that the JV Company had come into existence and the sub-contract was entered into. Thus, according to him, the assessee has fulfilled the conditions prescribed u/s 80IA of the IT Act and the assessee is eligible for deduction thereunder. As regards the AO's observation that the contract is not new, he observed that the term 'new' is meant to ensure that the deduction is available to entities that are contributing by adding to the country's infrastructure and it cannot be taken to mean that in order to avail the deduction, the assessee need to enter into new agreement every year as infrastructure projects by their very nature, generally have implementation cycles that are longer than a year. Thus, the CIT(A) directed the AO to allow deduction as claimed by the assessee.

10. Having heard both the parties and having considered the rival contentions, we find that the deduction u/s 80IA is available in respect of profit and gains from the industrial undertaking or enterprises engaged in infrastructure development etc. The only reason for the disallowance by the AO is that the assessee has undertaken the sub-contract works and has also not undertaken the new contracts during the relevant asst. year. We find that the assessee has filed sufficient evidence before the CIT(A) to prove his case that it is party to the consortium, which was engaged in the business of civil construction and was also awarded the contract by the NHAI. It was also proved that the assessee has invested the entire capital for completion of the contract and so it was entitled to

receive the entire contract receipts. In such a case, we are satisfied that the assessee has itself carried on the works contract and was not a sub-contractor carrying on the works contract. Further, as rightly held by the CITIA), every year the assessee cannot be expected to enter into new contract for the reason that the infrastructure project are by the very nature carried on over a period of time and cannot be completed within a year. The main aim of allowing the deduction w/ B01A is for improving the infrastructure facilities in the country In view of the same, we are of the opinion that the CITA) has properly appreciated the evidence before allowing the claim of the assessee and there is no reason to interfere with the same."

Emphasis supplied

3.5.3) The Hon'ble ITAT Visakhapatnam Bench in the case of *Transstory (India) Ltd. v. ITO, Ward-2(2), Guntur* reported in (2012) 134 ITD 269 (Visakhapatnam) has held that:

"8. Having given a thoughtful consideration to the rival submissions and from a careful perusal of the orders of the authorities below and documents placed on record, we find that undisputedly the joint venture or the consortium was formed only to obtain the contract from the Government bodies. At the time of execution of the joint venture or the consortium, it has been made clear that work/project awarded to the joint venture would be executed by the joint venturers or the constituents. As per mutually agreed terms and conditions between them, it was also agreed that each party shall be responsible for the provisions of without limitation on resources required for the purpose of fulfilment of the scope and also solely responsible for the performance of its scope of work and shall bear all technical, commercial and facing risk involved in performing its scope of work. It was also agreed that none of the party shall assign its rights and obligations to any other party without written consent of other party. From a careful perusal of this joint venture agreement and the consortium agreement, it is evidently clear that the joint venture and the consortium was formed only with an object to bid contract. Once the project or contract is awarded to the joint venture or the consortium, it is to be executed by its constituents or the joint ventures in a ratio agreed upon by the parties. In the instant case in case of a joint venture agreement, the assessee was entitled to execute the 40% of total work awarded by the Andhra Pradesh Government to the joint venture and in case of a consortium it was agreed that the entire work is to be executed by the assessee itself. Therefore for all practical purposes, it was the assessee who executed the work contract or the project awarded to the joint venture. No doubt the joint venture is an independent identity and has filed its return of income and was also assessed to tax but it did not offer any profit or income earned on this project/works awarded to it nor did he claim any exemption/deduction u/s 80IA (4) of the Act. These facts clearly indicates that the joint Venture was only a de jure contractor but in fact the assessee was a de facto contractor.

10. There is no dispute with regard to the nature of business or the activities undertaken by the assesseees. The dispute is only with regard to the identity of a person to whom this benefit of deduction u/s 80IA (4) can be allowed. We have carefully perused the provisions of section 80IA (4) and we find that the benefit of exemption/ deduction is to be allowed to any enterprise carrying on business of developing or operating and maintaining or developing, operating, maintaining any infrastructure facility subject to fulfilment of certain conditions. One of the condition is that the enterprise should be owned by a company registered in India or by a consortium of such companies or any other body established or constituted under any centre or any state Act. The other condition is that it has entered into an agreement with the Central Government or a State Government or local authorities or any other statutory body for developing, operating and maintaining or developing, operating & maintaining a new infrastructure facility. There is no dispute with regard to the fulfilment of other requisite conditions. The dispute was only raised that the contract was awarded only to the joint venture and not to the assessee and therefore assessee is not entitled for deduction. If we read these provisions of sub-section (4) of section 80IA, we would find that this benefit of deductions is to be given to an enterprise who carry on the aforesaid classified business. The legislature have also used the word consortium of such companies, meaning thereby the legislature was aware about the object of formation of consortium and joint ventures. Generally, the joint ventures or consortiums are formed to obtain a contract from the Government body for its execution by its constituents. If the constituents do not want to execute the work, there was ne need to form a consortium. Therefore, mere formation of consortium for obtaining a contract should not debar the enterprises who in fact carried on the aforesaid classified business from claiming the deduction or exemption u/s 80IA[4]

11. Turning to the facts of the case, we find that joint venture and the consortium was formed only to obtain the contract from the Government body and they in fact did not execute the work awarded to it. In a joint venture agreement or a consortium agreement, it was agreed that the awarded work had to be executed by the joint ventures or parties to the agreement in an agreed manner. The work was awarded by the Andhra Pradesh Government and the KSHIP, a body of the State Government of Karnataka to the J.V. and consortium but the work was executed by the assessee and the other constituents. In case of joint venture agreement, 40% works were executed by the assessee and in case of consortium; the 100% work was executed by the assessee. Whatever bills were raised by the assessee for the work executed on J.V. and consortium, the joint venture and consortium in turn raised the further bill of the same amount to the Government. Whatever payment was received by the joint venture, it was accordingly transferred to their constituents. Therefore, the joint venture or the consortium was only a paper entity and has not executed in contract itself. They have also not offered any income out of the work

executed by its constituents, nor did they claim any deductions u/s 801A(4). Therefore, in all practical purposes, the contract was awarded to the constituents of the joint ventures through joint venture and the work was executed by them. As per provisions of section 801A (4), the benefit of deduction under this section is to be given only to the enterprise who carried on the classified business. Therefore, in the light of this legal proposition, we are of the view that the assessee is entitled for the deductions u/s. 801A (4) on the profit earned from the execution of the work awarded to JV and consortium. We accordingly set aside the order of the CITA) and direct the A.O to allow the deductions.

Emphasis Supplied

3.5.4) The decision of the Hon'ble ITAT Visakhapatnam Bench cited supra has also been followed by the Hon'ble ITAT Hyderabad Bench 'B' in the case of DCIT, Central Circle-2,Hyd. vs. Megha Engg. & Infrastructure Ltd. (ITA No. 607, 608, 609 610/H/2016) in Para 9.2 of the order wherein the Coordinate Bench of Tribunal also held that constituents/ members of the joint venture shall be eligible to claim the benefit of deduction u/s 801A(4) of the Act in respect of eligible infrastructural projects awarded to the joint venture.

3.6) In view of the findings reiterated in the judicial precedents cited supra, it becomes abundantly clear that members of joint venture are eligible to claim the benefit of deduction u/s 801A(4) of the Act in respect of profit earned by them from work executed as a member of the joint venture in the facts of the present case, the appellant was one of the members of the joint ventures namely M/s Balaji ARSS (JV) and SBEPL GRIL (JV) who carried out the work awarded to joint ventures by the Government bodies. The appellant raised invoices to the joint venture at market price in respect of work executed by it and Incurred various expenses for carrying out the work awarded to the joint venture. The resultant profit earned by the appellant from carrying out these projects on behalf of the joint ventures is being claimed as deduction u/s 801A(4) of the Act in light of the settled legal position. Moreover, the infrastructural development projects undertaken by the joint venture were identical to the infrastructural development projects undertaken independently by the appellant in respect of which the Jurisdictional Bench of ITAT itself had held that the appellant was eligible for claiming the benefit of deduction u/s 801A(4) of the Act. Hence, the appellant was also eligible for further deduction of Rs. 35,80,390/- u/s 801A of the Act in respect of income/profit earned from work done as a member on behalf of its joint ventures, M/s Balaji ARSS (JV) and SBEPL-GRIL (JV).

3.7.1) The Ld CIT(A) vide its order dated 29-08-2023 has stated that Hon'ble ITAT Visakhapatnam Bench in the case of Transstory (India) Ltd. v. ITO, Ward-2(2), Guntur reported in (2012) 134 ITD 269 (Visakhapatnam) has given benefits of deduction to the members since the JV has not offered any income or profit on any of the projects awarded to it nor claimed any deduction under section

801A of the Act. The Ld CIT(A) has stated that in the present case in hand, both the JV's have shown profit and has claimed deduction u/s 80IA of the Act for Assessment Year 2013-14 and has due to ignorance has claimed under section 80IA of the Act for Assessment Year 2011-12 and therefore, the decision of Hon'ble ITAT Visakhapatnam Bench in the case of Transstory India Ltd vs ITO, Ward-2(2), Guntur is not applicable and has concluded that the members are merely work contractors and net developers and were not eligible for deduction under section 80-IA of the Act in respect of income/profit earned from work done as a member on behalf of its joint ventures, M/s Balaji ARBS (JV) and BBEFL-GRIL (JV).

3.7.2) With due respect, it is being highlighted that the Lat CITIA) has wrongly interpreted the decision of Hon'ble ITAT Visakhapatnam Bench in the case of Transstory India Adv. ITO. Ward-2 Guntur reported in (2012) 134 ITD 269 (Visakhapatnam) in the said case, 100% of the work of consortium was executed by the appellant and therefore, there was no question of claiming deduction under section 80-IA of the Act by the Joint Venture. The Hon'ble ITAT Vishakhapatnam Bench has rightly concluded that as per section 80-IA of the Act, the benefit of deduction under this section is to be given to the enterprise who carried on the Classified business. However, the Hon'ble ITAT Vishakhapatnam Bench in no way has concluded that if the JV's are eligible for deduction under section 80-1A of the Act, the members of the JV's will be merely termed as contractors and will not be eligible for deduction under section 80-IA of the Act in respect of work performed by them as interpreted by Ld CIT(A) Since, in the said cane, 100% of work of JV was performed by members only, there was no claim of deduction under section 80-1A of the Act by the JV and therefore, the said issue was not decided by the Hon'ble ITAT Vishakhapatnam Bench. However, the Hon'ble ITAT has rightly decided that since, the members of the JV has carried out the classified business as specified under section 80-IA of the Act, the members will also be eligible for deduction under section 80-IA of the Act in respect of profit earned from work performed on behalf of JVs.

3.7.3) In the present case in hand, there is no dispute that the members of the JV has executed work as a member on behalf of its joint ventures, M/s Balaji ARSS (JV) and SBEPL-GRIL (JV). As per section 80-IA of the Act, the benefit of deduction is to be given to the enterprise who has carried out the respective work. The appellant in respect of work executed by it has raised invoices to the joint venture at market price in respect of work executed by it and incurred various expenses for carrying out the work awarded to the joint venture. The resultant profit earned by the appellant from carrying out these projects on behalf of the joint ventures is being claimed as deduction u/s 80IA(4) of the Act in light of the settled legal position.

3.7.4) Further, the Ld CITIA! in its order has stated that the members are merely work contractors and not developers' and due

to the said reason, has not allowed additional claim of deduction of Ra. 35,80,390/- u/s. 80-IA of the Act in respect of the Joint Ventures, M/s Balaji ARSS (JV) and SBEPL-GRIL (JV). Relevant extract of the findings of the Ld CIT(A) vide its order dated 29-08-2023 is also reproduced for ready reference of the Hon'ble Bench.

"6.11 Considering the fact that the members are mere work contractors and not developers, the factual matrix of the judicial precedents cited by the AR are not applicable to the present case. Accordingly, additional claim of deduction of Rs 35,80,390/- u/s 80-IA of the Act in respect of the Joint ventures-M/s Balaji ARSS (JV) and (1) SBEPL-GRIL (JV) is denied."

3.7.5) In this regard, with due respect, it is again being highlighted that the Ld CIT(A) has utterly failed to understand the relationship between the members of the JV and the JV. In a Joint Venture, each member of JV stands in the relation of principal, as well as agent, as to each of the other members with the general scope of the Enterprises. By way of joint venture agreements, the members of the JV have regulated the relationship entered with respect to their joint responsibility that existed in relation to the member. The Joint Venture is formed for execution of specific work by the members of the JV only. Henceforth, the members of the JV cannot be termed as sub-contractors to JV in respect of work executed by them for and behalf of JV.

3.7.6) It is also utterly important to highlight the relevant clauses of Joint Venture Agreement/ Joint Bidding Agreement as formed between the members of the joint ventures, M/s Balaji ARSS (JV) and SBEPL-GRIL (JV) for understanding the relationship between the members of JV and the JV which are reproduced hereunder for ready reference of the Hon'ble Bench:

*Joint Venture Agreement between Shree Balaji Engicons Private Limited, the appellant and ARSS Infrastructure Projects Limited for formation of JVMs Balaji ARSS (JV):

Clause No.3

3. The 'Parties' have resolved that the distribution of share, responsibilities, profits, losses and remuneration shall be as under :

- a) Lead Partner's share : 70%
Name Shree Balaji Engicons Pvt. Ltd.
Responsibilities : i) Financial 100%
(Technical, Financial & other obligations)
Obligation 100% ii) Other
- Profits, losses and remunerations:70%
- b) Joint Venture Partner's share : 30%
Name ARSS Infrastructure Projects Limited
Responsibilities : i) Technical 100%

(Technical, Financial & other obligations) ii) Execution 30%

Profit & losses : 30%

On perusal of the above, it is evident that the obligations of the respective members of the JV were duly defined in agreement itself and the actual amount of work for which JV was formed was required to be performed by the members only.

* **Clause No. 5:**

JOINT AND SEVERAL RESPONSIBILITY

The parties undertake that they shall be jointly and severally liable to the E. Co, Railway acting through Chief administrative Officer (Con), E.Co. Railway, Bhubaneswar or his assignees, for satisfactory execution and completion of the Project work in accordance with General and Special conditions of contract. The JV member shall also be liable jointly and severally for the loss, damages that may be caused to the East **Coast** Railway Administration, acting through Chief Administrative Officer (Con), E. Co. Railway, Bhubaneswar and during the course of execution of the contract or due to non-execution of the contract or part thereof. The parties solemnly affirm and declare that every possible care will be taken by them for ensuring satisfactory execution and completion of the work awarded under the contract.

On perusal of the above, it is evident that the members of the JV were jointly and severally liable in respect of work executed by them. Hence, it is evident that each member of JV stands in the relation of principal, as well as agent, as to each of the other members with the general scope of the Enterprise.

> Joint Bidding Agreement between Shree Balaji Engicons Private Limited, the appellant and G R Infrastructure Limited for formation of JV - SBEPL - GRIL f J.V1

[Page No. 744-748]

> Clause No. 3 and 4:

The actual distribution of work is as follows :-

SBEPL	70%
GRIL	30%

It is agreed that both the Partners of JV will participate, contribute and share the profit or loss in the following ratio.

SBEPL	70%
GRIL	30%

On perusal of the above, it is evident that Shree Balaji Engicons Private Limited, the appellant will perform 70% of the work assigned to JV and G R Infrastructure Limited will perform 30% of the work

assigned to the JV. Henceforth, it is evident that the agreement itself mentioned that the actual amount of work will be performed by JV only for which the JV was formed.

> **Clause No. 12:**

12. It is agreed that both the partners will work together for the mutual benefit of the JV and each partner agrees to indemnify and keep indemnified the other against any loss, damages, liabilities, cost expenses, claim suffered, incurred by it as a consequence of any act, omission or default of such member. **Both Partners are committed to be jointly and severally liable for due performance, recourse/sanctioned in the event of default or withdrawal of any partner and arrangement for required indemnities.**

On perusal of the above, it is evident that the members of the JV were jointly and severally liable in respect of work executed by them. Hence, it is evident that each member of JV stands in the relation of Principal, as well as agent, as to each of the other members with the general scope of the Enterprise.

3.7.7) On perusal of the joint venture agreement/joint binding agreements as formed between the members of the joint ventures, M/s. Balaji ARSS (JV) and SBEPL.GRIL (JV), it is evident that the JV was formed for execution of specific work by members of the JV only and the members of the JV were in relation to the principal as well as agent to each other members with the general scope of the enterprise. Henceforth, the members of the JV cannot be termed as sub-contractors to JV in respect of work executed by them.

3.8] Relevant extract of few of the judicial precedents wherein it is held that the members of the JV cannot be termed as sub-contractors to JV in respect of work executed by them are reproduced hereunder for ready reference of the Hon'ble Bench:

3.8.1 The Hon'ble ITAT Jurisdictional Bench Le, Hon'ble ITAT Cuttack Bench in thy held of HCIL Adhikarya-ARSS (JV) v. ITO (TDS) ITA No. 140/CTK/2014] has categorically held that the JV cannot be ter v ITO (TDS) its members as sub-contractors. Relevant extract of findings of the Hon'ble ITAT Cuttack Bench is reproduced hereunder for ready reference of the Hon'ble Bench:

“*7. In our country, the implementation of infrastructure projects is taking place in a massive scale. In this connection, global tenders are invited. Hence two or more business enterprises are joining hands by forming a consortium of Joint Venture in order to get qualified for participating in tender process. They regulate themselves, by entering into an agreement, the methodology to be adopted for executing the contract obtained. Before going into the main issues, we feel that it is imperative to discuss about the status and legal position of "Joint Venture vis-a-vis Income-tax Act The Joint Ventures are not be governed by the provisions of the "Indian

Partnership Act, 1932. It is also a known fact that there is no statute which governs a Joint Venture. Hence the issue regarding the relationship between the members and also between the members and the Joint venture has to be decided on the basis of the terms of agreement entered between the parties. Though the Joint Venture Agreements generally fall in the category of "Association of Persons" (AOP) under the Income-tax Act, yet their assessability in the status of "AOP" was not free from doubt and we notice that the authorities have decided this issue on the basis of facts and circumstances of each case.

8.The Hon'ble Supreme Court has made a detailed discussion on the Concept of Joint Venture the case of Faqir Chand Gulati u. Uppal Agencies Private Ltd. (2008) 10 SCC 345. The relevant observations are extracted below:-

17. This Court had occasion to consider the nature of joint venture in New Horizons Ltd v. Union of India (1995 (1) SCC 478). This Court held The expression joint venture is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. [Black's LawDictionary, Sixth Edition, p.839].

According to Words and Phrases, Permanent Edition, a joint venture is an association of two or more persons to carry out a single business enterprise for profit [P.117, Vol. 23]. "Emphasis supplied)

The following definition of joint venture occurring in American Jurisprudence [2ndEdition, Vol. 46 pages 19, 22 and 23) is relevant

"A joint venture is frequently defined as an association of two or more persons formed to carry out a single business enterprise for profit. More specifically, it is in association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property, money, effects, skill, and knowledge, without creating a partnership, a corporation or other business entity, pursuant to an agreement that there shall be a community of interest among the parties as to the purpose of the undertaking, and that each joint venture must stand in the relation of principal, as well as agent, as to each of the other covertures within the general scope of the enterprise.

Joint ventures are, in general, governed by the same rules as partnerships. The relations of the parties to a joint venture and the nature of their association are so similar and closely akin to a

partnership that their rights, duties, and liabilities are generally tested by rules which are closely analogous to and substantially the same, if not exactly the same as those which govern partnerships. Since the legal consequences of a joint venture are equivalent to those of a partnership, the courts freely apply partnership law to joint ventures when appropriate. In fact, it has been said that the trend in the law has been to blur the distinctions between a partnership and a joint venture, very little law being found applicable to one that does not apply to the other. Thus, the liability for torts of parties to a joint venture agreement is governed by the law applicable to partnerships.

A joint venture is to be distinguished from a relationship of independent contractor, the latter being one who, exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of his employer except as to the result of the work, while a joint venture is a special combination of two or more persons where, in some specific venture, a profit is jointly sought without any actual partnership or corporate designation. (Emphasis supplied)

To the same effect is the definition in Corpus Juris Secundum (Vol. 48A pages 314-315):

"Joint venture, a term used interchangeably and synonymous with joint adventure', or coventure, has been defined as a special combination of two or more persons wherein some specific venture for profit is jointly sought without any actual partnership or corporate designation, or as an association of two or more persons to carry out a single business enterprise for profit or a special combination of persons undertaking jointly some specific adventure for profit, for which purpose they combine their property, money, effects, skill, and knowledge..... Among the acts or conduct which are indicative of a joint venture, no single one of which is controlling in determining whether a joint venture exists, are: (1) joint ownership and control of property; (2) sharing of expenses, profits and losses, and having and exercising some voice in determining division of net ramings. (3) community of control over, and active participation in management and direction of business enterprise, (4) intention of parties, express or implied, and (Sifixing of salaries by joint agreement." (emphasis supplied)

Black's Law Dictionary (7th Edition, page843) defines joint venture thus Joint Venture: A business undertaking by two or more persons engaged in a single defined project. The necessary elements are: (1) an express of implied agreement, (2) a common purpose that the group intends to carry out, (3) shared profits and losses; and (4) each member's equal voice in controlling the project.

9. On a careful reading of the order of the Hon'ble Supreme Court we notice the following essential ingredients for a "Joint Venture",

(a) It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit, (or)

(b) it is in association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property, money, effects, skill, and knowledge, without creating a partnership. (or)

(c) a special combination of two or more persons wherein some specific venture for profit is jointly sought without any actual partnership or corporate designation, or as an association of two or more persons to carry out a single business enterprise for profit.

(d) that each joint venture must stand in the relation of principal, as well as agent, as to each of the other covertures within the general scope of the enterprise.(e) Among the acts or conduct which are indicative of a joint venture, no single one of which is controlling in determining whether a joint venture exists, are: (1) joint ownership and control of property; (2) sharing of expenses, profits and losses, and having and exercising some voice in determining division of net earnings; (3) community of control over. and active participation in management and direction of business enterprise; (4) intention of parties, express or implied, and (5) fixing of salaries by joint agreement.

12. Thus, on an understanding of the concept of the Joint Venture and the terms of agreement between the members of the present case, we are of the view that in the instant case, the consortium of Joint Venture has been formed only to procure the contract works. By way of the agreement, the parties have only regulated the relationship inter with respect to their joint responsibility that existed in relation to the Principal. viz., M/s Konkan Railway In reality, both the parties have divided the contract works between themselves and they have executed their share of work on their own risks. It is pertinent to note here that the AO has not given any finding on the issues like that each member had authority to interfere with or control the work executed by the other member, that both the members have jointly executed the project and thus produced the income jointly. In our opinion, the finding on the lines stated above is crucial to determine the issue of availability of income in the hands of Joint Venture- AOP. On the contrary, the AO is on record that the each of the ITA Nos. 496 & 497/12 ITA No. 178/13 & ITA Nos. 140&141/14 members has declared the income derived from their respective share of contract works in their hands. In this kind of situation, we do not find any merit in the presumption made by the AO that the Joint Venture is the Main Contractor and the members are the Sub- contractors. Once this presumption has been found to be wrong, then the question of estimation of income by way of Sub-contract commission does not arise. So also the question of deduction of tax u/s 194C(2) of the Act and the disallowance u/s

40(a)(ia) does not arise. In view of the fore going discussions, we do not find any infirmity in the decision reached by the Ld CIT(A).

8. Following this order of the Tribunal, the Hyderabad Bench of the Tribunal has taken similar view in case of M/s Hindustan Ratna JV (supra) by holding that there could not be any sub-contract between JV and its constituents as the JV has been formed only to procure contract works from Government. The relevant observations of the Tribunal are extracted hereunder for the sake of reference:

11. In the result, all the appeals of the assessee are allowed"

[Emphasis supplied)

3.8.2] The Hon'ble ITAT Hyderabad Bench 'B' in the case of Hindustan Ratna JV v. ITO, Ward - 6/2), Hyderabad reported in 2014/2 in then.com 107 (Hyderabad - Trib.) has held that

15. In the present case, the modus of obtaining the Government contracts, the sequence and frequency of execution of the contracts clearly show that the assessee as a partnership firm secured contracts and given to its partners with a collective responsibilities and liabilities jointly and severally liable towards the owners for the execution of the contracts in accordance with the contract of the business as per clause (g) of the partnership deed. They have demarcated the nature of the contracts into principal contracts and sub-contracts for the purpose of identifying the work handled by the partners and for the purpose of accounting contract receipts and payments.

16. In order to establish a relationship of contractor and sub-contractor, in addition to a formal agreement, it is necessary to show that the parties have acted in such a manner conducive to uphold a contractor-subcontractor relationship when there is a strong case of interlacing of finance and funds, interdependence of responsibilities, interconnection of activities. It is very difficult to come to a conclusion that the assessee were acting in the status of contractors vis-a-vis sub-contractors. A more rational finding would be that the parties were executing the contracts through joint effort, as a group of partners.

17. Defacto speaking, when there is no basis for coming to a conclusion that there existed a relationship of contractor vis-a-vis sub-contractor, it is useful to look into the principle embodies in section 20 of the Indian Contract Act of 1872. This section provides that where both parties to an agreement are under a mistake as to a matter of fact, essentially to the agreement, the agreement is void. In the present case, the question is mainly focussed on the contractual relationship of the assessee and its partners. This principle embodies in the section 20 of the Indian Contract Act has great relevance. It turns out that the formats of the agreement entered into with the partners and the styling of accounts prepared

by them are products of mistakes of fact, and therefore, the agreement is not to be relied on to hold that the assessee is acting in the status of contractors vis-a-vis sub contractors. Therefore, it is to be seen that the question of TDS in the present case cannot be considered only on the basis of the agreements entered into between the assessee and its partners.

18. The liability u/s. 194C(2) is cast on the assessees only when they are in fact and in substance acting in the relationship of contractors and sub-contractors. Dehors the agreements and accounts, when it is found that they are acting jointly, for the purpose of their contract business, there cannot be a relationship of contractor and sub- contractor and there may not be an occasion to invoke Section 194C(2). When the said provision relating to deduction of tax at source is not applicable for the assessee for the reasons stated above, violation u/s. 40(a)(ia) does not arise. If that is the case, payments made under the nomenclature of "sub-contractors" are not liable to be disallowed

22. In view of the above discussion and considering the facts and circumstances of the case, we are of the view that the relationship created by the Partnership Deed dated 31st August, 2007 and partners cannot be considered as sub-contractors of the firm and they are jointly and severally liable towards the owners for the execution of the contract commitments in accordance with the contract conditions. Being so, the provisions of section 194C cannot be attracted so as to treat them as sub-contractors of the firm thereby invoking the provisions of section 40(a)(ia). In other words, we can safely conclude that there is no sub-contract between JV and the constituents and since the JV has been formed only to procure contract works from the Government and the contract is being executed by the constituent partners in their sharing ratio 60:40 as per the terms of JV, it cannot be said that the JV is a contractor and its constituents are sub-contractors. Accordingly, we set aside the orders of the revenue authorities and delete the disallowance of Rs. 111,09,23,018/- made by the Assessing Officer by invoking the provisions of section 40(a)(ia) of the Act.

3.8.3] The Hon'ble ITAT Kolkata Bench in the case of Ramky ECI JV v. ITO (TDS) reported in [2024] 158 taxmann.com 167 (Kolkata Trib) has held that:

"7.3 Based on the above detailed discussion, the Co-ordinate Bench arrived at a conclusion that consortium of JV has been formed only to procure the contract works. By way of the agreement, the parties have regulated the relationship entered with respect to their joint responsibility that existed in relation to the member. In reality, both the parties have divided the contract work between themselves and have executed their share of work on their own risk. It was thus concluded that there is no merit in the presumption made by the AO that the JV is the main contractor and the constituents are the sub-contractors. Accordingly, it held that question of deduction of tax at

source u/s. 194C(2) does not arise. It was thus concluded that assessee JV was not liable to deduct tax at source and, therefore, it cannot be held to be in default u/s. 201(1) and liable to be charged interest u/s. 201(1A) of the Act."

3.9) in the view of the findings as laid down in the above judicial precedents, it is evident that in a Joint venture agreement, there sub-contract between JV and the constituents and since the JV has been formed only to procure contract works from the Government which is executed by the members of the JV only at a specified ratio. Henceforth, in a Joint venture, it cannot be concluded that the JV is a contractor and the members of the JV are sub-contractors in respect of work executed by them in the present case in hand, the appellant was member of Joint Venture, M/s Balaji ARSS (JV) and SREPL-GRIL (JV) which was formed for execution of specific work by members of the JV only and the members of the JV were in relation to the principal as well as agent to each other members with the general scope of the Enterprise. Henceforth, there was not contractual relationship between the members of the JV and the JV.

3:10) Hence, the Ld CIT(A) was not correct in not allowing further deduction of Rs. 35,80,390/- u/s 801A of the Act in respect of income/profit earned from work done as a member on behalf of its joint ventures, M/s Balaji ARSS (JV) and SBEPL-GRIL (JV) by treating the appellant as work contractors in respect of work executed by it on behalf of JV even when the JV's were formed for execution of specific work by the members of the JV only and the members of the JV were jointly and severally liable in respect of work executed to them. Henceforth, the members of the JV cannot be termed as sub-contractors in respect of work executed by them for and behalf of JV only. The appellant has executed work on behalf of the JVs and has undertaken all the risk associated with the said work as highlighted in the agreement also. The appellant raised invoices to the joint venture at market price in respect of work executed by it and incurred various expenses for carrying out the work awarded to the joint venture. Therefore, the resultant profit earned by the appellant from carrying out these projects on behalf of the joint ventures is also eligible for deduction under section 80-IA of the Act.

3.11) The appellant in the above paras has duly cited following judicial precedents wherein it is categorically held that the assessee is eligible for deduction under section 80-IA of the Act in respect of work executed by it on behalf of JV:

- CIT u. Pic Construction Co. Ltd reported in (2015) 55 taxmann.com 21 (Allahabad)
- ACIT v. M/s JSR Constructions (P) Ltd. (ITA No. 898/Bang/2009

- *Transstory (India) Ltd. v. ITO, Ward-2(2), Guntur reported in [2012] 134 ITD 269 (Visakhapatnam)*
- *DCIT, Central Circle-2, Hyd. vs. Megha Engg. & Infrastructure Ltd. (ITA No. 607, 608, 609 & 610/H/2016/*

3.12) In view of the above discussion, the Hon'ble Bench is kindly requested to allow the further deduction of Rs. 35,80,390/- u/s 801A of the Act in respect of income/ profit earned from work done as a member on behalf of its joint ventures, M/s Balaji ARSS (JV) and SBEPL-GRIL (JV) and oblige.

8. In view of the above submissions, Id. AR vehemently argued that the assessee is eligible for deduction u/s.80IA(4) of the Act on the works executed by it for and on behalf of the joint venture as lead constituent.

9. On the other hand, Id. CIT-DR vehemently supported the order of the Id. CIT(A) in not allowing the additional claim to the assessee of deduction u/s.80IA(4) of the Act on the profit earned from the works executed by it as one of the lead partner to the joint venture. Ld. CIT-DR submitted that in Section 80IA(4) of the Act, there is express provision for allowability of deduction that it is available only to the enterprises which had entered into the agreement with the State Government/Central Government/local authority and since in the instant case no such agreement is executed between the assessee and any such authority, and the project was awarded by such Government authority to the joint venture only and, therefore, the assessee is not eligible for deduction u/s.80IA(4) of the Act on the execution of work in such project. He further submit that the assessee simply worked as a sub-contractor executing the work contract, thus, as per the explanation to Section 80IA(13) of the Act, it is not eligible for deduction u/s.80IA(4) of the Act. He further submitted

that the assesee is not a developer and also submitted that as per the scope of work given in the tender document in Chapter III available in page no.397 of the paper book, the work is to be executed by the contractor i.e. joint venture firm and not by the constituent, therefore, he prayed for confirming the order of the Id. CIT(A) in not allowing the deduction to the assesee. The extract of the page 397 of paper book is as below :-

Page 397
CE/Con/III/BBS/T/07/2010

EAST COAST RAILWAY CONSTRUCTION ORGANISATION
CHAPTER-03
SCOPE OF WORK IN BRIEF

Name of work: Construction of ROB at km 530.269(815 m F/CSB of LPG Station) span (2x12m+2x22.5 m) RCC T-beam Girder and other allied works in connection with setting up Alumina smelter plant at Lapanga Station (Deposit work) (**Two Packet System**).

Scope of work and salient features of the tender

SCOPE OF WORK

1. The works covered in this tender are required to provide line between Jharsuguda and Rengali - a part of Project on western Orissa.
Schedule 'A' :- Execution of Pile foundation
Schedule 'B' :- Execution of Bridge sub-structure works and other allied works
Schedule 'C' :- Execution of Bridge Super-structure works and other allied works
Schedule 'D' :- Supplying Cement
Schedule 'E' :- Supplying Steel reinforcement
Schedule 'F' :- Execution of works under SER-SOR
Schedule 'G' :- Load test of completed prestressed concrete super-structures
Schedule 'H' :- Preparation and plotting of Completion Drawings

2. Brief Information on the Project:

- 2.1 The above works covered in this tender are required to provide line between Jharsuguda - Rengali a part of Project on western Orissa .Construction of this portion of the project is to be completed on top priority basis.
- 2.2 Contractors who have adequate experience and resources to adhere to the specifications and completion schedule, should participate in this tender.
3. **APPROXIMATE COST:** The approximate cost of the work covered by this tender is **Rs. 12,16,63,700/-**

BALAJIARSS (JV)
[Signature]
Attorney
SIGNATURE OF TENDERER(S)/OFFEROR

[Signature]
Chief Engineer/Con./III
E. Co. Railway / Bhubaneswar
मुख्य अभियंता/निर्माण /III
पु:त: रेलवे /भुवनेश्वर

66

[Signature]
Dy. CE/Con/II/SBB



10. We have considered the rival submissions and perused the material available on record. During the year under appeal, the assessee was a constituent of two separate joint ventures and a sum was received on account of work done by the assessee on behalf of the joint venture for respective JVs on which profits of Rs.35,80,390/- was earned and claimed as deduction u/s.80IA(4) of the Act. The respective joint venture have also earned certain profits on such works. The necessary details of the scope of work and receipts of the joint venture firm's and of the assessee is tabulated at page 885 of the paper book which is reproduced hereunder :-

S. No	Name of the JVs	Name and shares of the members	Profit earned by the appellant from the said project [in Rs.]
1	M/s Balaji ARSS (JV)	1. M/s Shree Balaji Engicons Pvt. Ltd. (Presently known as M/s Shree Balaji Engicons Limited) – 70% 2. M/s ARSS Infrastructure Projects Limited – 30%	2,02,535
Nature of work to be undertaken – Construction of ROB at km 530.269 RCC T-beam Girder and other allied works in connection with setting up Alumina smelter plant at Lapanga Station (Deposit work)(Two Packet System) awarded by East Coast Railway Construction Organisation			
2	M/s SBEPL-GRIL (JV)	1. M/s Shree Balaji Engicons Pvt. Ltd. (Presently known as M/s Shree Balaji Engicons Limited) – 70% 2. M/s G R Infraprojects Limited – 30%	33,77,855
Nature of work to be undertaken – Widening and strengthening of existing single/ intermediate lane with geometric improvement to two lane carriage way from km 89/0 to 104/0 and km 117/0 to 131/0 of N.H.-200 awarded by Chief Engineer NH, Orissa			
Total			35,80,390

3.2.2] Summary of profit as earned by the appellant in respect of work done on behalf of JVs and profit as earned by the JV's is as under:

<i>Amount in Rs.</i>						
S. No	Name of the JVs	Gross contract value of JV	Net profit earned by JV	Amount of development work done by the appellant on behalf of JV	Profit earned by the appellant	Effective net profit earned on project allocated to JV
1.	M/s Balaji ARSS (JV)	3,95,85,143	9,80,149	51,54,366	2,02,535	11,82,684
2.	M/s SBEPL-GRIL (JV)	13,55,52,489	24,52,354	8,55,00,000	33,77,855	58,30,209
Total		17,51,37,632	34,32,503	9,06,54,366	35,80,390	70,12,893

11. The Id. CIT(A) while dismissing the claim made by the assessee has observed in para 6.6 to 6.11 as under :-

6.6 As seen above, the appellant during the course of appellate proceedings further claimed deduction under section 801A (4) of the Act in respect of work executed as member for and on behalf of Joint ventures. The appellant claimed that entire work of Joint ventures were executed by its members. The sales invoices were raised to the Joint Ventures by the appellant on the basis of work executed by it and in turn final bills were raised by the joint ventures to the respective client i.e. the govt. Agencies. In the books of Joint ventures, net profit was shown being difference in the amount of final bill raised by the Joint ventures after reducing the cost of bills received from respective members and in the book of members profit was calculated in respect of work executed as member of that joint ventures. On the amount of profit as earned by the respective members in respect of work executed for Joint ventures. Audit Reports in Form 10CCB stipulated u/s 801A (7) of the Act was also filed by the appellant during appellate proceedings. The appellant also relied on the decision of Vizag Bench of ITAT in the case of Transstory (India) Ltd Vs ITO (134 ITD 269).

6.7 It is seen that the assessee has incorporated two Joint Ventures - (i) M/s Balaji- ARSS (JV) and (ii) M/s SBEPL-GRIL (JV) and executed the work given to the said Joint Ventures. In the submissions made by the appellant it is evident that the said JVs filed their Income Tax Return and claimed deduction u/s 80-1A of the Act from AY 2013-14 onward.

The relevant extracts of the submission is given below:

S. No	Brief description of documents
1	Documents related to M/s Balaji-ARSS (JV)
1.1	Copy of audited final accounts for the year ended 31 March, 2011
1.2	Agreement with East Coast Railway for construction of ROB at km 330.269 RCC T-beum Ginder and other allied works in connection with setting up Alumina smelter plant at Lapanga Station (Deposit work) (Two Packet System) awarded by East Coast Railway Construction Organisation
1.3	Joint-Venture (JV) Agreement entered into by the appellant with M/s ARSS Infrastructure Projects Limited for formation of JV in the name of M/s Balaji-ARSS (JV) after awarding of tender by East Coast Railway
1.4	Copy of supporting invoices raised by the appellant to M/s Balaji-ARSS (JV)
1.5	Copy of supporting invoices raised by the appellant to M/s Balaji-ARSS (JV)
1.6	Copy of Profit and Loss account for the year ended 31 March, 2011 in respect of income earned and expenses incurred by the appellant for work done on behalf of the joint-venture. M/s Balaji ARSS (JV)
1.7	Copy of acknowledgement of income-tax return along with computation of income of M/s Balaji ARSS (JV) as filed u/s. 139 of the Income-Tax Act, 1961 for the Assessment Year 2013-14 wherein deduction u/s 80-1A of the Act was claimed
2	Documents related to M/s SBEPL-GRIL (JV):

2.1	<i>Copy of audited final accounts for the year ended 31 March 2011</i>
2.2	<i>Agreement with Executive Engineer, N.H Division, Jharsuguda for widening and strengthening of existing single/intermediate lane with geometric improvement to two lane carria</i>
2.3	<i>Joint Bidding Agreement entered into by the appellant with M/s GR Infra projects Limited for formation of IV in the name of M/s SBEPL-GRIL (JV)</i>
2.4	<i>Copy of supporting invoices raised by the appellant to M/s SBEPL-GRIL (JV)</i>
2.5	<i>Copy of audit report in Form No. 10CCB issued by independent chartered accountant in respect of work done by the appellant eligible for deduction u/s 80-1A of the Act</i>
2.6	<i>Copy of Profit and Loss account for the year ended 31 March, 2011 in respect of income earned and expenses incurred by the appellant for work done on behalf of the joint-venture, M/s SBEPL- GRIL (JV)</i>
2.7	<i>Copy of acknowledgement of income-tax return along with computation of income of M/s SBEPL GRIL (JV) as filed u/s 139 of the Income-Tax Act, 1961 for the Assessment Year 2013-14 wherein deduction w/s 80-1A of the Act was claimed</i>

6.8 The appellant relied on the judgement of Hon'ble ITAT, Vizag Bench in the case of Transstory (India) Ltd Vs ITO (134 ITD 269) in support of its claim. The relevant portion of the said judgement is given below:

"8. Having given a thoughtful consideration to the rival submissions and from a careful perusal of the orders of the authorities below and documents placed on record, we find that undisputedly the joint venture or the consortium was formed only to obtain the contract from the Government bodies. At the time of execution of the joint venture or the consortium, it has been made clear that work/project awarded to the joint venture would be executed by the joint ventures or the constituents. As per mutually agreed terms and conditions between them, it was also agreed that each party shall be responsible for the provisions of without limitation on resources required for the purpose of fulfilment of the scope and also solely responsible for the performance of its scope of work and shall bear all technical. Commercial and facing risk involved in performing its scope of work. It was also agreed that none of the party shall assign its rights and obligations to any other party without written consent of other party. From a careful perusal of this joint venture agreement and the consortium agreement, it is evidently clear that the joint venture and the consortium was formed only with an object to bid

contract. Once the project or contract is awarded to the joint venture or the consortium, it is to be executed by its constituents or the joint ventures in a ratio agreed upon by the parties. In the instant case in case of a joint venture agreement, the assessee was entitled to execute the 40% of total work awarded by the Andhra Pradesh Government to the joint venture and in case of a consortium it was agreed that the entire work is to be executed by the assessee itself. Therefore for all practical purposes, it was the assessee who executed the work contract or the project awarded to the joint venture, No doubt the joint venture is an independent identity and has filed its return of income and was also assessed to tax but it did not offer any profit or income earned on this project/works awarded to it nor did he claim any exemption/deduction u/s 801A (4) of the Act. These facts clearly indicate that the joint Venture was only a de jure contractor but in fact the assessee was a de facto contractor.

From the aforesaid submissions made by the AR, it is apparent that the works were awarded to both the JVs and they claimed deduction u/s 801A from the AY 2013-14 onward. In this context, it is pertinent to refer the submission made by the AR which is reproduced below for the sake of clarity;

Para 5-The Documents related Balaji-ARSS JV (PAN-AABAB1071G) for AY 2011-12, AY 2012-13 and Y 2013-14 are submitted herein which shows that the JV assessee had not claimed deduction u/s 801A in its ITR for its AY 2011-12 & 2012-13 out of ignorance but having known its eligibility for deduction u/s 801A, it started claiming the same from assessment year 2013-14 onwards. The claim of the assessee u/s 801A was allowed in the intimation u/s 143(1). A copy of such order is attached herein for your ready verification.

Para 6 - Likewise, The Documents related SBEPL-GRIL JV (PAN AAFAS2639R) for AY 2011-12, AY 2012-13 and Y 2013-14 are submitted herein which shows that the JV assessee had not claimed deduction u/s 801A in its ITR for its AY 2011-12 & 2012-13 out of ignorance but having known its eligibility for deduction u/s 801A, it started claiming the same from assessment year 2013- 14 onwards. The claim of the assessee u/s 801A was allowed by your good office in the order dated 31-05-2023. A copy of such order is attached herein for your ready verification. It may also be noted such claim u/s 801A by the SBEPL-GRIL JV was allowed by the jurisdictional ITAT in Appeal before [ITA 195/CTK/2019] for AY 2014-15. A copy of such order is already in your good office's records.

6.9 As per the AR, due to ignorance the profit relating to JVs were not claimed during the AY 2011-12 and 2012-13 even if the said JVs were entitled to deduction u/s 801A of the Act. Further, jurisdictional ITAT in Appeal No. ITA 195/CTK/2019 decreed that the said JVs were entitled to deduction u/s 801A being the

"developer of an infrastructure facility in their individual capacity. Hence, it is apparent that the JVs were the "developer" and work executed by the members were mere work contractors. As the JVs were unable to claim deduction u/s 801A due to ignorance for the impugned assessment year, AR harps on the points that the profit attributable to the portion of the work executed by the members that were executed/sub-contracted by JVs are entitled to get Deduction U/s 801A of the Act. Considering the submission of AR and Order of the Jurisdictional ITAT. JVs are entitled to deduction u/s 801A being the "developer" and members are not entitled to deduction u/s 801A in the guile of being a "developer".

6.10 As seen in earlier para, the Judgements of the Hon'ble ITAT, Vizag has given the benefit of deduction to the members since the JV has not offered any income or profit on any of the projects awarded to it nor claimed any deduction u/s 801A of the Act. In the present case both JVs have shown profit and claimed deduction u/s 801A from AY 2013-14 but due to ignorance has not claimed deduction v/s 801A for the AY 2011-12 & 2012-13. However, they have claimed deduction from AY 2013-14 onward. Hence, the factual matrix in the case of Transstory (India) Ltd are not applicable to the assessee as the assessee has claimed deduction u/s 801A from AY 2013-14 and due to ignorance they have not claimed in the Ay 2011-12 & 2012-13 which they are otherwise entitled to.

6.11 Considering the fact that the members are mere work contractors and not "developers", the factual matrix of the judicial precedent cited by the AR are not applicable to the present case. Accordingly, additional claim of deduction of Rs. 35,80,390/- u/s 80-1A of the Act in respect of the Joint ventures - (i) M/s Balaji-ARSS (JV) and (ii) M/s Balaji-ARSS (JV) is denied.

12. Before dwelling upon the issue, for the sake of convenience, we extract the provisions of Section 80IA(4) of the Act :-

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

80-IA. (1) *****

(2) *****

(3) *****

(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.

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 notified⁷⁹ 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, ⁸⁰[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, ⁸⁰[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, ⁸⁰[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) [***]*

13. In the present case, to our understanding the “enterprises” as referred to in Section 80IA(4)(i) of the Act are two joint ventures namely M/s Balaji ARSS-JV and M/s SBNEPL-GRIL JV. These joint ventures are incorporated in terms of joint venture agreements executed between the parties known as constituent of joint ventures and the said joint ventures are separate legal entity having their own PAN number and assessed as AOP. The Joint Ventures has entered into an agreement with the respective authorities i.e. East Coast Railways and the Chief Engineer, NH, Odisha for development of infrastructure facility. Both the joint ventures have started after first day of April, 1995. Thus, these joint ventures are the “enterprises” as referred to in Section 80IA(4) of the Act for claiming deduction. It is also relevant to state here that the respective joint ventures have also claimed deduction u/s.80IA(4) of the Act on the profits earned from these projects and has been allowed to them for which the necessary documents in the shape of return of income and appellate orders in the case of SBEPL-GRIL-JV were also placed by the assessee in the paper book. The deduction u/s.80IA(4) could be claimed for ten consecutive assessment years during a period of 15 years and it appears that these joint ventures have started claiming deduction from A.Y.2013-2014 and not from the year under appeal. Thus, it is clear that the deduction u/s.80IA(4) of the Act was claimed by the joint ventures, who

have been entered into the agreement with the respective authorities and worked as developer.

14. Now coming to the claim of the assessee for deduction u/s.80IA(4) of the Act on the execution of the work on the project undertaken by the joint ventures. The assessee has claimed that it had executed the entire work on the basis of the joint venture agreement according to which the assessee is the lead partner. On a conjoint reading of the provisions as contained in Section 80IA(4)(i) with 80IA(4)(i)(b) of the Act, it is clear that the enterprises could be a consortium of the companies. In the present case, as discussed above, the joint ventures are the enterprises created in terms of joint venture agreement where certain companies including assessee are constituents of such joint venture agreement, therefore, claiming that such joint venture is represented by its constituent for execution of the work and is eligible for deduction u/s.80IA(4) of the Act, is farfetched argument which cannot be accepted.

15. Now, coming to the joint venture agreement, in terms of the joint venture agreement of M/s Balaji ARSS JV, para 4 reads as under :-



4.	The 'Parties' have resolved that the distribution of share and responsibilities is as under:	
a)	Lead Partner share Shree Balaji Engicons Pvt. Ltd. 70%	
	Responsibilities.	i) Financial 100%
	(Technical, Financial & other obligations)	ii) Other Obligation 100%
		iii) Execution 51%
	Joint Venture Partner share 30%	
	Name ARSS Infrastructure Projects Limited	
	Responsibilities.	i) Technical 100%
	(Technical, Financial & other obligations)	ii) Execution 30%

16. From the perusal of the clause 4, it is clear that as per the joint venture agreement, both the constituents of M/s Balaji ARSS-JV had defined their scope of responsibility as well as scope of the work to be executed and also clearly defined their share in the profit/loss. Therefore, they simply at the most could be treated as the partners to the joint venture which is a separate legal entity. None of the constituent has undertaken the responsibility to execute 100% execution and as per the chart reproduced in para 10 above, they have share gross receipt in almost 55% - 45% ratio for this year. The bills against the execution of work were separately raised by the assessee to M/s Balaji ARSS-JV, which is evident from the copies of the invoices available in the paper. M/s Balaji-ARSS (JV) and SBEPL-GRIL (JV) have raised the bills to their respective principals against the works executed by them and had received the amounts which were in turn paid to the parties who have executed the work. In such manner these constituents parties are only the sub-contractors and cannot be treated as the "enterprises" for claiming deduction u/s.80IA(4) of the Act. From perusal of the work order given by the East Coast Railway to M/s Balaji ARSS (JV) and the Chief Engineering, NH, Odisha to M/s SBEPL-GRILL(JV), it is clear that the works have been awarded to the respective joint ventures wherein they have been termed as the "contractors" by the respective authorities. The relevant copy of the work orders are as under:-

Page 329

East Coast Railway

Office of the
Chief Engineer (Con)/III
Bhubaneswar

No. CE/Con/III/BBS/SBP/W/BA-JV/918/

Dt. 25/10/2010To,
The Sr. AFA/Con
E. Co. Railway, Sambalpur.

Sub : Ratification of Principal Agreement No.30/CE/C/III/BBS/SBP/ECOR/2010 dtd. 22.10.2010 entered into with **Balaji-ARSS (JV), Jharsuguda**,
Name Work : Construction of ROB at Km. 530.279 (815 m F/CSB of LPG Station) span (2x12m + 2x22.5m) RCC T-beam Girder and other allied works in connection with setting up Alumina smelter plant at Lapanga station (Deposit work) (Two packet system).
Agency : **Balaji-ARSS (JV)**, At/PO : **Belpahar (R.S.)**, Dist : **Jharsuguda, ODISHA-768217**.

Please find enclosed herewith two copies of Principal Agreement bearing No. 30/CE/C/III/BBS/SBP/ECOR/2010 dtd. 22.10.2010 in respect of the above mentioned work for ratification.

The original B.G. bearing No. 8445/26/61 dtd. 14.09.2010 for Rs.58,89,860/- issued by State Bank of India, Samada (Belpahar) Branch, PO : Belpahar R.S., Jharsuguda, Orissa towards Performance Guarantee valid up to 13.09.2011 along with verified letter No. Adv/26/70 dtd. 16.10.2010 in original is sent herewith for safe custody at your end. While accepting the P.G. the procedure laid down in para-1 of Railway Board's letter No. 2005/AC/1/25/19 dated 05/20.09.2005 as well as in Railway Board's letter dated 29.04.2008 has been followed.

Encl : **Principal Agreement in 02 copies.**

Executive Engineer (Con)/Tender,
For Chief Engineer (Con)/III
E. Co. Railway, Bhubaneswar

Copy to Dy. CE/C/III/SBP along with a copy of Aft. & Copy of B.G. bearing No. 8445/26/61 dtd. 14.09.2010 for Rs.58,89,860/- issued by State Bank of India, Samada (Belpahar) Branch, PO : Belpahar R.S., Jharsuguda, Orissa towards Performance Guarantee valid up to 13.09.2011 along with copy of verified letter No. Adv/26/70 dtd. 16.10.2010 is sent herewith for your information.

Copy to : **Balaji-ARSS (JV)**, At/PO : **Belpahar (R.S.)**, Dist : **Jharsuguda, ODISHA - 768217** along with a copy of Agreement for information.

Encl : One copy of Principal Agt.

Kumar Singh
Executive Engineer (Con)/Tender,
For Chief Engineer (Con)/III
E. Co. Railway, Bhubaneswar



EAST COAST RAILWAY
(Construction Organization)

CONTRACT AGREEMENT NO.	: 30 /CE/C/III/BBS/SBP/ECOR/2010
APPROXIMATE VALUE OF CONTRACT	: Rs.,11,77,97,146/- (Rupees Eleven crore seventy seven lakh ninety seven thousand one hundred & forty six only)
TOTAL SECURITY DEPOSIT	: Rs.58,89,860/- (Rupees Fifty eight lakh eighty nine thousand eight hundred & sixty only)
Estimate No. & Allocation	: Estimate No. CE/C/III/BBS/SBP/ROB/LPG/DW/1, Allocation : Deposit
Date of completion	: 07.04.2011 i.e. 09 (Nine) months from the date of issue of the acceptance letter.

REFERENCE TO THE INITIAL SECURITY DEPOSIT: Rs.7,58,320/ (Rupees Seven lakhs fifty eight thousand three hundred & twenty only) in shape of DD No. 888851 dtd. 18.03.2010 issued by SBI, Sanada (Belpahar) Branch, Jharsuguda by the contractor as EMD is adjusted towards Security Deposit.

BALANCE SECURITY DEPOSIT : Rs.51,31,540/- (Rupees fifty one lakh thirty one thousand five hundred & forty only) : The balance Security Deposit of Rs.51,31,540/- (Rupees Fifty one lakh thirty one thousand five hundred & forty only) will be recovered at the rate of 10% from running on account bill in accordance with the clause No. 34.3 of the Special Conditions of Contract, Chapter - 09.

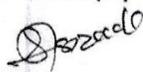
PERFORMANCE GUARANTEE : Rs.58,89,860/- (Rupees Fifty eight lakh eighty nine thousand eight hundred & sixty only) : The contractor(s) has/have submitted B.G bearing No. 8445/76,61 dtd. 14.9.2010 for Rs.58,89,860/- issued by State Bank of India, Samada (Belpahar) Branch, Belpahar R.S., Jharsuguda towards Performance Guarantee with valid up to 13.09.2011.

NAME & PLACE OF WORK : Construction of ROB at Km. 530.269 (815 m F/CSB of LPG Station) span (2x12m + 2x22.5m) RCC T-beam Girder and other allied works in connection with setting up Alumina smelter plant at Lapanga Station (Deposit work) (Two Packet System).

Articles of AGREEMENT made this 22nd day of October in the year two thousand ten between **BALAJI-ARSS (JV), At/PO : Belpahar (R.S), Dist : Jharsuguda, ODISHA - 768217** hereafter called the "Contractor" of the one part and the President of India acting in the premises through the **Chief Engineer (Con)/III/E.Co.R, Bhubaneswar** of the East Coast Railway Administration herein after called the "Railway" of the other part.

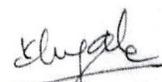
WHEREAS the Contractor has agreed with the Railway during the period mentioned in the Annexer, Additional Special Condition and Specification for the performance of such of the works named above and described in the said Additional Special Conditions & Specifications set forth in the Schedules and will be set forth in the work orders (which work Orders shall be deemed and taken to be the part of this contract) that will be issued during the said period at the rates tendered for by the Contractor as mentioned in the Annexed Schedule of Works and Specified in the General Conditions of Contract as amended and corrected from time to time and the Special/Additional special conditions, specifications of works of the contract documents of the S.E. Railway Part-II, III and Annexure-IV and the S.E. Railway Schedule of Rates, the contents of which have been read and fully understood by the Contractor as forming part of this Agreement and the Additional Special Conditions and Specifications annexed hereto AND WHEREAS the performance of the said works is an act in which the public are interested.

BALAJI-ARSS (JV)


Attorney
Contractors



No correction on this page


CHIEF ENGINEER (CON)/III/BBS
Chief Engineer/Con. III
E. Co. Railway / Bhubaneswar
मुख्य अभियंता / कॉन्. III
यु.ए. रेलवे / भुवनेश्वर

AND WHEREAS the Contractor has deposited with the Railway Administration by way of Security for the due fulfillment of the terms of this contract a sum of **Rs.7,58,320/- (Rupees Seven lakh fifty eight thousand three hundred & twenty only)** under receipt whereof by the Railway Administration is hereby acknowledged against the full Security amount of **Rs.58,89,860/- (Rupees fifty eight lakh eighty nine thousand eight hundred & sixty only)** calculated on the basis of clause No. 34.3 of the Special Conditions of Contract, Chapter-9, embodied hereunder and balance amount of Security Deposit i.e. **Rs.51,31,540/- (Rupees fifty one lakh thirty one thousand five hundred & forty only)** to be recovered from the progressive bills at the rate of 10% till it reaches the required value to be made on account of work being done, repayable as per Revised clause No.16(1) of the General Conditions of Contract, Revised Edition 2001, Volume-II..

NOW THIS INDENTOR PRESENTS WITNESSETH that in consideration of the payments to be made by the Railway, the contractor will duly perform the said works mentioned in the said schedules and shall execute the same with great promptness, care and accuracy in the workman like manner to the satisfaction of the Railway and will complete the same in accordance with the said specifications, drawings and the said conditions of contract as amended and corrected from time to time on or before the time specified in the annexed additional special conditions and/or in the schedules and will observe, fulfill and keep all conditions therein mentioned (which shall be deemed and taken to be part of this contract as if the contract shall duly perform the said works in the manner aforesaid and observe and keep the said terms and conditions the Railway will pay or cause to be paid to the contractor for the said works on the final completion thereof for the amount due in respect thereof at the rate specified in the schedule annexed hereto.

No correction on this page

DA :- Schedule A, B, C, D, E, F, G & H.
Special conditions & Specifications in Annexure.

BALAJI ARSS (JV)
Contractor(s)
Address
BALAJI-ARSS (JV),
At/PO : Belpahar (R.S),
Dist : Jharsuguda,
ODISHA - 768217.

Signature of Witness
With addresses to the
Signature of the Contractor(s)

Witness

Chief Engineer (Con)/III/BBS
For & on behalf of the President of India
E. Co. Railway / Bhubaneswar
मुख्य अभियंता/निर्माण /III
पुनः रेलवे / भुवनेश्वर



Page 563

S.B.D AGREEMENT

No.01/2010-11

CERTIFIED COPY
17/9/10

Name of the Work:-	Widening and strengthening of existing single/Intermediate lane with geometric improvement to two lane carriageway from Km 89/0 to 104/0 and km 117/0 to 131/0 of N.H-200 .
Authority of acceptance with No and Date:-	Chief Engineer N.Hs (Orissa),Bhubaneswar. vide letter No. 12296 Dtd. 27.08.2010
Percentage of Excess of less:-	12.41 % .Less.
Name of Contractor:- Agreement Value:-	SBEPL- GRIL(JV) Rs. 38,25,49,957.00 (Rupees Thirty Eight crore twenty five Lakh fortynine thousand nine hundred fiftyseven) only
Date of Commencement:-	17.09.2010
Stipulated date of Completion:-	16. 09.2012
Extension of time granted upto:-
Authority and No. and Date in which
The copy of Agreement submitted to.....
1) Chief Engineer.....
2) Superintending Engineer.....
3) Senior D.A G (Works) Orissa.....



Page 1 This SBD Agreement
Page 56
pages from No 172 (one A one-
hundreded seventy two) only.
sd
EXECUTIVE ENGINEER
JHARSUGUDA N.H. DIVISION

AGREEMENT

This agreement, made on the 14th of September, 2010 between the Executive Engineer National Highway Division, Jharsuguda (herein after called "the Employer") and SBEPL-GRIL(JV) here in after called "the contractor of the other part").

Where as the Employer is desirous that the contractor to execute the work "Widening and strengthening of Existing single / Intermediate lane with geometric improvement to two lane carriageway from km 89/0 to 104/0 and Km 117/0 to 131/0 of N.H-200(Bid No. 33CENH/2009-10) and the employer has accepted the Bid by the contractor for he execution and completion of the work and remedy of any there in , at a cost of Rs. 38,25,49,957.00 (Rupees Thirty Eight crore twentyfive lakh fortynine thousand nine hundred fiftyseven) only

MEMORANDUM

- a) Name of the work:- Widening and strengthening of existing single/Intermediate lane to two lane with geometric improvement to two lane carriageway from km 89/0 to 104/0 and Km 117/0 to 131/0 of N.H-200
- b) Agreement Amount:- Rs. 38,25,49,957.00 . (Rupees Thirty Eight crore twentyfive lakh fortynine thousand nine hundred fiftyseven) only
- c) Earnest money:- Bank Guarantee for Rs. 20,000,00.00 (Rupees twenty lakh only) issued by S.B.I Samada Belpahar vide B.G No. 8445/26/03 Dt. 09.04.2010
- d) Security:- 6% from each bill subject to a maximum of 5% of final contract price.
- e) Performance Security:- Bank Guarantee of Rs. 1,91,27,500.00(Rupees one crore ninetyone lakh twentyseven thousand five hundred)only issued by S.B.I Samada Belpahar vide guarantee No. 8445/26/59 Dt. 09.09.2010 valid upto 08.09.2011
- f) Additional performance Security:- Bank Guarantee of Rs. 95,63,800.00.00(Rupees ninetyfive lakh sixtythree thousand eight hundred)only issued by S.B.I Samada, Belpahar vide guarantee No. 8445/26/60 Dt. 09.09.2010 valid upto 08.09.2011

Contractor

Signature
Jharsuguda
Jharsuguda

sd
Divisional Accounts Officer
N.H.Division, Jharsuguda

sd
Executive Engineer
N.H.Division Jharsuguda



//page-2//

- g) Date of Commencement of work:- 17.09.2010 (Executive Engineer . N.H. Division,
Jharsuguda letter No. 1902 Dt. 14.09.2010.)
- h) Date of Issue of Notice to proceed with the work:- 14.09.2010.
- i) Intended completion date:- 16.09.2012 i.e 24 (Twenty) Calendar Months after commencement
of the work.
- j) Total number of item of works Tendered for:- 52 (fifty two) Items only.

NOW THIS AGREEMENT WITNESSETH AS FOLLOW:-

1. In this Agreement ,words and expression shall have the same meaning as are respectively assigned to them in the conditions of contract herein after referred to and they shall be deemed to form and be read and constructed as part of this Agreement.
2. In consideration of the payments to be made by the Employer to the Contractor as hereinafter mentioned the contractor hereby covenants with the Employer to execute and complete the work and remedy any defects therein in conformity in all aspects with the provisions of the contract.
3. The Employer hereby covenants to pay the contractor in consideration of the execution and completion of the works and the remedying the defects wherein contract of the price or such other sum as may become payable under the provisions of the contract at the times and in the manner prescribed by the contract.

Contractor
Signature
Signature

Divisional Accounts Officer
N.H.Division, Jharsuguda

Executive Engineer
N.H.Division Jharsuguda



//page-3//

4. The following documents shall be deemed to form and be ready and constructed as part of this Agreement viz.

- i) Letter of Acceptance.
- ii) Notice to proceed with the works.
- iii) Contractor's Bid.
- iv) Condition of contract:- General Special.
- v) Contract Date.
- vi) Additional condition.
- vii) Bill of Quantities.
- viii) Any other Documents listed in the contract Date as following part of the contract.

In witnessed where of the parties there to have caused this Agreement to be executed the 14th day of September '2010.

Signature of the witness:-

Rakesh Agrawal

Name and Address of the witness:-

RAKESH AGRAWAL

c/o Jalan Bhawan

Munga para Dist Jharsuguda

Occupation:-

Binding Signature of Employer:-

Binding Signature of Contractor:-

Executive Engineer
N.H. Division Jharsuguda.

For SBEPL GRILL
Contractor *[Signature]*
Authorized Signatory

[Signature]
Divisional Accounts Officer
N.H.Division, Jharsuguda

[Signature]
Executive Engineer
N.H.Division Jharsuguda



[Signature]
14/9

17. It is also observed that the awardee i.e. the principals have retained the certain amounts towards the performance guarantee which in no way

could be treated as risk and responsibility shared by the assessee as a constituent of the joint venture. Since the amounts of such securities were held by the principal in the name of the joint venture only and was repayable to the assessee only on the completion of performance guarantee which in no way could be treated as sharing the risk and responsibilities. Since both the JV's could only be termed as "developer", therefore, the joint venture firms are eligible for deduction u/s.80IA(4) of the Act and was rightly claimed and allowed which is not in dispute before us.

18. For claiming the deduction u/s.80IA(4) of the Act in the hands of the constituent of joint venture, reliance was placed by the assessee on the decision of the Hon'ble Allahabad High Court in the case of PNC Constructions Co. Pvt. Ltd, reported in 37 taxmann.com 361 (All-HC), wherein the Hon'ble High Court has approved the findings of the coordinate bench of the ITAT Agra. The facts of the case are that M/s PNC Construction Co. Pvt. Ltd. was one of the constituent of the joint venture and it executed the entire work for and on behalf of the joint venture firm which was solely created only for the purpose of participating in the bid process and thereafter the entire activities of such contract was carried out by M/s PNC Construction Co. Pvt. Ltd. Thus, the Hon'ble High Court opined that the company has fulfilled all the conditions as provided u/s.80IA(4) of the Act for claiming deduction. However, in the instant case, from the chart of the receipts as reproduced in para 10 above, it is clear that during the year under appeal out of the total receipts of Rs.17.51

crores received by both the joint ventures entities, the assessee had received a sum of Rs.9.06 crores only and the remaining amount was received by other constituent of the joint ventures. Therefore, it cannot be said that the assessee is sole executants of the project undertaken by the respective joint ventures. Moreover, it is an admitted fact that both the joint venture have also claimed deduction u/s.80IA(4) of the Act on the profits from such projects, therefore, there cannot be two beneficiaries of deduction u/s.80IA(4) of the Act on one project i.e. first deduction is claimed by the joint venture as the principal awardee and developer of the infrastructure facility and later by one of its constituent claiming to be the lead partner and main executants of the project awarded to such joint venture. Therefore, the facts of the case of M/s PNC Construction (supra) are fully distinguishable from the facts of the present case of the assessee and are not applicable.

19. Likewise, the reliance placed by the assessee on the decision of coordinate bench of the Bangalore Tribunal in the case of M/s JSR Constructions (P) Ltd., passed in ITA No.898/BANG/2009, dated 29.03.2011 and the decision of the ITAT Vizag Bench of the Tribunal in the case of Transstory (India) Ltd., reported in (2012) 134 ITD 269 (Visakha) are also distinguishable on facts wherein in both of these cases also, the entire work was executed by one of the constituent of the joint venture who was allowed deduction u/s.80IA of the Act, whereas in the present case as observed above, the assessee has partly executed the contract and partly by the other constituent and JV's have also claimed

deduction u/s.80IA of the Act. Thus, the ratio laid down in these cases is not applicable to the present case.

20. Further, Id. AR of the assessee placed heavy reliance upon the decision of coordinate bench of Hyderabad Tribunal in the case of Megha Engineering & Infrastructure Ltd., passed in ITA No.1499/Hyd/2019, dated 25.09.2024, wherein the hon'ble bench was of the opinion that the deduction u/s 80IA(4) is available to the main constituent of the JV who had executed the work on behalf of the JV. After going through the facts we find that in that case hon'ble bench has observed that in most of the cases entire work awarded to JV was executed / performed by the assessee (Megha Engg.) as main constituent of JV. Further in many cases even the bill were directly raised to the principal and payments have been received directly and JV was merely created to obtain / participate in the process of bidding. After considering these facts the hon'ble bench has allowed deduction u/s 80IA(4) in the hands of the main constituent who executed the work as developer. In the instant case, facts are totally different. In present case a JV was created in terms of the MOU executed between two companies where they have agreed to come together to participate in the tender process. After successful bidding, they again entered into a specific Joint Venture Agreement wherein the terms and conditions of their revenue/ profit sharing, their individual scope of work, risks and responsibilities etc. are decided. The JV than applied for all the registrations like PAN, TDS etc. and become a separate legal entity. Based on such JV Agreement, both the parties have executed the

work awarded to them by the JV entity and share the receipts according to their contribution in the execution which has already been tabulated in the para 10 above. The bills were raised by both the constituents to the JV at the price agreed between them and JV's and in turn JV's has raised the bills to the principal at the rate awarded in the tender. The principal has made the payment to the JV after making TDS and then payments were released to both the constituents according to their bills. Thereafter the returns of income were filed by the assessee wherein no deduction u/s 80IA(4) was claimed on such work. However, the JV's from AY 2013-14 has stated claiming the deduction u/s 80IA on the same project as developer and was allowed to them which is an undisputed fact. Thereafter even knowing the fact that both the JV's has claimed deduction u/s 80IA(4) on the profits from the said project, assessee has made a fresh claim of deduction u/s 80IA(4) of the Act before Id.CIT(A) during the course of appellate proceedings by way of additional ground of appeal and also filed the necessary audit reports required for claiming such deduction. All these clearly established that the conclusion reached by the coordinate bench of Hyderabad Tribunal in the case Megha Engg. (supra) is based on facts which are entirely different from the facts of the case of the assessee thus the ratio laid down by the coordinate bench in the case of Megha Engg.(Supra) is not applicable to the case in hand.

21. In all the other cases relied by the assessee also has similar facts thus cannot be followed having different facts.

22. The assessee has also placed reliance on the decision of the Hon'ble Supreme Court in the case of Faqir Chand Gulati Vs. Uppal Agencies Pvt. Ltd. reported in (2008) 10 SCC 345 (SC), wherein the Hon'ble Supreme Court has discussed the concept of joint venture. Accordingly to Id. AR the joint venture was formed only to procure the contract work and the parties have requested with respect to their joint responsibility that existed in relation to the principal and, therefore, once the parties have taken the responsibility towards principal they stepped into the shoe of the joint venture which was formed to procure the contract work. Once the contractor entered into the shoe of the joint venture it should be allowed deduction u/s.80IA(4) of the Act. Looking to the facts of the present case, we find that though both the joint ventures are formed for a specific purpose of participating the tender as per MOU, however, later both the constituents have entered into a separate agreement titled as "Joint Venture Agreement" and performed the work as per the terms and conditions of such agreement. It is also a matter of fact both the joint ventures have claimed deduction u/s.80IA(4) of the Act for the work executed, therefore, the constituent of such joint venture cannot be held as stepped into the shoe of the joint venture for claiming deduction u/s.80IA of the Act.

23. One more aspect is that to claim the deduction u/s 80IA(4) assessee should kept separate books of accounts of each eligible project. In the present case the assessee has not made any claim of deduction on the projects related to JV's in the return of income filed and after the

expiry of few years, claim was made before the CIT(A) through additional ground of appeal and filed the relevant reports. Here it is relevant to note that in the audit report u/s 44AB filed alongwith the return of income nowhere it was observed by the auditors that separate books of account were maintained for all the eligible projects related to JV's thus it is not sure whether there were separate books of accounts available to deduce the true and correct profits eligible for deduction u/s 80-IA on these projects. Assessee also failed to file the Balance Sheets of these projects and only P&L accounts were filed alongwith the report in Form 10CCAC required to claim deduction u/s 80IA. Thus assessee has also failed to comply full conditions for claiming deduction u/s 80IA of the Act.

24. It is also a relevant factor that on a single project, deduction u/s 80IA has been claimed twice, *firstly* by both the JV's claiming themselves as the developer and *secondly* by one of the constituents who executed part work by claiming itself as the developer. To our understanding deduction u/s 80IA is available to one entity only in one project that too to the developer enterprise and not to the other parties execute the work down the line as sub-contractor. Such activity could only be termed as "works contract" and as per Explanation to 80IA(13) works contracts are not eligible for deduction u/s.80IA(4) of the Act. The concession 80IA was provided in the statute to the developers who take all the risks and responsibility to create a new infrastructure facility and not to those entities who simply execute the work and received the remuneration immediately or in advance as mobilization advance.

25. It is also a matter of fact that assessee was not able to demonstrate whether the other constituent of joint ventures had claimed deduction u/s.80IA(4) of the Act on the income on their part of the receipts. On specific query by the bench, the Id. AR stated that he was not aware. On the contrary, it is an undisputed fact that both the principals i.e. Joint Ventures, who have been awarded the project form the respective authorities i.e. East Coast Railway and the Chief Engineer, NH, Odisha, had claimed deduction u/s.80IA of the Act on the income earned by the execution of such projects.

26. Recently the coordinate bench of the Tribunal ITAT Mumbai in the case of AJR Infra and Tolling Limited, passed in ITA No.2330/Mum/2022 along with other connected appeals, dated 31.01.2024 has held that the deduction u/s.80IA(4) of the Act is available to the Special Purpose Vehicles (SPV), who had entered into the agreement with NHAI and also raising invoices upon the NHAI. Hence, in the eyes of law, it is the SPVs which are actually executing the work of development and operation of infrastructure facility. In the instant case also it is the respective joint entities, who had entered into agreement with their principals and developed the infrastructure facilities by awarding the sub-contract to its constituent. Therefore, in terms of Section 80IA(4) of the Act the enterprises which is eligible for deduction is the "joint venture firm" and not any of the constituent as has been claimed by the assessee.

27. In the last, it is observed that in the case of M/s Rawat-Balaji-JV and M/s SBEPL-GRIL-JV in A.Y.2014-2015, the department proposed to

withdraw the deduction allowed u/s.80IA of the Act to these JVs vide order passed u/s.263 of the Act, against which appeals were preferred by these two JVs before ITAT wherein in ITA No.193&194/CTK/2019, the assessee's main argument was that though the work was executed by the constituents but it was for the JVs and, therefore, these JVs are entitled for deduction u/s.80IA of the Act. After considering the arguments of the assessee, the coordinate bench of the ITAT Cuttack in these two cases (ITA No.193&194/CTK/2019) has held that these JVs are eligible for deduction u/s.80IA of the Act. The relevant observations as made in the said order are as under :-

48. Now, we further proceed to adjudicate the grounds of assessee on merits in ITA Nos.193&194/CTK/2019. Ld. AR has relied on the provision of sub-clause (a) of clause (i) of sub-section 4 of Section 80IA of the Act and has submitted that sub-section (4) applies to an entity which is owned by a company registered in India or by consortium of such company. He further explained that in these two appeals, the assessee has claimed deduction u/s.80IA(4) of the Act with regard to the income earned from the Joint Venture entity which was created by the respective assessees for the purpose of executing development-cum-contract work, thus, they are also entitled for deduction u/s.80IA(4) of the Act as these two companies earned income from the business of developer-cum-contract work done through Special Purpose Vehicles/Entities created for this special purpose under Joint Venture agreement for the similar kind of business of developer akin to the related assessee i.e. Shri Balaji Engicon Pvt. Ltd. (ITA No.194/CTK/2019). It has also been contended that the work was executed by the member of consortium, material were purchased by them, plant and machinery of members of consortium was also used and investment and other financial risk were also undertaken by the assessee in the capacity of member of consortium. He specifically pointed out that the work was obtained on the strength of technical and financial capacity of assessee and was executed under its supervision by Joint Venture entity and the work contract of developer-cum-contractor was neither sublet nor sub-contracted to any other outsider third party or entity, therefore, these two assessees are also eligible for deduction u/s.80IA(4) of the Act. The above factual position have not been controverted by the Id. CITDR during his arguments before the Bench and on careful reading of sub-clause (a) of clause (i) of Section 4 of Section 80IA of the Act,

we clearly observe that the said provision also applies to an entity or company owned by a company registered in India or by consortium of such companies and this provisions qualifies both the assessee of ITA Nos.193&194/CTK/2019 for deduction u/s.80IA(4) of the Act. We may also point out that the Id. CITDR has also not demonstrated that the work undertaken by these companies was not in the nature of work of developer-cum-contractor and the same was worked by works contractor. Therefore, the findings arrived at by us in the foregoing paragraphs of this order pertaining to ITA No.195/CTK/2019 read with provision of Section 80IA(4)(i)(a) of the Act, we are compelled to hold that these two assessees are also qualified and entitled for deduction u/s.80IA(4) of the Act and, thus, on merits, the impugned assessment orders cannot be branded as erroneous and prejudicial to the interest of revenue.

28. From the above, it is clear that assessee M/s Shree Balaji Engicon Pvt. Ltd. had tried to play with the department wherein at one stage it had claimed that the work done by it was on behalf of the JVs and the JVs are entitled for deduction u/s.80IA of the Act and later itself claimed deduction u/s.80IA on the vary same project which is not permissible in the eyes of law as deduction u/s.80IA cannot be allowed to two entities as developer enterprise on a single project.

29. The entire discussion lead to following facts :-

- (i) assessee is one of the constituent of two separate Joint Venture Entities and partly executed the projects awarded to such JV entities.
- ii) JV entities had claimed deduction u/s.80IA of the Act on such project and allowed to them. Wherever the claim was not allowed to the JVs, such claim was agitated in appeals and it was submitted that though the works were executed through constituents, however, since no work was carried out by the third party i.e. other than the constituents therefore, the JVs are entitled for deduction u/s.80IA of the Act and accordingly those JVs were succeeded in appellate forums and allowed the deduction u/s.80IA of the Act.

- iii) the deduction u/s.80IA of the Act could be allowed to the enterprises who developed the infrastructure facility which in the present case are two JV Entities.
- iv) The deduction u/s.80IA on one single project cannot be allowed to two entities i.e. first in the hands of the JV who had been awarded the project by the authorities wherein the JV has entered into the agreement and had signed the same and later executed it. Secondly, by the constituents of the JV who now claimed that it had carried out major part of the execution, therefore, is also entitled deduction u/s.80IA of the Act on the same project. In our understanding deduction u/s.80IA of the Act cannot be allowed to two entities by treating them as enterprises and developer at the same time.

30. In view of the foregoing discussion, we are of the considered view that the assessee is not entitled for the work executed by it for and on behalf of Joint Venture, which is the enterprises eligible for deduction u/s.80IA(4) of the Act. Accordingly, ground No.2 of the assessee is dismissed.

31. In ground No.3, the assessee has challenged the disallowance deduction of Rs.47,15,405/- claimed u/s.80IAB of the Act.

32. Brief facts leading to this ground of appeal are that the assessee had claimed that during the year under appeal, it has awarded contract from Vedanta Aluminum Ltd. for construction of road at its site which was declared by the Government as Special Economic Zone (SEZ) in terms of the Notification dated 27.02.2009. Assessee claimed that since the plant of Vedanta was declared as SEZ by the Government and assessee has constructed road, it comes under the category of development of Special

Economic Zone (SEZ) and, therefore, is eligible for deduction u/s.80IAB of the Act on the profits earned from such contract. Ld. AR further placed reliance on the submissions made before the Id. CIT(A) in this regard and are available in the order of the Id. CIT(A) from para 5.10 to 5.13. He accordingly prayed for the allowability of deduction u/s.80IAB of the Act to the assessee on the development of the SEZ.

33. On the other hand, Id. CIT-DR vehemently supported the orders of the lower authorities and submitted that the assessee has worked for the Vedanta Aluminium, Ltd. who is declared as developer, deduction u/s.80IAB of the Act is allowed to the developer only. Since the assessee is not the developer, it cannot be allowed deduction u/s.80IAB of the Act. Ld. CIT-DR also submitted the copy of the list of approvals granted under SEZ Rules upto 31.12.2022 accordingly to which out of total 425 areas are declared as SEZ and the SEZ under reference is appearing at Sl.No.259 where M/s Vedanta Aluminum Co. Ltd. is declared as the “developer” and not the assessee, therefore, the Id. CIT-DR submitted that the assessee cannot be allowed deduction u/s.80IAB of the Act.

34. We have considered the rival submissions and perused the material available on record. Before dwelling upon the issue, the provisions of Section 80IAB of the act should be considered which read as under :-

Deductions in respect of profits and gains by an undertaking or enterprise engaged in development of Special Economic Zone.

80-IAB. (1) Where the gross total income of an assessee, being a Developer, includes any profits and gains derived by an

undertaking or an enterprise from any business of developing a Special Economic Zone, notified on or after the 1st day of April, 2005 under the Special Economic Zones Act, 2005, 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 one hundred per cent of the profits and gains derived from such business for ten consecutive assessment years:

Provided that the provisions of this section shall not apply to an assessee, being a developer, where the development of Special Economic Zone begins on or after the 1st day of April, 2017.

(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 a Special Economic Zone has been notified by the Central Government :

Provided that where in computing the total income of any undertaking, being a Developer for any assessment year, its profits and gains had not been included by application of the provisions of sub-section (13) of section 80-IA, the undertaking being the Developer shall be entitled to deduction referred to in this section only for the unexpired period of ten consecutive assessment years and thereafter it shall be eligible for deduction from income as provided in sub-section (1) or sub-section (2), as the case may be :

Provided further that in a case where an undertaking, being a Developer who develops a Special Economic Zone on or after the 1st day of April, 2005 and transfers the operation and maintenance of such Special Economic Zone to another Developer (hereafter in this section referred to as the transferee Developer), the deduction under sub-section (1) shall be allowed to such transferee Developer for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee Developer.

(3) The provisions of sub-section (5) and sub-sections (7) to (12) of section 80-IA shall apply to the Special Economic Zones for the purpose of allowing deductions under sub-section (1).

Explanation.—For the purposes of this section, "Developer" and "Special Economic Zone" shall have the same meanings respectively as assigned to them in clauses (g) and (za) of section 2 of the Special Economic Zones Act, 2005.

35. From bare perusal of the provisions of Section 80IAB of the Act, it is clear that deduction is available to an assessee being a developer from the

profits of developing a Special Economic Zone. As per the Notification dated 27.02.2009, M/s Vedanta Aluminum Limited, was declared as “developer” to set up a sector specific Special Economic Zone for Manufacture and Export of Aluminum along with 1215 MW Captive Power Plant at Bhurkamunda, Brundamal and Kurebaga Villages, Tehsil and District Jharsuguda, in the state of Orissa. As the Government has notified M/s Vedanta Aluminium Ltd. as “developer” and the assessee has simply executed road work for M/s Vedanta Aluminum Co. Ltd., in its plant situated in SEZ, therefore, such activity could be termed as contract between M/s Vedanta Aluminium Ltd. and the assessee and such activity has nothing to do with the development of the SEZ as a developer. Since the assessee is not a developer, it is not entitled deduction u/s.80IAB of the Act. Therefore, the same cannot be allowed to the assessee. Accordingly, the ground No.3 of the assessee is dismissed.

36. In view of the above, the appeal of the assessee is dismissed as discussed above.

37. Thus, the appeal of the assessee in IT(SS)A No.77/CTK/2023 for A.Y.2011-2012 is dismissed.

38. Now, coming to the appeal of the revenue wherein at the outset, we find that in the appeal filed by the Revenue, the total tax effect is less than Rs.60 lakhs as per the monetary limit prescribed by the CBDT vide its Circular No.09/2024, dated 17.09.2024.

39. Ld. CIT-DR also fairly conceded that no doubt the tax effect involved in the appeal is less than Rs.60 lakhs, thus, bound by the

Departmental Instruction, however, Id. DR drew our attention to para 10 of the Circular No.3/2018, dated 11th July, 2018, which has been modified by Circular dated 20th August, 2018 and in terms of said modification, the Departmental Representatives made a prayer that permission to pray for recall of the order may be granted in case any of the conditions in the reports made available by the AO subsequently show that the issues were required to be contested.

40. In view of the above, we dismiss the appeal filed by the Revenue on account of low tax effect as per the monetary limit prescribed by the CBDT vide its Circular No.09/2024, dated 17.09.2024. However, it is made clear that the Department is at liberty to file Miscellaneous Application, if the tax effect is found to be more than the prescribed limit of Rs.60,00,000/- as per amendment carried out by the CBDT in Circular No.09/2024, dated 17th September, 2024, or any of the conditions etc. as available in the amended para 10 of Circular No.3/2018, dated 20th August, 2018. Accordingly, the appeal of the Revenue is dismissed.

41. Thus, the appeal of the revenue in ITA No.320/CTK/2023 for A.Y.2011-2012 is dismissed.

ITA No.296/CTK/2023 (AY : 2013-2014)

42. In this appeal the assessee has raised the following grounds of appeal :-

1. *That on the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in not entertaining/ adjudicating the additional claim of Rs. 42,60,511/- as lodged during the course of appellant proceedings even when the appellant was eligible for deduction u/s 80-IA of the Act in respect of profit earned from work undertaken by the appellant as a member of the*

consortium in respect of the projects undertaken by the joint ventures/ consortiums.

2. *That on the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in maintaining the disallowance of claim of deduction under section 801AB of the Income Tax Act, 1961 of Rs. 18,61,270/- without properly appreciating the facts of the case and submission made before him*
3. *The appellant reserves the right to add, alter and modify the grounds of appeal as taken by it*

43. Ground No.1 is in relation to the disallowance u/s.80IA of the Act on the works executed by it for and on behalf of Joint Venture. During the course of hearing, the Id. AR of the assessee has placed reliance on the submission filed in A.Y.2011-2012 and further submit that the facts in the year under appeal are identical with the facts of A.Y.2011-2012. On the other hand, Id. CIT-DR also accepted this fact and placed reliance on the arguments made in A.Y.2011-2012. This issue has been discussed elaborately in assessee's appeal for A.Y.2011-2012 in IT(SS)A No.77/CTK/2023, wherein while deciding ground of appeal No.2, we are of the view that the assessee is not entitled deduction u/s.80IA of the Act on the work executed by it for and on behalf of the joint venture firm Since the facts are identical, therefore, by following the said order, this ground of appeal of the assessee is dismissed.

44. Ground No.2 is in relation to the disallowance of deduction u/s.80IAB of the Act. This issue has already been decided by us in assessee's appeal for A.Y.2011-2012 in IT(SS)A No.77/CTK/2023, wherein while deciding ground of appeal No.3, we are of the view that the assessee is not entitled for deduction u/s.80IAB of the Act as it is not the

developer for the purpose of establishing the Special Economic Zone (SEZ), therefore, following the observations made therein, Ground No.2 in this appeal is hereby dismissed.

45. Thus, the appeal of the assessee is dismissed.

ITA No.88/CTK/2023 & ITA No.141/CTK/20023 (AY : 2016-2017)

46. These are the cross appeals filed by the assessee and revenue against the order of the Id. CIT(A)-2, Bhubaneswar for the assessment year 2016-2017.

47. First, we shall take the appeal of the assessee in ITA No.88/CTK/2023, wherein the assessee has the raised the following grounds :-

1. *That on the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in confirming the addition of Rs.4,25,543/- out of total addition of Rs. 31,87,692/ made to the total income of the appellant under section 14A of the Income-tax Act, 1961 read with Rule 8D of the Income-tax Rules, 1962 without properly appreciating the facts of the case and submissions filed before him.*
2. *That on the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in confirming the addition of Rs.4,25,543/- out of total addition of Rs.31,87,692/ made to the total income of the appellant under section 14A of the Income-tax Act, 1961 read with Rule 8D of the Income-tax Rules, 1962 even when the said addition was made without issuance of show-cause notice during the course of assessment proceedings.*
3. *That on the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in confirming the addition of Rs.4,25,543/- out of total addition of Rs.31,87,692/- made to the total income of the appellant under section 14A of the Income-tax Act, 1961 read with Rule 8D of the Income-tax Rules, 1962 even when the case of the appellant was selected for verification of other issues*
4. *That on the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in not allowing additional claim of Rs. 3,13,68,851/- as lodged during the course of appellant*

proceedings even when it was eligible for deduction u/s 80-IA of the Act in respect of profit earned from work undertaken by the appellant as a member of the consortium in respect of the projects undertaken by the joint ventures/ consortiums.

4. *That on the facts and in the circumstances of the case and in law, the appellant is also eligible for deduction of Rs.3,13,68,851/- under section 80-IA of the Income-tax Act, 1961 in respect of profit earned from work undertaken by the appellant as a member of the consortium in respect of the projects undertaken by the joint ventures/ consortiums.*
5. *The appellant reserves the right to add, alter and modify the grounds of appeal as taken by it.*

48. The grounds of appeal raised by the revenue in its appeal i.e. in ITA No.141/CTK/2023 are as under :-

1. *The CIT(A) erred in law in allowing deduction u/s 801A(4) to the assessee when the assessee doesn't satisfy the requisite conditions to be eligible to get the deduction/s 801A(4) of the Act.*
2. *The CIT(A) ought to appreciate that in the facts and circumstances of the case the meaning of 'works contract' as in Explanation to Section 801A as borrowed from section 194C applies only to labour contract and not a composite contract of construction of an infrastructure facility.*
3. *The CIT(A) was not correct in holding that the infrastructure facility executed by the assessee (Contractor) can be considered to be owned by it within the meaning of item (a) of clause (i) of sub section (4) of Section 801A.*
4. *The CIT(A) erred in treating the Contract receipts received by assessee-company in lieu of execution of contract work be considered as profit and gains of business of deduction u/s 801A.*
5. *The deduction u/s 801A as per the condition in item (c) of clause (i) of sub section (4) of Section 801A can be availed only after the infrastructure facility has started (i.e got completion Certificate). However, the assessee being a contractor does not get any compensation after completion of project. In view of above, whether the CIT(A) was justified in holding the eligibility of assessee company for deduction u/s 801A on receipts accrued prior to completion of the project.*
6. *Any other ground of appeal that may arise at the time of hearing.*

49. Ground No.1 raised in appeal of the assessee (ITA No.88/CTK/2023) is in relation to the addition of Rs.4,25,543/- confirmed by the Id. CIT(A) out of the total disallowance of Rs.31,87,692/- made u/s.14A of the Act.

50. Brief facts of the case are that the assessee has interest bearing funds and is having exempt income in the shape of profits earned from the joint ventures. The AO was of the opinion that since the nexus between the interest bearing funds with the investments made having exempt income is not established, therefore, provision of Section 14A of the Act are clearly applicable and he made the disallowance u/s.14A of the Act after invoking the provisions of Rule 8D of the I.T.Rules, 1962. In first appeal, Id. CIT(A) has deleted the disallowance to the extent of Rs.27,62,149/- made by applying the provisions of Rule 8D(2)(i) and upheld Rs.4,25,543/- as per rule 8D(2)(iii) of the I.T.Rules, 1962.

51. Before us, Id. AR submitted that the assessee is having no dividend income, however, it has earned exempt income in the shape of profit of joint venture on which is suffered tax in the hands of joint venture, therefore, no disallowance could be made u/s.14A of the Act.

52. On the other hand, Id. CIT-DR supported the orders of the lower authorities and submitted that the CIT(A) already allowed the substantial relief to the assessee and since the assessee is having exempt income in the shape of profits from the joint ventures, therefore, the disallowance upheld by the Id. CIT(A) deserves to be confirmed.

53. We have considered the rival submissions and perused the material available on record. There is no quarrel about the deletion made

by the Id. CIT(A) to the extent of Rs.27,62,149/-, where the Id. CIT(A) was of the opinion that the interest free funds were applied for making investments, however, the Id. CIT(A) confirmed Rs.4,25,543/- being 0.5% of the average value of the investments towards the management fee etc.. Since the assessee is a private limited company and is having expenditure on the staff for management of the contracts between the joint venture and the assessee company and, therefore, the incurrance of expenditure to earn income from the joint venture, which is exempt from tax cannot be ruled out. Moreover, the assessee has received a sum of Rs.7,45,964/- as profits from the joint venture, which is exempt from tax, therefore, the disallowance u/s.14A of the Act to the extent of such income is reasonable. Since the half per cent of the average value of the investments comes to Rs.4,25,543/-, which has been upheld by the Id. CIT(A), thus, we find no infirmity in the order of the Id. CIT(A) in confirming such disallowance. Accordingly, disallowance of Rs.4,25,543/- is hereby upheld. Thus, ground No.1, 2 and 3 are dismissed.

54. Ground No.4 is in relation to the deduction u/s.80IA of the Act for the work undertaken by the assessee as per the joint ventures/consortiums. This issue has already been discussed and decided against the assessee in assessee's appeal for A.Y.2011-2012 in IT(SS)A No.77/CTK/2023, the facts of the year under appeal are identical. In this regard both the assessee and revenue relied upon the arguments made in the appeal for A.Y.2011-2012 and also agreed that there were no difference in the facts for the year under appeal to the appeal decided by

us for A.Y.2011-2012. Thus, following the reasoning given in the said appeal of the assessee for A.Y.2011-2012, this ground of appeal i.e. ground No.4 is also dismissed.

55. Thus, ITA No.88/CTK/2023 filed by the assessee is dismissed.

ITA No.141/CTK/2023(AY : 2016-2017)

56. In this appeal the revenue has challenged the allowability of deduction u/s.80IA(4) on the profits of the infrastructure facilities developed by the assessee, which was allowed by the Id. CIT(A).

57. Brief facts of the case are that during the year under appeal, the assessee has claimed deduction u/s.80IA(4) of the Act at Rs.9,82,61,053/-, which was disallowed by the AO by holding that those works have been carried out by the assessee are in nature of work contract, therefore, the assessee is not entitled for deduction u/s.80IA(4) of the Act. In first appeal, the Id. CIT(A) by following the decision of the coordinate bench of the Tribunal for A.Y.2013-2014, in ITA No.195/CTK/2019, dated 23.12.2021, wherein the Tribunal has declared the assessee as developer-cum-contractor sharing risk and responsibility as the developer, thus, entitled for deduction u/s.80IA(4) of the Act. Against such decision of CIT(A), the revenue is in appeal before us.

58. During the course of hearing, the Id. CIT-DR submitted that the assessee has executed works wherein all the risk and responsibilities were borne by the principal as the assessee has taken mobilization advances for execution of the works and just after the execution of the works, the entire consideration was paid to the assessee. Thus, there was no risk

involved of the assessee. The amount of retention money is towards the performance of the work for a certain period which cannot be treated as the risk and responsibility and it is a contractual obligation. Therefore, the assessee is not eligible for deduction u/s.80IA(4) of the Act on this contract. He further submitted that the coordinate bench of the Tribunal while deciding the appeal of the assessee in ITA No.195/CTK/2019 has held that a literal interpretation should be taken. However, the Hon'ble Supreme Court recently in the case of ITO Vs. Wipro Limited, passed in CA No.1449 of 2022, dated 11.07.2022 and also in the case of M/s Checkmate Services Pvt. Ltd., passed in CA No.2833 of 2016, dated 12.10.2022 has held that the taxation issue are to be constituted strictly. He further placed a written submission on record, which reproduced as under :-

1. The Judgment of the Hon'ble Supreme Court of India dated 11.07.2022 in CA case of the Pr. Commissioner of Income Tax Vs M/S Wipro Limited in CA no 1449 of 2022. Though the of Income Supreme Court of India in the Wipro Case(supra) has given its judgment on the issue of non-compliance of the conditions prescribed in judgment (8) of Income Tax Act which prescribes furnishing of declaration under 108(8) of Income Tax Act before the due date of filing of return of income u/s 139(1) of the Income Tax Act, the ration laid down by the Hon'ble Supreme Court of India will be applicable in all cases where any exemptions have been claimed without complying the conditions laid down in the Income Tax Act.

2. Apart from the para of the aforesaid judgment of the Hon'ble Supreme Court quoted and relied upon by the Learned CIT(A), the undersigned would like to reproduce the relevant para of the aforesaid judgment in support of the contention that the adherence of the pre-requisite conditions of filing of return of income in prescribed form and within the prescribed time limit is mandatory conditions for claiming exemption u/s 10(46) of the Income Tax Act.

3. In its judgment the Hon'ble Supreme Court has mentioned in para 11 of the Judgment that "As per the settled position of law, an

assessee claiming exemption has to strictly and literally comply with the exemption provisions. Further, in the same para, while distinguishing Chapter III(Exemptions) and Chapter VIIA(Deductions) of the Income Tax Act, the Hon'ble Supreme Court has also held that "None of the decisions which are relied upon on behalf of the assessee on interpretation of Chapter VIA shall be applicable while considering the claim u/s 10B (8) of the Act."

4. Further, the Hon'ble Supreme Court in para 12 of the aforesaid judgment has reiterated that "As observed hereinabove, the exemption provisions are to be strictly and literally complied with and the same cannot be construed as procedural requirement."

5. The Hon'ble Supreme Court has also held that if the language of the section prescribing the conditions for claim of any exemption is unambiguous, and interpretation contrary to the provision is erroneous. The relevant part of para 14 of the abovementioned Judgment is reproduced as under:

In view of the above discussion and for the reasons stated above, we are of the opinion that the High Court has committed a grave error in observing and holding that the requirement of furnishing a declaration under Section 10B (8) of the IT Act is mandatory, but the time limit within which the declaration is to be filed is not mandatory but is directory. The same is erroneous and contrary to the unambiguous language contained in Section 10B (8) of the IT Act. We hold that for claiming the benefit under Section 10B (8) of the IT Act, the twin conditions of furnishing a declaration before the assessing officer and that too before the due date of filing the original return of income under section 139(1) are to be satisfied and both are mandatorily to be complied with."

6. Further, a three Judge Bench of Hon'ble Supreme Court of India in its judgment dated 12.10.2012 in the case of M/S Checkmate Services P. Ltd vs Commissioner of Income Tax in CA No. 2833 of 2016 has formulated the guiding principle for interpretation of tax statute when exemptions or deduction have been claimed. In para 48 of this judgment the Hon'ble Supreme Court of India has observed that:

48. "One of the rules of interpretation of a tax statute is that if a deduction or exemption is available on compliance with certain conditions, the conditions are to be strictly complied with. This rule is in line with the general principle that taxing statutes are to be construed strictly"

7. In para 49 of the Checkmate Judgment the Hon'ble Supreme Court has reiterated the aforesaid conclusion by affirming its own judgment in the case of the State of Jharkhand Vs M/S Ambay Cements (2005) 1 SCC 368. The quoted part of the judgment of M/S Ambay Cement(supra) is reproduced as under:

26. Whenever the statute prescribes that a particular act is to be done in a particular manner and lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein."

59. Ld. CIT-DR, thus, submitted that the assessee has executed the works as a work contractor and its case is falling under the category of explanation to Section 13A of the Act. Therefore, the assessee is not eligible for deduction u/s.80IA(4) of the Act and requested for confirming the order of the AO.

60. On the other hand, Id. AR vehemently supported the order of the Id. CIT(A) and submitted that the assessee has worked as a developer. Section 80IA(4) of the Act states that deduction is available to the developer carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfills all the conditions prescribed thereunder, as the assessee company is developing infrastructure facilities wherein the works have been awarded by the respective authorities and the nature of work clearly in the nature of developing the infrastructure facilities, therefore, it should be allowed the deduction u/s.80IA(4) of the Act on the works executed by it. He further made a detailed submission in this regard, which reads as under :-

A.7) *The contentions of the appellant apropos the grounds of appeals taken before the Hon'ble Bench are dealt with in the subsequent paragraphs of this submission.*

1] GROUND NOS. 1 TO 4 (DEPARTMENT - CHALLENGING THE ACTION OF THE LD CITIAI IN DELETING THE ADDITION OF RS. 1,52,72,905/- MADE BY THE LD AO TO THE TOTAL INCOME OF THE APPELLANT ON ACCOUNT OF DISALLOWANCE OF CLAIM OF DEDUCTION U/S 801A(4) OF THE ACT.

1.1] The Department in these grounds of appeal has challenged the action of the Ld CIT(A) in deleting the addition of Rs. 1,52,72,905/ made by the Ld AO to the total income of the appellant on account of disallowance of claim of deduction u/s B01A(4) of the Act.

1.2.1] At the outset, it is pertinent to mention that issue in dispute in the present appeal is regarding the allowability of deduction u/s 801A(4) of the Act. In this respect, we would like to bring this fact to the kind notice of the Hon'ble Bench that identical issue arose for consideration before the Hon'ble Jurisdictional Bench of ITAT Le. Hon'ble ITAT Cuttack Bench in the case of the appellant itself for the Assessment Year 2014-15 wherein the Hon'ble Bench of ITAT duly examined the said issue at length and reached to a conclusion that the appellant was eligible to claim the benefit of deduction under sub-section (4) of section 80-IA of the Act since it was a developer-cum-contractor and not merely a contractor who undertook work contracts only. Moreover, there was no adverse inference regarding non-compliance of any of the conditions specified in sub-section (4) of section 80-IA of the Act even during the said proceedings for the Assessment Year 2014-15.

1.2.2) The relevant extract from the order passed by the Hon'ble Jurisdictional Bench of ITAT in the case of the appellant itself for the Assessment Year 2014-15 is reproduced hereunder for ready reference of the Hon'ble Bench.

**42. On careful consideration of above rival submissions and thoughtful perusal of the material placed on record and case laws cited by both the parties, first of all, we may point out that the Explanation below Section 801A(13) of the Act was inserted by the Finance Act, 2007 and subsequently it was again amended by way of inserting some words and specifying that the provisions of Section 801A shall not apply in relation to a business referred to sub-section (4) which is in the nature of work contract awarded by any person including the central government or state Government and executed by the undertaking or enterprises was referred in sub-section (1) and this amendment was made applicable with retrospective effect i.e. 01.04.2000, this explanation restricts the benefit of deduction u/s.80IA(4) of the Act to a person who executes a project, which is in the nature of works contract. For proper understanding of said*

Explanation, it is required to consider the difference between a developer-cum-contractor and work contractor. In a common meaning a person is referred as developer-cum-contractor who undertakes a project to develop and conduct on own responsibility and takes all the risk including investment risk, financial risk, entrepreneur risk and all kinds of business risk.

43. In our humble understanding keeping view the nature of business as elaborated by the assessee and not controverted by the revenue, we clearly observe that the assessee obtained work by way of tenders wherein he submitted all technical bids in the form of details and working process that the assessee brought in his own material according to the specification of the employer/contractee, skilled man power, technical expertise for the execution and timely completion of the work, responsibility of development, to rectify and/or indemnify against damages and had undertaken entrepreneurial and investment risks while carrying out the infrastructure development facilities. From the copies of the agreement and the nature of work as explained by the assessee before the Id. Pr.CIT in the tabular form by referring requirements of contractee and consequent liabilities and responsibilities of the assessee, we also clearly observe that the assessee was required to furnish details of technical personnel, plant and machinery, past experience of similar work, financial strength etc. at the time of applying for tender in the form of technical bid, which further prove beyond doubt that the appellant not only carried business risk but also undertook entrepreneurial risk, financial risk and investment risk and almost all responsibilities as noted in preceding para of this order.

44. In our humble understanding, Explanation below section 801A(13) was inserted to prevent misuse and abuse of tax incentives and the purpose of same was explained in the explanatory clause 22 to the amendment which clarifies that the provisions of section 80-1A shall not apply to a person who executes a works contract entered into with the undertaking or enterprise referred to in the said section. Thus, in a case where a person makes the investment and himself executes the development work i.e. carries out the civil construction work, he will be eligible for tax benefit under section 80-1A. The purpose of legislature behind insertion of Explanation below Section 801A(13) of the Act was to clarify that mere works contract would not be eligible for deduction u/s.801A of the Act and to disqualify the entities, who does only mere works contract or sub- contract as distinct from the work of a developer-cum-contractor. From the explanatory memorandum, the intention of Parliament is loud and clear that the purpose of tax benefit is to encourage investment in development of infrastructural

sector and not for the persons who merely execute the civil construction work. In explanatory clause 22, it was categorically explained that the deduction u/s.801A(4) of the Act will be available to the developers, who undertakes entrepreneur and investment risk and not for the contractors who undertakes only works contracts. This proposition has also rendered by the ITAT Cuttack Bench in the case of ARSS Infrastructure Ltd. (supra) as heavily relied on by the Id. AR

45. In view of foregoing discussion, we are of the considered view that the Id. AR has successfully demonstrated by way of all relevant details and documents that the assessee at present, has undertaken huge risk in terms of deployment of technical persons, plant and machinery, technical knowhow, expertise managerial and financial resources which qualifies the assessee as developer- cum-contractor and the assessee is not merely a contractor who undertakes work contracts only. The financial statements, balance sheet and profit and loss account, clearly demonstrate that the assessee has used its own machinery and equipment of more than Rs.42 crores and has purchased and consumed materials of more than Rs.102 crores, purchased from various vendors relevant financial period, which was not provided by the contractee, these factual position has not been controverted by the Id. Pr.CIT in any manner, therefore, we safely presume that the assessee is not merely a contractor discharging works contract but it is a developer-cum-contractor, thus, rider created by the Explanation below Section ROIA(13) of the Act, which clearly provides that the entity doing work contract will not be eligible for benefit of deduction but the assessee cannot be put in the basket of work contractor and keeping in view wider scope of his work and various business risks such as entrepreneur, finance and other risks, the assessee has qualified a position of developer cum contractor, thus, proviso below section BOIA(13) of the Act does not create any bar in the allowability of deduction u/s.801A[4] of the Act to the assessee

47.6 The above noted factual matrix, placed before the bench by way of relevant documentary evidence, copies of the contract development agreements and other legal propositions and citations on the issue pertaining to present assessee M/s Balaji Engicon Pvt. Ltd. (ITA No.195/CTK/2019) have not been controverted by the Id. CIT DR Therefore, we hold that the AO was right in allowing the claim of assessee u/s 801A(4) of the Act after due examination and verification of the relevant materials, documents, copies of the contract and evidence etc., thus, on merits the assessment order cannot be alleged as erroneous and prejudicial to the interest of revenue.

Emphasis Supplied)

1.2.3) *On perusal of the relevant extract from the order passed by the Hon'ble Jurisdictional Bench of ITAT in the case of the appellant only for Assessment Year 2014-15, as reproduced hereinabove, it shall be quite manifest that the Hon'ble ITAT in the case of the appellant itself and that too under identical facts and circumstances, categorically reached to a conclusion that the appellant was not merely a contractor but it was a developer-cum-contractor since the appellant not only took business risk but also undertook entrepreneurial risk, financial risk and investment risk associated with these projects and therefore, the appellant was eligible to claim the benefit of deduction u/s 801A of the Act.*

1.2.4) *In the present case in hand, the Lad CITIA) vide its order dated 29-08-2023 passed in the case of the appellant for Assessment Year 2011-12 has deleted the addition of Ra 1,52,72,905/- made to the total income of the appellant on account of disallowance of deduction claimed u/s 80-1A of the Act by relying on the decision of Hon ble Jurisdictional Bench of ITAT in the case of the appellant only for Assessment Year 2014-15. Relevant extract of Ld CITIA)'s order dated 29-08-2023 is reproduced hereunder for ready reference of the Hon ble Bench:*

"5.9.3 On this issue the Hon'ble TAT, Cuttack in its order IT A No. 195/CTK/2019, dtd 23.12.2021 decreed that the appellant was a developer-cum-contractor assuming risks and responsibilities akin to a developer, the work executed was not in the nature of works contract but the same was for development of infrastructure in nature, the TDS was rightly deducted under section 194C of the Act as a contractor, the contract was for development of Infrastructure facility and therefore, the appellant company was eligible to claim the benefit of deduction u/s 80-1A(4) of the IT. Act, 1961. As per the Hon'ble ITAT, Explanation inserted below section 80-LA (13) of the I.T. Act, 1961 denying the benefit of deduction to a works contractor shall not be applicable in the case of the appellant

In view of factual matrix Hon'ble ITAT, Cuttack's above discussion I am of the considered opinion that the appellant is a developer-cum- contractor and is eligible to claim the benefits of deduction u/s.801A (4) of the Income Tax Act, 1961."

[Emphasis supplied]

1.2.5) *In view of the above discussion, it is quite manifest that the present case of the appellant for the Assessment Year 2011-12 is squarely covered by the decision of the Hon'ble Jurisdictional Bench of ITAT in the case of the appellant itself for the Assessment Year 2014-15 wherein the Hon'ble Jurisdictional Bench of ITAT has categorically held that the appellant was not merely a contractor but*

it was a developer- cum-contractor since the appellant not only took business risk but also undertook entrepreneurial risk, financial risk and investment risk associated with these projects and therefore, the appellant was eligible to claim the benefit of deduction u/s 801A of the Act.

1.2.6. Henceforth, the Ld CIT(A) was correct in deleting the addition of Rs 1.52,72.905/-made to the total income of the appellant on account of disallowance of deduction claimed u/s 80-1A a of the Act and therefore, the Hon'ble Bench is thereby kindly requested to affirm the findings of Ld CIT(A)

1.3.1) However, for the sake of brevity, the claim of deduction u/s 80-1A of the Act is again being discussed hereunder on merits of the case. The gist of the observations of the Ld. AD as discussed in the assessment order while disallowing the claim of deduction u/s 80-1A of the Act in under

(a) The documents in the form of agreement with various authorities are nothing but works contract as the assessee periodically receives money for execution of such contracts TDS were deducted by the principals u/s 194C of the Act which presupposes that such were works contract only. An explanation below sub-section [13] of section 80-LA of the Act was added in 2007 which was later substituted with a view to prevent the misuse of tax holiday u/s 80-1A of the Act and to clarify that nothing contained in the section shall apply in relation to business which is in the nature of works contract executed by an undertaking The assessee, being a works contractor, is therefore covered under explanation to section 801A (13) of the Act and shall not be eligible for deduction u/s 80-1A of the Act.

1.4 The corresponding explanation/ justification of the appellant with respect to the various observations of the Ld. AO as discussed in the assessment order are as under:

1.4.1 The moot question which arises for consideration is whether the appellant is a "developer as envisaged under section 80-IA of the Act or is it merely a contractor engaged in works contract" as observed by the Ld. AO.

1.4.2] At the outset, it would be relevant to go through the provisions of section 80-IA of the Act, so far as it is relevant to the issue in hand which is reproduced hereunder:

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

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.

(4) This section applies to-

(i) any enterprise carrying on the business of (1) developing or (i) operating and maintaining or (ii) 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 enterprises 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;

.....

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 (m) 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).

1.4.3) On perusal of the order passed by the Ld. AO, it becomes crystal clear that there was no adverse finding of

the Ld. AO regarding the non-compliance of any of the conditions specified in sub-section (4) of section 80-IA of the Act. The sole grievance of the Ld. AO while disallowing the claim of deduction u/s 80-1A of the Act was with reference to the Explanation inserted below sub-section (13) of section 80-IA of the Act wherein a business which is in the nature of works contract is debarred from claiming any benefit under the said section Hence, the entire discussion in the subsequent paragraphs shall be confined to whether the appellant "developer entitling it to claim the benefit of deduction u/s 80-1A of the Act or a "contractor engaged in works contract thereby getting debarred from claiming the benefit under this section by virtue of the Explanation inserted below sub-section (13) of section 80-IA of the Act

1.4.4 At this juncture, it becomes significantly important to understand the legislative intent behind insertion of the said Explanation below section 80-1A/13) of the Act in order to understand the need and true spirit behind introducing the said Explanation

1.4.5] In 2007, an explanation was inserted with retrospective effect from April 1, 2000, which read as follows:

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

1.4.6) The relevant extract from the Memorandum explaining the provisions in the Finance Bill 2007 dealing with the issue in hand, read as under:

"Clarification regarding developer with reference to infrastructure facility, industrial park, etc. for the purposes of section 80-IA

Section 80-IA, inter alia, provides for a ten-year tax benefit to an enterprise or an undertaking engaged in development of infrastructure facilities, Industrial Parks and Special Economic Zones.

The tax benefit was introduced for the reason that industrial modernization requires a massive expansion of, and qualitative improvement in, infrastructure (viz., expressways,

highways, airports, ports and rapid urban rail transport systems) which was lacking in our country. The purpose of the tax benefit has all along been for encouraging private sector participation www of investment in development of the infrastructure sector and not for the persons who merely execute the civil construction work or any other works contract.

Accordingly, it is proposed to clarify that the provisions of section 30-JA shall not apply to a person who executes a works contract entered into with the undertaking or enterprise referred to in the said section. Thus, in a case where a person makes the Investment and himself executes the development work Le, carries out the civil construction work. he will be eligible for tax benefit under section 80-1A. In contrast te this, a person who enters into a contract with another person (i.e. undertaking or enterprise referred to in section 80-1A) for executing works contract, will not be eligible for the tax benefit under section SO-IA

This amendment will take retrospective effect from 1st April, 2000 and will, accordingly, apply in relation to the assessment year 2000-01 and subsequent years.

(Clause 22)

Emphasis Supplied

1.4.7 The Explanatory Memorandum clearly laid out that purpose of extending tax benefit u/s 80-IA of the Act was to encourage investments from the private sector and hence work contracts, i.e. contracts involving merely labour (or mere execution of construction without making investments) were kept outside the purview of the provisions of section 80-IA of the Act. The Explanatory Memorandum clearly stated that the deduction u/s 801A of the Act would be available to developers who undertake entrepreneurial and investment risk and not for the contractors, who undertakes only business risk.

1.4.8) A new Explanation was thereafter inserted by the Finance (No. 2) Bill of 2009 with retrospective effect from April 1, 2000 substituting the explanation inserted earlier and it read 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)."

Emphasis Supplied)

1.4.9) The relevant extract from the Memorandum explaining the provisions in the Finance (No 2) Bill of 2009 dealing with the issue in hand, read as under

"Further, with a view to preventing the misuse of the tax holiday under section 80-IA of the Income-tax Act, it is proposed to amend the Explanation to the said section to clarify that nothing contained in the said section shall apply in relation to a business referred to in sub section (4) of the said section which is in the nature of a works contract awarded by any person (including the Central or State Government and executed by an undertaking or enterprise referred to in sub-section (1) thereof."

Emphasis Supplied

1.4.10) On a conjoint reading of the Explanatory Memorandum to the Finance Bill 2007 and Finance (No. 2) Bill of 2009, it appears that section 80-IA of the Act was an instrument of legislative policy conceived with a view to provide an impetus to private sector participation in the infrastructural projects. Consistent with the legislative object of encouraging private sector participation in the development of infrastructure, section 80-IA was enacted. The purpose of the tax benefit had all along been for encouraging private sector participation by way of investment in development of the infrastructure sector.

1.4.11 The Explanation was inserted subsequently with retrospective effect to prevent the misuse of tax holiday u/s 80-IA of the Act in respect of persons engaged solely in work contracts, i.e. contracts involving merely labour (or mere execution of construction without making investments) and to restrict the benefit of tax holidays only in respect of those cases where the person made investment and himself executed the development work i.e., carried out the civil construction work.

1.4.12) Hence, after insertion of the said. Explanation below section 80-1A(113) of the Act. understanding of the term works contract assumed significant importance to adjudge the allowability of deduction u/s 80-1A of the Act. The term 'works contract has not been defined u/s 80-1A of the Act. Hence, the natural meaning of the word shall apply. As per the Oxford Dictionary, the term work means application of effort to a purpose or use of energy. Thus, going by the dictionary meaning, 'works contract' means a contract which involves effort or in other words labour of the contractor. Further, as per the Black's Law Dictionary, the term work means labour or in other words physical and mental exertion to attain an end especially as controlled by and for the benefit of the employer. Thus, as per Black's Law also, a 'works contract' is a labour contract under which the contractor merely employs his labour as per the directions of the contractee

1.4.13) On perusal of these definitions, it can be safely concluded that a works contract constitutes a contract under which the contractor is merely employing his efforts or labour. Under such a contract, the contractee provides the material and other requisites (a complete infrastructure) needed to carry out the desired work to the contractor who by applying his labour to the said material turns the material into a desired product

1.4.14 The Hon'ble Bombay High Court in the case of CIT v. Glenmark Pharmaceuticals Ltd. reported in [2010] 324 ITR 199/191 Taxman 455 has held that in 'works contract', the contractor would be provided materials and all other requirements in the process of manufacture and production. The contractor merely carries the work with the materials supplied by the contractee and knowledge supplied by the contractee.

1.4.15] At this juncture, it is also imperative to appreciate the difference between a "developer" and a "contractor". These terms have neither been defined in the Act nor in the General Clauses Act and therefore, we need to go through the dictionary meaning of these words. As per Oxford Advanced Learner's Dictionary, 'developer is a person or company that designs and creates new products, whereas "contractor" is a person or a company that has a contract to do work or provides services or goods to another. The New

Shorter Oxford Dictionary defines the word contractor as person who enters into a contract or agreement. Now chiefly spec. a person or firm that undertakes work by contract, esp. for building to specified plans".

1.4.16) In the light of the meaning ascribed to these words by the dictionaries, it is observed that the developer in a person who creates new products. He may execute the entire project himself or assign some parts of it to others. On the contrary, the contractor is the one who is assigned a particular job to be accomplished on the behalf of the developer. There may, in certain circumstances, be overlapping in the work of developer and contractor, but the line of demarcation between the two is thick and unbreachable. When the person acting as developer also executes the construction work, he works in the capacity of contractor too. But when he assigns the job of construction to someone else, he remains the developer simpliciter, whereas the person to whom the job of construction is assigned, becomes the contractor. The role of developer is much larger than that of the contractor. It is no doubt true that in certain circumstances, a developer may also do the work of a contractor but a mere contractor per se can never be called as a developer, who undertakes to do work according to the pre-decided plan.

1.4.17 It is an undisputed fact that the word "contractor" is used to denote a person entering into an agreement for undertaking the development of infrastructure facility. Every agreement entered into is a contract. The word "contractor" is used to denote the person who enters into such contract. Even a person who enters into a contract for development of infrastructure facility is a contractor. Therefore, a contractor and a developer cannot be viewed differently. Every contractor may not be a developer but every developer developing infrastructure facility on behalf of the Government is a contractor.

1.4.18) However, it is pertinent to note that the Ld AO utterly failed to appreciate the thick and unbreachable line of demarcation between the terms, 'contractor' and 'developer' as discussed supra. Rather, the Ld. AO observed in the assessment order passed u/s 143(3) of the Act that the appellant was not a "developer but merely a "works

contractor". In light of the contentions discussed supra, the findings of the Ld. AO do not hold water for the below mentioned reasons:

Every person who enters into an agreement with Central Government and State Government Departments, local authorities, other corporate etc. for development of an infrastructural facility envisaged in section 80-IA of the Act would necessarily be a contractor since the word "contractor" is used to denote the person who enters into any contract which also takes within its purview the contracts for development of infrastructural facility.

Once it is established that a person is a contractor, the next question which arises for consideration is whether that person is a developer cum contractor or a mere contractor engaged in works contract

Hence, the observations of the Ld. AO in the under passed u/s 1433) of the Act treating the appellant as merely works contractor were ill founded and perverse since every contractor may not be a developer but every developer developing infrastructure facility on behalf of the Government is necessarily a contractor . Accordingly, the contractors performing the work in the nature of a developer-cum-contractor and assuming risks and responsibilities shall be eligible for deduction under section 80- IA of the Act in respect of the eligible infrastructural facilities as in the present case of the appellant.

*There have also been a few landmark judicial precedents which have elaborately discussed and laid down broad guidelines/ parameters to ascertain whether the contract entered into by an assessee for development of infrastructural facility would be in the capacity of a *contractor-cum-developer" or "contractor engaged in works contract".*

Relevant extracts from these judicial precedents are reproduced hereunder for the ready reference of Your Hon'bur

1.5.1] The Hon'ble ITAT Rajkot Bench in the case of Katira Construction Ltd. v. ACIT reported in [2020] 119 taxmann.com 489 (Rajkot Trib.) vide order dated 30.07.2020

differentiated between a 'developer' and a 'contractor' and held that contractors performing work in nature of a developer-cum-contractor and assuming risks and responsibilities shall be eligible for deduction under section 80-IA in respect of eligible infrastructural facilities by observing as under:

"13. The next controversy arises whether the assessee is acting as a developer or a work contractor in the projects of road development as per explanation 13 attached below section 80-IA (13) of the Act. At this juncture, it is pertinent to refer the provisions of the Explanation attached below section 80-LA 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 sub-section (1).

13.1 The aforesaid Explanation to section 80-1A 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 ie. 1-4-2000 Thus explanation restricts 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. For this purpose, first of all it is imperative to appreciate the difference between a 'developer and a contractor Generally in common parlance a person is referred as 'developer who undertakes the project to develop and construct on its own responsibility and takes all the risks of the development These responsibilities and risk can be categorized as under.

(a) That in a development contract responsibility is fully assigned to the developer to do all acts for execution and completion of work right from designing the project till handing over the project to the Government. As such, the agreement is not for a specific work, it is for development of facility as a whole. Indeed the ownership of the site or the ownership over the land remains with the

Government/owner but during the period of development agreement the developer exercise complete realm over the land or the project However, in some case there can be a situation that the developer has to take the approval of the design from the Government/contractee but that will not change the status of the developer as works contractor.

(b) That the first phase for the developers is to take over the existing premises of the projects and thereafter developing the same into infrastructure facility. Secondly, the assessee shall facilitate the people to use the available existing facility even while the process of development is in progress.

(c) That a developer has to execute managerial responsibility by engaging the requisite qualified/skilled/semi-skilled staff and the labourers including the other supporting staff. As the developer under takes the complete responsibility of the manpower to be used in developing the infrastructure facility.

(d) The assessee has to utilize its expertise, experience including its technical knowhow in the development of the project

(e) That a developer has to execute financial responsibility. A developer is therefore expected to arrange finances either by private placement or from financial institutions for the proper development of the project at its own risk. Thus the developers is the one who undertakes entrepreneurial and investment risk besides the business risk.

(f) That a developer is required to bring the qualitative material. The Government does not provide any material to the assessee.

(g) That a developer is required to bring plant and machineries to be utilized in the project.

(h) Any loss caused to the public or the Government in the process of developing the project would be the responsibility of the developer. The Government shall

not take any responsibility for any such kind of loss except where it is responsible.

(i) That a developer stands as guarantor for the project developed by it and in the event of any defect it, he shall provide the remedy for the same.

(j) That a developer shall be exposed to the penalty if it contravenes the any of the clause appearing in the contract awarded by the Government. Thus, the developer is responsible to complete the construction in a specified manner failing which it would be responsible for the consequences of delay/any other fault attributable to it.

(k) That a developer shall undertake to maintain safety, security and protection of the environment

(l) That a developer shall provide and maintain at his own cost all lights, guards, fencing, warning signs and watching, when or where necessary.

These are few broad sample qualities/parameters of a developer through which the character of a developer can be defined.

13.2 On the other hand, a contractor is a person who undertakes work on a contract basis. He does not assume risks and responsibilities like that of a developer. He merely carries out the work as has been instructed to him by the contractee Moreover, in case of such work the contractor gets fixed amount of revenue for executing such work and is not entitled to any share of profit from revenue generated by the developer/land owner,

13.3 To summarize, the developer acts as a principal whereas the contractor acts as an agent in performing the functions as required by the developer. The developers, in true sense, are the persons who are carrying out the business of developing or operating and maintaining or developing, operating and maintaining the infrastructure facility the infrastructure facility whereas the contractors are those persons who merely execute part of these functions on behalf of developer and do not own any risks and responsibilities of the work. In such cases, the contractors

may not be eligible for the deduction under section 80-IA of the Act, as they are not developing any infrastructure facility but only providing assistance to the actual developer.

13.6 On the detailed analysis of the above project, we find that the assessee meets the criteria laid down for the developer as discussed above. 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 assessee in the tender documents as discussed above has clearly demonstrated the various risks undertaken by it. The assessee was to furnish a security deposit to the Government and indemnify at the same time of 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 Government 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 the defect, if any. Thus, it cannot be said that the assessee had not undertaken one risk. Thus on perusal of the terms and conditions in the agreement, it is clear that the assessee was not a works contractor simplicitor but a developer and hence Explanation to section 80-1A(13) does not apply to the assessee.

13.11 Further, it may be worthwhile to mention that judiciary has time and again held that beneficial provision, as in the instant case, should be given liberal interpretation so as to benefit the assessee. The cardinal rule for interpretation of any provision relating to exemption, allowance, deduction, rebate or relief is that they should be interpreted liberally and broadly so as to advance the object sought to be achieved and not frustrate it. Thus, even on this count, it can be said that the contractors performing function of a developer shall be given benefit of deduction under section 80- IA(4) of the Act

13.14 In view of the above discussion, it may be concluded that even after the amendment by the Finance Act, 2007 and the Finance Act, 2009, the contractors performing the work in the nature of a developer-cum contractor and assuming risks and responsibilities shall be eligible for deduction under

section 80-IA in respect of the eligible infrastructural facilities Hence the ground of appeal of the assessee is allowed."

(Emphasis Supplied)

1.5.2] The Hon'ble ITAT Kolkata Bench 'A' in the case of ACIT, Circle-12(2), Kolkata Vs. M/s Simplex Infrastructures Ltd. reported in [TS-163-ITAT-2021(Kol)] vide order dated 10.03.2021 has categorically held as under:

**7. From the aforesaid activities undertaken by the assessee we note that the contractor assessee's activities involves substantial risk. It is noted that like any other entrepreneur' who employs his material, plant, machinery, labour etc. in a project and undertakes risk, the assessee was also exposed to substantial amount of risk by virtue of engaging his establishment in the infrastructure projects. In addition, the assessee was exposed to further risk of non completion of work within time, or of any damage caused to the works site, etc., or increase in prices of materials, labour etc. beyond what the Government had agreed to compensate as per the agreements. Thus, we are of the opinion that it is not a case where the assessee is a works contract simpliciter, where the Government authority has provided the assessee with the entire set up i.e. plant & machinery, materials and the infrastructure needed to support construction; and all that the assessee had to employ was labour to carry out construction. Instead in this case the assessee had provided an entire enterprise which was needed to convert the site (given by the Government) into an infrastructural facility.*

9. In the instant case, as will be evident from the perusal of the agreements, as enclosed in the Paper book and relevant portions of which are discussed as above, all the agreements under consideration are not for a specific work, they are for development of facility as a whole. Therefore, merely because in the agreement for development of infrastructure facility, assessee is referred to as contractor or because some basic specifications are laid down, it does not detract the assessee from the position of being a developer, nor will it debar the assessee from claiming deduction u/s.801A(4) of the Act

10. It is noted that in a development contract, responsibility is fully assigned to the developer for execution and completion of work. It is evident that the assessee, vide the agreements, has clearly demonstrated the various risks undertaken by it. In all the agreements, relevant portions of which are reproduced supra, the assessee has undertaken huge risks in terms of deployment of technical personnel, plant and machinery, technical knowhow, expertise and financial resources. Hence, undoubtedly entering into lawful agreements and thereby becoming a contractor should, in no way, be a bar to the one being a developer since the role of a developer is larger than that of a contractor. As such it follows from the above that the assessee, who is engaged in developing the infrastructural facility, is rightfully entitled to the benefits of deduction u/s.801A(4) of the Act.

1.5.3) The Hon'ble ITAT Pune Bench' in the case of B.T. Patil & Sons Belgaum Constructions (P.) Ltd. v. ACIT, Circle-2, Kolhapur reported in [2013] 59 SOT 61 (Pune - Trib.) (URO) held that:

8. In the case of ABG Heavy Industries (supra), the assessee therein had not developed the entire port but it was only the supplier of cranes at the loading and unloading terminal at the said JNPT port. Thus assessee was not required to execute the entire project as observed by the Third Member. Another significant word used here is owned, which indicates that the infrastructure facility should be owned by a company so as to be entitled to deduction under this section. The work done by the assessee is not owned by it, it does not satisfy sub clause(a) of section 801A(4)). The infrastructure facility should be owned by the assessee is not correct interpretation. It is evident from section itself as clarified by the jurisdictional High Court in ABG Heavy Industries (supra) inter alia held that the assessee has shouldered out Investment & technical risk in respect of the work executed and it is liable for liquidated damages if failed to fulfill the obligation laid down in the agreement. The liability which has been assumed by the assessee under terms of the contract are obligations involving the development of an infrastructure facility. The

assessee has also in its employment technically and administratively qualified team of persons and therefore it is not correct to say that assessee is merely a contractor & not a developer. The assessee is eligible for benefit u/s 80-IA even if part of the Infrastructural Project work is executed"

[Emphasis Supplied)

1.5.4) *The Hon'ble ITAT Hyderabad Bench 'B' in the case of GVPR Engineers Ltd. v. ACIT, Circle-2(3), Hyderabad reported in [2012] 51 SOT 207 (Hyderabad) (URO) held that:*

"28. The next question is to be answered is whether the assessee is a developer or mere works contractor. The Revenue relied on the amendments brought in by the Finance Act 2007 and 2009 to mention that the activity undertaken by the assessee is akin to works contract and he is not eligible for deduction under section 801A(4)of the Act. Whether the assessee is a developer or works contractor is purely depends on the nature of the work undertaken has to be analyzed and a conclusion has to be drawn about the nature of the work undertaken by the assessee. The agreement entered into with the Government or the Government body may be a mere works contract or for development of infrastructure. It is to be seen from the agreements entered into by the assessee with the Government. We find that the Government handed over the possession of the premises of projects to the assessee for the development of infrastructure facility. It is the assessee's responsibility to do all acts till the possession of property is handed over to the Government. The first phase is to take over the existing premises of the projects and thereafter developing the same into infrastructure facility Secondly, the assessee shall facilitate the people to use the available existing facility even while the process of development is in progress. Any loss to the public caused in the process would be the responsibility of the assessee. The assessee has to develop the infrastructure facility. In the process, all the works are to be executed by the assessee. It may be laying of a drainage system; may be construction of a project; provision of way for the cattle and bullock

carts in the village; provision for traffic without any hindrance, the assessee's duty is to develop infrastructure whether it involves construction of a particular item as agreed to in the agreement or not. The agreement is not for a specific work, it is for development of facility as a whole. The assessee is not entrusted with any specific work to be done by the assessee. The material required is to be brought in by the assessee by sticking to the quality and quantity irrespective of the cost of such material. The Government does not provide any material to the assessee. It provides the Works in packages and not as a works contract. The assessee utilizes its funds, its expertise, its employees and takes the responsibility of developing the infrastructure facility. The losses suffered either by the Govt. or the people in the process of such development would be that of the assessee. The assessee hands over the developed infrastructure facility to the Government on completion of the development. Thereafter, the assessee has to undertake maintenance of the said infrastructure for a period of 12 to 24 months. During this period, if any damages are occurred it shall be the responsibility of the assessee. Further, during this period, the entire infrastructure shall have to be maintained by the assessee alone without hindrance to the regular traffic. Therefore, it is clear that from an un- developed area, infrastructure is developed and handed over to the Government and as explained by the CBDT vide its Circular dated 18-05- 2010, such activity is eligible for deduction under section 801A(4) of the Act. This cannot be considered as a mere works contract but has to be considered as a development of infrastructure facility: Therefore, the assessee is a developer and not a works contractor as presumed by the Revenue. The circular issued by the Board, relied on by learned counsel for the assessee, clearly indicate that the assessee is eligible for deduction under section 801A(4) of the Act. The department is not correct in holding that the assessee is a mere contractor of the work and not a developer.

29. We also find that as per the provisions of the section 801A of the Act, a person being a company has to enter into an agreement with the Government

or Government undertakings. Such an agreement is a contract and for the purpose of the agreement a person may be called as a contractor as he entered into a contract. But the word "contractor" is used to denote a person entering into an agreement for undertaking the development of infrastructure facility. Every agreement entered into is a contract The word "contractor" is used to denote the person who enters into such contract. Even a person who enters into a contract for development of infrastructure facility is a contractor. Therefore, the contractor and the developer cannot be viewed differently. Every contractor may not be a developer but every developer developing infrastructure facility on behalf of the Government is a contractor."

1.5.5] The Hon'ble ITAT Kolkata Bench in the case of DCIT ve SPML Infra Ltd reported in TS-6009-ITAT-2016(Kolkata)-held that:

8.5.If a person who only develops the infrastructure facility was not paid by the Government, the entire cost of development would be a loss in the hands of the developer as he was not operating the infrastructure facility, Merely because the assessee was paid by the Government for development work it could not be denied deduction under section 80-1A(4) The Chennai Bench of Tribunal in case of R.R. Constructions, Chennai vs Department of Income tax held that "When an assessee is only developing an infrastructure facility project and is not maintaining nor operating it, obviously such an assessee will be paid for the cost incurred by it; otherwise, how will the person, who develops the infrastructure facility project, realize its cost? If the infrastructure facility, just after its development, is transferred to the Government, naturally the cost would be paid by the Government. Therefore, merely because the transferee had paid for the development of infrastructure facility carried out by the assessee, it cannot be said that the assessee did not develop the infrastructure facility. If the interpretation done by the Assessing Officer is accepted, no enterprise carrying on the business of only developing he infrastructure facility would be entitled to deduction under section 801A(4), which is not the intention of the law. An

enterprise, which develops the infrastructure facility is not paid by the Government, the entire cost of development would be a loss in the hands of the developer as he is not operating the infrastructure facility. The legislature has provided that the income of the developer of the infrastructure project would be eligible for deduction. It presupposes that there can be income to developer i.e to the person who is carrying on the activity of only development infrastructure facility. Ostensibly, a developer would have income only if he is paid for the development of infrastructure facility, for the simple reason that he is not having the right/authorization to operate the infrastructure facility and to collect toll there from, has no other source recoupment of his cost of development.

The Indore Bench of the Tribunal in case of Saneer Infrastructure Pvt. Ltd vs ACIT (138 ITD 433) held that "As per our considered view, after amendment by the Finance Act, 2002 for claim of deduction u/s 80IA(4) infrastructure facility is only required to be developed and there is no condition that assessee should also operate the same. Thus, after amendment, when the assessee is not required to operate the facility, the payment for development of such infrastructure is required to be made by the Government only

After amendment, when assessee undertakes to develop the infrastructure facility only, it is the Government who will make payment to assessee in respect of infrastructure facility developed by it in terms of agreement so entered with Government. Thus, we do not find any infringement of conditions for claim of deduction"

8.6 Thus from the above, it is clear that the fact that the assessee had received payments from the Government in progress of its work has no bearing on eligibility of deduction u/s 80- IA. Further, the Revenue in all the grounds has contended that the contracts entered into by the assessee were merely construction contracts' since the assessee is not exposed to any entrepreneurial and investment risk. In this regard, the AO has observed that the assessee is executing the contract against predetermined revenue w.r.t the above, it is submitted that under the impugned contracts, the assessee was merely carrying out the civil construction work. It was responsible for overall development of the infrastructure facility. It was merely provided with the site which it had to develop into an infrastructural facility by deploying his resources i.e. material, plant & machinery, labour, supervisors etc. It was responsible for any damage/loss caused to any property or life in course of execution of the works. It was even responsible for remedying of the defects in the works at its cost. It was also required to operate and maintain the infrastructure facility. Hence, it cannot be said that the contract with the Government was to carry out mere civil construction, Attention in this regard is invited to the following:

(i) The ITAT (Ahmedabad) in case of Sugam Construction (P) Ltd. vs. ITO 156 SOT 45] held that it is also gathered (a) That a developer is a person who undertakes the responsibility to develop a project (b) That a developer is therefore not a civil contractor simpliciter (c) That if we apply the commercial aspect, then a developer has to execute both managerial as well as financial responsibility (d) That the role of a developer, according to us, is larger than that of a contractor (e) That when a person is acting as a developer, then he is under obligation to design the project, it is another aspect that such design has to be approved by the owner of the project, ie. the Government in the present case (1) That he has not only to execute the construction work in the capacity of a contractor but also he is assigned with the duty to develop, maintain and operate such project. (g) That to ascertain whether a civil construction work is assigned on development basis or contract basis can only be decided on the basis of the terms and conditions of the agreement. Only on the basis of the terms and conditions it can be ascertained about the nature of the contract assigned that whether it is a "work contract or a "development contract. (h) That in a development contract responsibility is fully assigned to the developer for execution and completion of work. (1) That although the ownership of the site or the ownership over the land remains with the owner but during the period of development agreement the developer exercise complete domain over the land or the project. That a developer is not expected to raise bills at every step of construction but he is expected to charge the cost of construction plus mark-up of his profit from the assignee of the contract. (k) That a developer is therefore expected to arrange finances and also to undertake risk (1) That in contrast to the rights of a "contractor" a "developer" is authorized to raise funds either by private placement or by financial institutions on the basis of the project. These are few broad qualities of a developer through which the character of a developer can be defined."

(i) ITAT Hyderabad) in case of Keys and Co, Construction (P) Ltd ACIT [51 SOT 203] held that The explanatory memorandum to Finance Act 2007 states that the purpose of the tax benefit has all long been to encourage investment in development of infrastructure sector and not for the persons who merely execute the civil construction work. It categorically states that the deduction under section B01A of the Act is available to developers who undertakes entrepreneurial and investment risk and not for the contractors, who undertakes only business risk. Without any doubt, the learned counsel for the assessee clearly demonstrated before the court that the assessee at present has undertaken huge risks in terms of deployment of technical personnel, plant and machinery, technical knowhow, expertise and financial resources."

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 assessee vide the agreements has clearly demonstrated the various risks undertaken by it. The assessee was to furnish a security deposit to the Employer and indemnify the employer of any losses/damage caused to any property/life in course of execution of works. Further, it was responsible for the correction of defects arising in the works at its cost. Thus, it cannot be said that the assessee had not undertaken any risk.

The ITAT (Hyderabad) in case of Siva Swathi Construction (P) Ltd. (supra) held that "Further reason given by the Id. CIT(A) for denying deduction under S.801A to the assessee is that the assessee has not undertaken any risks. The observations of the Id. CIT(A) in this behalf are also not valid and correct. It was clearly mentioned in the agreement that the assessee shall execute and furnish indemnity bond for a period of four years, indemnifying the Government against any loss or expenditure incurred, to repair any defect noticed due to faulty working done by the contractor or substandard material used by the contractor. Further, it is also mentioned in the contract agreement that the assessee shall not claim for any loss due to foreseen circumstances, including suspension of work due to course. It is also provided that in the event of accident to people employed by the assessee resulting in compensation to be paid as per the Workmen's Compensation Act the same shall be paid by the contractor, viz the assessee only. In view of the various specific clauses in the agreement fastening the risks to be undertaken by the assessee, discussed above, it cannot be said that the assessee has not undertaken any risk.

8.7 From the above, it is clear that the contention of the AO that the assessee had not undertaken any entrepreneurial and investment risk is an incorrect interpretation of the facts. Lastly, with regard to the project O&M, Bangalore (on which a deduction of Rs. 35, 16,9411- was claimed), it is submitted that it is an operation and maintenance project, to which Explanation to section 80-IA(13) does not apply. Explanation to section 80-IA(13) merely distinguishes between a developer and works contractor. It clarifies that a works contractor shall not be included in the category of 'developer u/s 80-1A. Thus, the Explanation clearly does not apply to O&M projects. Hence, deduction of Rs. 35,16,9411- claimed for the aforesaid project u/s 80-IA cannot be denied by invoking the explanation to section 80-IA.

9. From the perusal of the terms and conditions in the agreement, it is clear that the assessee was not a works contractor simpliciter and was a developer and hence Explanation to section 80- IA(13) does not apply to the assessee. Further, in addition to developing the infrastructure facility, the assessee was even operating and maintaining the same. Thus, clearly the assessee is eligible for deduction u/s 80-1A. In our considered view do not find any reason to interfere in the order of Id. CIT(A). Hence this ground of appeal of the Revenue is dismissed."

1.5.6] *The Hon'ble ITAT Kolkata Bench 'D' in the case of ACIT, Circle-33, Kolkata v. He Hun Simples JV reported in [2018] 92 taxmann.com 106 (Kolkata - Trib.) held that :*

6.15 We find that like any other entrepreneur who employs his material, plant, machinery, labour etc in a project and undertakes risk, the assessee was also exposed to a substantial amount of risk by virtue of engaging his establishment in the infrastructure projects. In addition, the assessee was exposed to risk of non completion of work within time, any damage caused to the work site etc, increase in prices of materials, labour etc. beyond what the Government had agreed to compensate as per the agreement.

6.16 From the facts stated above, it is clear that the assessee was a developer and not a mere works contractor. Thus, it is clearly outside the purview of the Explanation to section 80-IA(13) of the Act

6.17 To substantiate the above attention is invited to the terms and conditions of agreement entered into between the assessee and National Highway Authority of India, some of which have been listed below:

(i) General obligations The assessee shall, with due care and diligence, design, execute and complete the work and remedy any defects therein in accordance with the provision of the contract. The assessee shall provide all superintendence, labour, material, plant, require in for such design, execution, completion and remedying of any defects (page 12, para 8.1)

(ii) Material, Plant and workmanship:Page -21, para 36.1

(iii) Equipment, Temporary works and materials Page 31, para 54.1

(iv) Labour: The assessee was to make its own arrangement for the engagement of all staff and labour and for their payment, housing and feeding. (page 21, para 34.1)

(v) Superintendence: The assessee was to provide all the necessary superintendence required during the execution of the Works. Page 14, para 15.1

(vii) Safety, security and protection of environment. The assessee was responsible for safety of all person on the site Provide and maintain at his own cost all lights, guards, fencing, warning signs, etc. Take all reasonable steps to protect the environment. (Page 15, para 19.1)

(viii) (Defect Liability Period. Even after the completion of works the responsibility of the assessee did not end, it was correct defects arising therein at its own cost (page 28, para 49.3) The said period was 12 (Twelve months and extension of defect liability period-24 months (page 46)

(ix) *Performance Security: The performance security will be in the form of an unconditional and irrevocable Bank Guarantee in the amount 10 (ten) percent of contract price (page 45). Further, such performance Security was to be valid till successful completion of works and remedying of defects therein. (page 13, para 10.2)*

(x) *Retention Money: 10 (ten) percent of Interim payment certificate subject to 5 percent of total contract price. Upon issue of taking over certificate one half of retention money would be paid whereas the other half would be paid on expiration of the Defects Liability period. (Page 35, para 60.3)*

(x) *The assessee was to indemnify the Employer against all losses and claims in respect of death or injury to any person or damage to any property (other than works) which may arise in course of execution of works (page 17, para 22.1) The Employer would not be liable for any damage or compensation payable to any workman or other person in employment of the assessee. (para 24.1)*

(xi) *Liquidated Damages: The assessee was liable to liquidated damages as specified at page 45, if there was delay in completion of works (page 24, para 47.1)*

6.18 *The above conditions clearly exhibit that it is not a case where the assessee was provided with the establishment and materials required to execute the work, which happens in case of works contract where the contractor gets the material and other contains from the client and all he has to do is employ labour. The assessee in the present case was to procure raw material, make arrangements for power, water, plant machinery etc. And conduct all the other activities needed for construction*

6.19. *Now the aforesaid agreement with the NHAI was produced before the Ld CITIA) who after perusal of the same allowed the assessee's appeal*

6.20. *We find that the agreement in the wistant case is similar to that before the tribunal in the case of SPML. infra Ltd. (supra). In the instant case too, the assessee was not merely providing labour but was providing complete infrastructure required to support the development of Infrastructure facility it deployed its various resources like material, manpower, machinery etc. In addition it exposed itself to various risks*

6.21 *In view of the aforesaid findings in the facts and circumstances of the case and respectfully following the various judicial precedents relied upon including that of co-ordinate bench of this tribunal in SPML Infra Ltd. (supra), we hold that the assessee is a developer and not a mere works contractor and accordingly is eligible for deduction u/s 801A of the Act, which has been rightly held by the lid CITA Accordingly, we do not find any infirmity in the order of the Id CITA. Accordingly, the grounds raised by the revenue are dismissed"*

`Emphasis Supplied

1.5.7] The Hon'ble Gujarat High Court in the case of CIT v. Radhe Developers reported in [2012] 341 ITR 403 (Gujarat) has dealt with the scope of 'works contractor' in the context of section 80-IB of the Act and has held that:

"36. We have noted at some length, the relevant terms and conditions of the development agreements between the assesseees and the land owners in case of Radhe Developers. We also noted the terms of the agreement of sale entered into between the parties. Such conditions would immediately reveal that the owner of the land had received part of sale consideration. In lieu thereof he had granted development permission to the assessee. He had also parted with the possession of the land. The development of the land was to be done entirely by the assessee by constructing residential units thereon as per the plans approved by the local authority. It was specified that the assessee would bring in technical knowledge and skill required for execution of such project. The assessee had to pay the fees to the Architects and Engineers. Additionally, assessee was also authorized to appoint any other Architect or Engineer, legal adviser and other professionals. He would appoint Sub-contractor or labour contractor for execution of the work. The assessee was authorized to admit the persons willing to join the scheme. The assessee was authorised to receive the contributions and other deposits and also raise demands from the members for dues and execute such demands through legal procedure. In case, for some reason, the member already admitted is deleted, the assessee would have the full right to include new member in place of outgoing member. He had to make necessary financial arrangements for which purpose he could raise funds from the financial institutions, banks etc The land owners agreed to give necessary signatures, agreements, and even power of attorney to facilitate the work of the developer. In short, the assessee had undertaken the entire task of development, construction and sale of the housing units to be located on the land belonging to the original land owners. It was also agreed between the parties that the assessee would be entitled to use the full FSI as per the existing rules and regulations. However, in future, rules be amended and additional FSI be available, the assessee would have the full right to use the same also. The sale proceeds of the units allotted by the assessee in favour of the members enrolled would be appropriated towards the land price. Eventually after paying off the land owner and the erstwhile proposed purchasers, the surplus amount would remain with the assessee. Such terms and conditions under which the assessee undertook the development project and took over the possession of the land from the original owner, leaves little doubt in our mind that the assessee had total and complete control over the land in question. The assessee could put the land to use as agreed between the parties. The assessee had full authority and also responsibility to develop the housing project by not only putting up the construction but by carrying out various other activities including enrolling members, accepting members, carrying out modifications engaging professional agencies and seen. Most significantly the risk element was entirely that of the assessee. The landowner agreed to accept only a fixed price for the land in question. The

assesse agreed to pay off the landowner first before appropriating any part of the sale consideration of the housing units for his benefit be short, assessee took the full risk of executing the housing project and thereby making profit or loss as the case may be. The assessee invested its own funds in the cost of construction and engagement of several agencies Landowner would receive a fix pre-determined amount towards the price of land and was thus insulated against any risk

37. By no stretch of imagination can it be said that the assessee acted only as a Works contractor

Emphasis Supplied

1.5.8] The Hon'ble ITAT Ahmedabad Bench 'D' in the case of En-vision Enviro Engineers (P.) Ltd. v. DCIT, Circle-1, Surat reported in [2012] 150 TTJ 621 (Ahmedabad - Trib.) has held that:

"7. We have heard both the parties at some length. We have perused the compilation filed, in the light of the provisions of the Act. Section 801A was subject to a change on several occasions in the past, however for the year under consideration, Le. A.Y. 2005-06, the section substituted by the Finance Act, 2001 w.e.f. 1/4/2002 is applicable. This section prescribes that in respect of profits and gains from an Industrial Undertaking engaged in infrastructure development, a deduction of an amount equal to 100% of the profits shall be allowed. Section 801A(4) prescribes that an Enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (ii) developing, operating and maintaining any infrastructure facility shall qualify for the deduction. This sub-section says that the Enterprise has to enter into an agreement with the Government, either Central or State, for developing or operating and maintenance or developing, operating and maintenance of a new infrastructure facility and that it has been started on or after first day of April-1995, as also owned by a company registered in India or by Consortium of such companies. Through an Explanation, annexed to the said section; "infrastructure facility is defined as road, bridge, rail system, high-way project, irrigation product, sewerage system or solid waste management system. With these submissions of legal requirement, our attention has been brought on the fact that the assessee has developed the infrastructure meant for solid waste management system. The assessee has entered into an agreement with the Municipal Council Udaipur (Rajasthan) dated 15/07/2004. The assessee has also entered into an another agreement with Surat Municipal Corporation dated 14/11/2002 We have examined both the agreements. Undisputedly, the assessee has been referred as a "Contractor in the agreement dated 15/07/2004. However, it was not so in the agreement dated 14/11/2002 executed with Surat Municipal Corporation. Be that as it was, merely mentioning the assessee as "Contractor the exact nature of the execution of the work do not alter. Rather, this controversy has been resolved by Respected Co- ordinate Bench in the case of Patel Engg. Ltd.(supra). We are convinced with the argument of the Id.AR that a contractor can also be a developer. In this context, our attention has been drawn on a latest decision

of Hon'ble Gujarat High Court pronounced in the case of CIT v. Radhe Developers (2012) 341 ITR 403/204Taxman 543/17 taxmann.com 156 (Guj.), wherein the issue was in respect of claim of deduction u/s.80IB(10) of IT Act and the assessee happened to be "developer-cum-building contractor". The Hon'ble Court has held that the said developer had to make the construction and to engage labour on contract, therefore the term "developer" has to be understood in common parlance as well as in legal sense. The Hon'ble Court has taken the help of Websters-encyclopedia and other dictionaries and thereupon opined that the term "developer" carries a much wider connotation. As far as the agreement with Surat Municipal Corporation is concerned, the assessee has been referred as "party of the first part", hence no serious objection has been raised by the Revenue. On account of these reasons and following the view expressed by the Hon'ble Court as also considering the nature of the work executed by this assessee, we are not inclined to agree with the AO that the assessee has acted merely as a "contractor", rather, we hereby hold that the assessee has acted as a "developer".

1.8.91 The Hon'ble ITAT Mumbai Bench 'B' in the case of *Bhinmal Contractors Prunett and Land Developers (P.) Ltd. v. ACIT/DCIT-4(1), Mumbai* reported in [2018] 170 ITD 599 (Mumbai) has held that:

"14. Here it is important to mention that the Legislature inserted the word *or* between *and* with effect from 1-4-2002, which is applicable to assessment year 2002-03 onwards. So with effect from the assessment year 2002-03, not only the enterprise (1) developing, (1) operating and maintaining the infrastructure facility shall be entitled to deduction, but also the enterprise which is only (developing, or (ii) operating and maintaining the infrastructure facility. From such year onwards the enterprise which only develops the infrastructure facility and thereafter transfers it to someone else for operating and maintaining on behalf of transferee shall also be covered for the purposes of granting benefit. The difference in the situation between assessment year 2002-03 onwards and prior two years is that whereas the operation and maintenance of the infrastructure facility on behalf of the enterprise developing is necessary in the former period, but in the later period, the operation and maintenance shall be on behalf of the transferee enterprise itself. The "works contract has not been defined in the context of section 80-IA and, hence, in the absence of assignment of any definition by the statute, its meaning should be understood in the common parlance. Accordingly a developer is a person who develops the facility and such person may or may not be a contractor. On the other hand, a contractor is stated to be a legal term whose rights and duties vis-à-vis contract are determined by way of legal document called the contract. For example if a contract to construct a highway from Mumbai to Delhi is given to a person he is contractor as well as developer. As against that a person who has been given a contract for painting or beautification is merely a contractor but not a developer. Accordingly while developing a project, a developer has to make technological inputs, entrepreneurial inputs, etc. Besides, there is financial involvement in terms of deployment of man and machine as well as bank guarantees. The developer

undertakes the risk and reward of the project and is accountable to the authorities for the development work carried out by them. Therefore the assessee in the present case cannot and should not be characterized anything other than a developer.

16. According to this dictionary, developer is a person or company that designs and creates new products, whereas contractor is a person or a company that has a contract to do work or provides services or goods to another. The New Shorter Oxford Dictionary defines the word 'contractor as person who enters into a contract or agreement. Now chiefly spec, a person or firm that undertakes work by contract, esp for building to specified plans. In the light of the meaning ascribed to these words by the dictionaries, it may be observed that the developer is a person who designs and creates new products. He is the one who conceives the project. He may execute the entire project himself or assign some parts of it to others. On the contrary, the contractor is the one who is assigned a particular job to be accomplished on the behalf of the developer. His duty is to translate such design into reality. There may, in certain circumstances, be overlapping in the work of developer and contractor, but the line of demarcation between the two is thick and unbreachable. When the person acting as developer, who designs the project, also executes the construction work, he works in the capacity of contractor too. But when he assigns the job of construction to someone else, he remains the developer simpliciter, whereas the person to whom the job of construction is assigned, becomes the contractor.

17. The role of developer is much larger than that of the contractor. It is no doubt true that in certain circumstances, a developer may also do the work of a contractor but a mere contractor per se can never be called as a developer, who undertakes to do work according to the pre-decided plan.

1.5.10] The Hon'ble High Court of Gujarat in the case of PCIT . Montecatio Ltd reported in (2024) 162 taxmann.com 389 (Gujarat) has approved the findings of the ITAT Ahmedabad Bench wherein it held that held that:

3.14. The CIT (Appeal) has further examined as to whether the project assigned to the assessee was incapacity of a contractor or the same was executed as a developer with respect to the canal projects, agreements were entered into by the assessee W 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.

Emphasis supplied!

1.5.11) The Hon'ble Supreme Court of India in the case of PCIT v. MBL Infrastructure Limited reported in [2023] 155 taxmann.com 657 (SC) has dismissed the SLP as filed by the Department against the decision of Hon'ble High Court of Calcutta in the case of PCIT v. MBL Infrastructure Limited reported in [2023] 155 taxmann.com 656 (Calcutta) wherein it was held that:

4. In paragraph 9 of the impugned order, learned Tribunal has noted the factual contend namely with regard to the purchases which were undertaken by the respondent/assessee as also the terms and conditions of the agreement entered into by the assessee with the concerned highways department and having been factually satisfied that the deduction claimed by the assessee is admissible, had granted relief More importantly the Tribunal and taken note of the fact that for the previous assessment years 2010-11 the learned Tribunal And adjudicated the issue and had granted relief for assessee and for the subsequent years 2013-14 and 2014-15 disallowance has been made under section 80-1A of the Act That apart the learned Tribunal has also taken note of various decisions of the Hon' ble Supreme Court which had laid down the legal principle as to what and under what circumstances the Commissioner of Income-tax can exercise power under section 263 of the Act.

5. The revenue has not disputed before us that no disallowance was made in the previous two assessment years as well as the subsequent two assessment years. Thus in the absence of any distinguished feature in the nature of contract the Rule of Consistency has to be upheld. Thus we find that no questions of law, much less substantial questions of law arise for consideration in this appeal."

[Emphasis supplied)

1.6.1) It is being highlighted that the appellant brought in his own material according to the specification of the employer, skilled man power, technical expertise for the execution and timely completion of the work, responsibility of development, to rectify and/or indemnify against damages and had undertaken entrepreneurial and investment risks while carrying out the infrastructure development facilities. It was further submitted that all the agreements entered into by the appellant carried such clauses which proved that the appellant was taking all sorts of risk whether it be entrepreneurial risk, investment risk or business risk. A detail risk analysis table in respect of one of these agreements entered into with the employer which is also reproduced hereunder so as to prove that the appellant complied with all the conditions of being a developer and was not a mere works contractor:

*Agreement with Chief Engineer N.H. Division, Bhubaneswar (Odisha)
Nature of work: Widening existing single/Intermediate lane to two lane
with strengthening from 59/0 to 68/0km of Nh-200, Vide Job No-NH-049-
ORS-2008-09-418, Ag No-SBD No-01/2009-10.*

S. No.	Categorical requirements to be a developer u/s 801A	Content from the contract sufficing the criteria making him eligible for deduction	Reference Para No. of agreement	Pg. No. of Paper Book
1	Not ordinary Contractor but a Developer	The eligibility criteria fulfilling which contract was obtained by the assessee which involved a description of method of work, schedule, drawings and charts, program for construction equipment planning, quality assurance procedures to be proposed to be adopted, justification of their ability of execution and completion as per technical specification and within stipulated time shows that the assessee was not a mere contractor but a developer. ii) Conditions fulfilled by the to obtain the contract showing that he is not a mere contractor but a developer.	Para 4.1 Appendix to ITB	928
2	Financial Risk	i) Undertaking that the assessee would rest a minimum of 25% of the value of the work during the implementation of the contract. ii) EMD to be deposited at the time of filing bid iii) Bank Guarantee furnished by the assessee against guarantee the performance	Undertaking Para c) to Memorandum Para'd) to Memorandum Para e) to Memorandum	912 912 912 912
3	Technical Expertise	The assessee is required to submit specifications and drawings showing the proposed Temporary works to the engineer for approval thereby exhibiting Technical expertise	Para 18	963
4	Entrepreneurial Risk	The assessee is required to bear all the risk of loss of or damage to physical property and of personal injury and death which may arise during the consequence and of in the performance of the contract thereby taking all entrepreneurial involved the risks	Para 12	962
5	Human Resource	The assessee has required to admit staffs with approval of Engineer according to their Qualifications, abilities and relevant experience as of the personnel listed in the schedule thereby depicting. requirement of specially qualified people for execution of the contract	Para 9	962
6	Material	The assessee confirms that no material supply has been made by the employer and all purchases made by the assessee from the third party has to undergo through quality assurance procedure proposed by the employer	Para 4:1	928

7	Labour	The assessee was required make arrangements his for OLLIFL the engagement of all staff and labour, local or other, and for their payment, housing. feeding and transport.	Para 1	
8	Indemnity/ Liability for damages	i) The assessee is liable to pay liquidated damages to the employer at the rate per day stated in contract thereby the assessee has to indemnify for the damages.	Para 49.1	971
9	Correction of defects	The assessee had undertaken to complete the undertaken to complete the work and remedy any defects therein thereby taking the liability for correction of defects. ii) The assessee shall be notified for any defects and shall have to correct the same within time notified by the Engineer	Para 2 Para 35.1 & 35.2	913 967

1.6.2] On perusal of the above table, it could be well understood that the appellatant not only carried business risk but also undertook entrepreneurial risk, financial risk and investment risk which are the well-settled parameters to distinguish a contractor-cum- developer from a mere contractor engaged in works contract.

1.6.3] To further substantiate the veracity of the above-narrated facts, the screenshots of the relevant extract of the tender documents are also reproduced hereunder for the ready reference of the Hon'ble Bench so as to justify that the appellatant was required to furnish details of technical personnel, plant and machinery, past experience of similar work, financial strength etc. at the time of applying for tender which further proved beyond doubt that the appellatant not only carried business risk but also undertook entrepreneurial risk, financial risk and investment risk:

1.6 Qualification and experience of key personnel required for administration and execution of Contract (Refer Clause 4.5.2). Attached Biographical data. Refer also to sub clause 4.3 (e) of Instruction to Bidders and Sub Clause 9.1 of the Conditions of Contract.

Details of Technical Key Personnel						
Sl.No	Position	Name	Qualification	Years of experience		
				Road Works	Building Works	Other
1	Project Manager	Lalitendu Patanaik	B.E.Civil Engg.	10 years	3 year	4 years
2	Site Engineer	Ashok Kumar Naik	B.E.Civil Engg.	6 years	2 years	2 years
3	Site Engineer	Sanjay Kumar Mishra	B.E.Civil Engg.	7 years	3 years	1 years
4	Site Engineer	Deepak Kumar Bhuiyan	B.E.Civil Engg.	9 years	2 years	2 years
5	Site Engineer	Firoz Khan	B.E.Civil Engg.	8 years	2 years	1 years
6	Plant Engineer	Judhistir Pradhan	Diploma in Mech.	11 years	3 year	2 years
7	Quantity Surveyor	Asit Kumar Barik	Diploma in Civil Engg.	8 years	3 years	2 years
8	Soil & Metal Engg.	Anil Kumar Samantraya	Diploma in Civil Engg.	9 years	2 years	3 years
9	Survey Engineer	Kiran Kumar Mishra	Diploma Civil Engg.	6 years	2 year	1 years

Shree Balaji Engicons Pvt.Ltd.

Managing Director



From,
The Executive Engineer
N.H.Division
Jharsuguda.

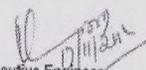
THE MACHINERIES/EQUIPMENTS ARE DEPLOYED

(Under our Division by Shree Balaji Engicons Pvt. Ltd., Belpahar, Dist: Jharsuguda)

Sl.No.	Name of the machineries/equipments	Identification No./Ongoing/Chasis No.	Capacity	Year of purchase	Condition (working /breakdown)	Since when deployed under him.	When it is likely to be released from current assignment
1	2	3	4	5	6	7	8
1	Asphalt Batch Mix Plant (Apollo Model ANP-1500)	Bill No. M/300, dt: 27.12.2010	128 TPH	2010	Good Running Condition	Feb'11	31.10.2012
2	Hydrostatic Sensor Paver Finisher Apollo Make	Bill No. M/q-288 dt: 17.10.2010	100 TPH	2010	Good Running Condition	Nov'10	--do--
3	Mechanical Paver Finisher Apollo Make	Bill No. 35, dt:21.06.2009	100 TPH	2009	Good Running Condition	Oct'09	--do--
4	Bituminous Boiler with Sprayer	Bill No. 04, dt:23.09.2009 & No PE/30r/2006-07 dt:11.11.2006	1000 Ltr	2009	Good Running Condition	Oct'09	--do--
5	Wet Mix Plant	Inv.No.18 dt:12.03.2010	100-120 TPH	2010	Good Running Condition	April'10	--do--
6	Vibratory Roller	Bill No. VAO 966 & VAO 967 dt:29.03.2008	10 T	2002	Good Running Condition	Oct'09	--do--
7	Tandem Vibratory Roller	P-676, 31.01.2004	DD-90 Specification	2003	Good Running Condition	Oct'09	--do--
8	Hydraulic Excavator	VCE/BLR/C193/2009-10, dt:31.07.2009 & VCE/BLR/10/199/2009-10, dt:31.07.2009	EX-210 & BLC-140	2009	Good Running Condition	Oct'09	--do--
9	Motor Grader	IM0100003951, dt:30.11.2011	CAT 120K2	2011	Good Running Condition	Dec'11	--do--
10	Dozer	IM0100003287, dt: 26.10.2010 & IM0100002229 dt: 15.04.2008	CAT D8G & D5K	2008 & 2010	Good Running Condition	Jan'09	--do--
11	Batching Plant-CP 30	Inv No.82600349, dt:25.09.2007 & 82801083, dt:11.09.2008	Swing Starter	2007-08	Good Running Condition	Jan'09	--do--
12	Concrete Mixture (Universal RM-800)	INV.No. 101, dt:24.09.2009, INV No.70, dt: 17.05.2011,	Universal	2009-2011	Good Running Condition	Oct'09	--do--
13	Tipper	Attached Separately		1997-2002	Good Running Condition	Oct'09	--do--
14	Front and Loader	Bill No. IMS200000323 & IMS200000324 dt: 05.04.2009	1.7 Cum	2009	Good Running Condition	Oct,09	--do--
15	Road Roller	Bill No. 162 & 163 dt:28.12.2006	8-10 T	2006	Good Running Condition	Oct,09	--do--
16	Water Tanker	Attached Separately			Good Running Condition	Oct,09	--do--

Certified that,

- I have verified the ownership documents with the identification no. of the machineries/equipments.
- Machines are currently utilized exclusively for the work under the Division.
- The facts provided are true as on the date of issue of this document to the best of my knowledge.


Executive Engineer
N.H.Division
Jharsuguda.

PERFORMANCE RECORD OF CONTRACTOR

1	Name of the Contractor	: Shree Balaji Engicons Pvt. Ltd.
2	Registration No. & Date	: 46 of 1997-98
3	Class of Contractor	: Super Class
4	Licensing Authority	: Chairman of the Committee of CEs & EIC (Civil) R&B Orissa
5	License valid up to	: 31.03.2015
6	Details of work executed.	:

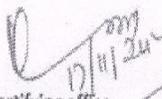
Sl. No.	Job under execution	Agreement Amount	Date of commencement	Stipulated date of completion	Whether work is/was progressing as per work programme	Reasons for delay, if any
1	2	3	4	5	6	7
1	Widening existing single /intermediate lane to two lane with IRCP form 104/0 km to 117/0 km of NH-200 Agt. No.: SBD No. 03/2009-10	857.26 Lakhs	20.10.2009	19.04.2011	Completed as per work programme	Does not arise
2	Widening existing single /intermediate lane to two lane with strengthening from 51/0 km to 59/0 km of NH-200 Agt. No.: SBD No. 02/2009-10	765.84 Lakhs	01.10.2009	30.03.2011	Completed as per work programme	Does not arise
3	Widening existing single/intermediate lane to two lane with strengthening from 59/0 km to 68/0 km of NH-200 Agt. No.: SBD No. 01/2009-10	861.52 Lakhs	21.08.2009	20.11.2010	Completed as per work programme	Does not arise
4	Widening existing single/intermediate lane stretches to two lane with strengthening from 0/0 km to 6/0 km and 14/0 km to 16/0 km of NH-200 for the year 2008-09 Agt. No.: SBD No. 01/2008-09	1,258.17 Lakhs	10.01.2009	09.04.2010	Completed as per work programme	Does not arise
5	Widening existing single lane carriage way to two lane carriage way including improvement to Riding Quality from Km 21/0 to 30/0 Km of NH-200 Agt. No.: 39F2/2005-2006	4,25,66,392.00	18.01.2006	17.07.2007	Completed as per work programme	Does not arise
6	Widening existing single lane carriage way to two lane carriage way with improvement of riding quality from 6/0 km to 10/0 km & 36/0 km to 41/430 km of NH-200 Agt. No.: SBD No. 01/06-07	876.58 Lakhs	07.04.2007	06.10.2008	Completed as per work programme	Does not arise

7	Widening existing single lane carriage way to two lane carriage way including improvement to Riding Quality from Km 123/0 to 131/0 Km of NH-200 Agt. No.: 1F2/2005-2006	2,98,03,232.00	15.04.2005	14.07.2006	Completed as per work programme	Does not arise
---	--	----------------	------------	------------	---------------------------------	----------------

7	Whether the contractor has requisite machineries and personnel deployed (details of machinery & personnel deployed)	: Yes
8	Whether the quality of construction is satisfactory	: Yes
9	Whether he has capability to make good the loss of time	: Yes
10	Whether the contractor has abandoned any work in the past three years, if yes, the details thereof.	: No
11	Whether the contractor has entered any litigation in the past, if yes, the details thereof.	: No

Shree Balaji Engicons Pvt.Ltd.


 Managing Director
 Signature of Contactor
 With Seal


 Signature of certifying office
 With official seal
 Executive Engineer
 Jharsuguda N.H.Division
 JHARSUGUDA

1.6.4] On perusal of the relevant extract of these documents furnished at the time of applying for tender, it becomes quite evident that the appellant was required to furnish various details such as qualification and experience of key personnel who shall be looking after the administration and execution of the project, list of machineries/ equipments deployed for execution of the projects, experience of similar work undertaken in the past and performance record etc. which clearly establish that the appellant worked as a developer-cum-contractor during the execution of these projects.

1.6.5) *In view of the parameters laid down in the judicial precedents (supra), on perusal of the relevant clauses of the agreements entered into by the appellant with these employers and on perusal of the documents furnished at the time of applying for tender, there remains absolutely no doubt that the appellant was a contractor performing the work in the nature of a developer-cum-contractor and was assuming risks and responsibilities which made it eligible for deduction under section 80-IA of the Act in respect of the eligible infrastructural facilities for the below-mentioned reasons:*

(i) The appellant was assigned full responsibility to do all acts for execution and completion of work right from the beginning till handing over of the project to the employer. The contract was not for a specific work but for development of the infrastructural facility as a whole. The contract also bound the appellant for change of scope of work in respect of any deviation/modification/extra work as envisaged during the execution of the project.

(ii) The appellant shouldered out investment and technical risk in respect of the work executed by it. It was merely provided with the site which it had to develop into an infrastructural facility by undertaking huge risks in terms of deployment of technical personnel, plant and machinery, technical knowhow, expertise and financial resources.

(iii) The material required for the project was purchased by the appellant from third party which had to undergo through quality assurance procedure proposed by the employer. The employer did not provide any material to the appellant.

(iv) The appellant was required to bring in plant and machineries to be used in the project. The appellant invested a huge amount in its plant and machineries for carrying out various projects

(v) The appellant executed managerial responsibility by engaging the requisite qualified/skilled/semi-skilled staff and labourers including the other supporting staff. The appellant undertook complete responsibility of the manpower to be used in developing the infrastructure facility including for their payment, housing, feeding and transport.

(vi) The appellant had to utilize its expertise, experience including its technical know-how in the development of the project.

(vii) The appellant provided all the necessary superintendence required during the executions of project.

(viii) The appellant was required to bear all the risk of loss of or damage to physical Property and of personal injury and death which arose during the and in consequence of the

performance of the contract thereby taking all the entrepreneurial risks involved.

(ix) The appellant undertook financial risk as it was required to invest some percentage of the value of the contract during the implementation of contract. The appellant was also required to deposit EMD at the time of filing bid. The appellant also furnished irrevocable and unconditional bank guarantee against performance security of the project which in itself goes on to show that the appellant took all the financial risks involved. Thus, it is evident that the appellant undertook entrepreneurial and financial/ investment risk besides business risk.

(x) The appellant had undertaken to complete the work and remedy any defects arising therein thereby taking the liability for correction of defects

(xi) The appellant was also liable to pay liquidated damages to the employer in the event of breach of any of the conditions stipulated in the contract.

1.6.6) The above-mentioned reasons clearly exhibit that the present case was not a case wherein the appellant was provided with the establishment and materials required to execute the work, which happens in case of works contract where the contractor gets the material and other requisites from the client and all he has to do is to employ labour. Rather, in the facts of the present case, the appellant was assigned with the responsibility of development of the infrastructural facility as a whole and the fact that the appellant deployed its resources (material, machinery, labour etc.) in the construction work and that the appellant was liable to indemnify the employer for any losses/ damage caused to any property/ life in the course of execution of work, clearly exhibited the risks undertaken by the appellant.

1.6.7) Further, it is also being highlighted that the appellant has executed work pertaining to agreement with Chief Engineer N.H. Division, Bhubaneswar (Odisha) for Widening existing single/Intermediate lane to two lane with strengthening from 59/0 to 68/0km of Nh-200, Vide Job No-NH-049-ORS-2008-09-418, Ag No-SBD No-01/2009-10 during the Assessment Year 2014-15 also wherein the Hon'ble ITAT 'Cuttack Bench itself has duly treated the appellant as a developer-cum-contractor and has allowed deduction under section 50-1A of the Act. Hence, it is evident that the infrastructural development preinstall undertaken by the appellant during Assessment Year 2011-12 were identical to the Infrastructural development projects undertaken by the appellant during the Assessment Year 2014-15 in respect of which the Jurisdictional Bench of ITAT itself had held that the appellant was eligible for claiming the benefit of deduction u/s 801A(4) of the Act and therefore, the appellant was eligible for claiming deduction u/s

80-1A of the Act in respect of infrastructural facilities developed by it during the Assessment Year 2011-12 also

1.6.8] In view of the above discussion, it is humbly submitted that the observation of the Ld AO that the appellant was merely a "works contractor" is devoid of any merits. It has been comprehensively explained that the appellant was a contractor performing work in nature of a developer-cum-contractor and was also assuming risks and responsibilities akin to that of a developer and henceforth, the appellant was eligible for claiming deduction u/s 80-1A of the Act in respect of infrastructural facilities developed by it Hence, the aforesaid observation of the Ld. AO for disallowing the claim of deduction u/s 80-1A of the Act was untenable

1.7.1 Further, the observation of the Ld. AO that TDS was deducted by the principals u/s 194C of the Act and thus, such contracts were work contracts is again an observation which is devoid of any merits in light of the detailed analysis (supra) wherein it has been clearly established that the appellant was a contractor performing work in nature of a "developer-cum- contractor and was not a mere "works contractor". It was stated time and again that the appellant is engaged as a contractor only but contractor for development of infrastructure facilities. Hence, TDS was rightly deducted under section 194C of the Act.

1.7.2] The term, "works contract" is not defined u/s 80-IA of the Act and therefore, meaning of the said term shall be interpreted using its dictionary meaning as well as definition of "work" provided in section 194C of the Act. Relying on the definition of "work" provided in section 194C of the Act, it is submitted that the term, "work" does not include "manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, other than such customer". It is further submitted that no material was supplied by the employer to the appellant and that the appellant was solely responsible to mobilize and procure all the material and other resources as per the specification of the employer and accordingly, it was contended that the appellant was not a works contractor as defined u/s 194C of the Act.

1.7.3] Reliance is also placed on the judgment of the Hon'ble ITAT Kolkata Bench in the case of Adhunik Infrastructure (P) Ltd. vs. J.C.LT, Range 10, Kolkata I.T.A. No. 1281/Kol/2015) wherein it was held that:

9.3.2. Thus as per section 194C of the Act also, "works contract does not include a contract wherein, the contractor in addition to employing labour, procures material from a third party. Thus, contracts involving mere labour of the contractor are included in the purview of "works contract We find that the Hon'ble Supreme Court in case of Associated Cement Co. Ltd. us. CIT reported in 201 ITR 435 while interpreting the term 'work' u/s 194C of the Act had held that

words any work in section 194C(1) of the Act means any work including supply of labour to carry out work and is not intended to be confined to or restricted to works contract, therefore, a person who credits to the account of or pays to a contractor any sum payable on behalf of organizations specified in section 194C(1) of the Act for carrying out any work (including supply of labour for carrying out any work) is liable to deduct income-tax as required under that sub-section. The words in the sub-section (1) of 194C of the Act on income comprised therein appearing immediately after the words 'deduct an amount equal to two per cent of such sum as income-tax from their purport, cannot be understood as the percentage amount deductible from the income of the contractor out of the sum credited to his account or paid to him in pursuance of the contract, but deduction is to be made out of payments made to the contractor. We see no reason to curtail or to cut down the meaning of the plain words used in the section. "Any work means any work and not a "works contract", which has a special connotation in the tax law. Indeed in the subsection, the "work" referred to therein expressly includes supply of labour to carry out a work. It is a clear indication of the Legislature that the "work" in the sub-section is not intended to be confined to or restricted to "works contract". The issue before the Hon'ble Supreme Court in the aforesaid case was whether the term "work" used in section 194C needs to be restricted to "works contract". The Hon'ble Apex Court laid out that the term "work" used in section 194C need not be restricted to "works contracts" (ie. labour contracts) because the subsection expressly includes supply of labour to carry out work. In Page 870 other words, it is implied that works contract means supply of labour to carry out work. Thus from the above we may say that works contract constitutes a contract under which the contractor is merely employing his efforts or labour. Under such a contract. the contractee provides the material and other requisites complete infrastructure) needed to carry out the desired work to the contractor who by applying his labour to the said material turns the material into a desired product

1.7.4] The Hon'ble Jurisdictional Bench of ITAT in the case of ARISS Infrastructure Projects Ltd. Vs. ACIT, Circle-2(1), Bhubaneswar [ITA Nos. 142 & 143/CTK/2010) has categorically held as under:

"10. Now coming to the merits of the deduction u/s 801A(4) of the Act. A perusal of the provisions of section 801A(4) of the Act shows that in the explanation A perusal of the provisions of sections 801A(4) of the Act shows that in the explanation infrastructure facility has been specified to mean a road including a toll road, a bridge or a rail system. Admittedly, the assessee is doing the business of development of railway tracks and bridges thereof as also roads. If, we are to accept the contention of the Ld. CIT that the provisions of

section 801A(4) of the Act after the substitution of the explanation to section 801A of the Act was introduced was only for the purpose of giving the benefit to BOT contracts then, the explanation to section 801A(4) of the Act becomes otiose. This is as explanation to section 801A(4) of the Act specifically provides for the road to include a toll road, a bridge or a rail system. BOT contract in respect of the railway system can never exist. Further, a perusal of the provisions of section 801A of the Act shows that the term 'works contract' is not defined in the said section. However, the terms 'works' and 'contract' is defined in the provisions of section 194C of the Act. If a particular word or term is not defined in the specific section then, one could go to other sections in the said Act where the definition would be available to draw a meaning to the said terms. In the provisions of section 194C of the Act, work has been given an inclusive definition but in the subsequent portion it has excluded the manufacturing or supplying a product according to requirement or specification of a customer by using material purchased from a person other than such customer. As has been specified by the Ld. AR, the assessee is doing contract work but that work is according to the requirement and specification of the customer and the same has been done by using materials purchase from third parties other than the customers. Thus, though the assessee is doing a works contract the same would not fall within the meaning of the word 'works contract' for the purpose of the Act due to the exclusion provided in the meaning of 'work' in section 194C of the Act. The issue raised by the Ld. CIT that the assessee is not doing the development work but is only doing the contract also does not stand to test as the assessee admittedly is developing the roads and railway lines and the bridges thereof Development encompasses within itself contract work. The agreement between the assessee and the customer being the government is for the development of the infrastructure facility being roads and rail systems and bridges by participating in the tenders. Under these circumstances, we are of the view that the AO was right in law in granting the assessee the benefit of deduction u/s, 801A(4) of the Act. On this ground also, we are of the view that the Ld. CIT's order passed u/s. 263 of the Act is unsustainable and is liable to be quashed and we do so. Here, we may specifically mention that in view of the fact that the explanation to section 801A(4) of the Act which has been substituted by the Finance, Act, 2009 with retrospective effect of 01.04.2000 is attempting to take away the statutory benefit granted to the assessee u/s. 801A(4) of the Act without making any amendment to the explanation to section 801A(4) of the Act, the said explanation substituted by the Finance Act, 2009 w.e.f. 01.04.2000 being an hindrance to the statutory deduction available to the assessee under the provisions of section 801A(4), the said

explanation would have to stand down in view of the decision of the Hon'ble Supreme Court in the case of S. Sundaram Pillai, referred to supra. Consequently, on this ground also the order passed u/s. 263 of the Act by the Ld. CIT for AY 2006-07 and 2007-08 stands quashed. Appeals of the assessee are allowed."

1.7.5) In view of the above discussion and findings reiterated in the judicial precedents cited supra, it becomes quite clear that even though the definition of "work" provided in section 194C of the Act is "Inclusive" and not "exhaustive", yet, it specifically excludes from Purview, "manufacturing or supplying a product according to the requirement at specification of a customer by using material purchased from a person, other than such customer. Therefore, it is evident that a works contract constitutes a contract under which the contractor is merely employing his efforts of labour and under such contrast, the contractee provides the material and other requisites (is complete infrastructure) needed to carry out the desired work to the contractor who by applying his labour to the said material turns the material into a desired product

1.7.6] However, in the facts of the present case, the appellant was assigned the responsibility for development of infrastructural facility as a whole and the appellant was solely responsible to mobilize and procure all the material and other resources as per the specification of the employers. The appellant also undertook entrepreneurial and investment/ financial risk besides business risk in executing the development project which was akin to performing work in the nature of developer-cum-contractor. The appellant did not merely employ its labour while executing the project nor was it provided with the material and other requisites (is complete infrastructure) needed to carry out the desired work. Hence, it can be conclusively held that work related to development of infrastructural facility undertaken by the appellant did not partake the nature of "works contract" by any stretch of imagination. Hence, the aforesaid observation of the Ld. AO also does not hold good.

1.8] The appellant also places reliance on the following judicial precedents wherein similar claim of deduction u/s 80-IA of the Act was examined and allowed by the Hon'ble High Court and Hon'ble Coordinate Benches:

- *CIT. TRG Industries (P.) Ltd reported in [2016] 76 taxmann.com 105 (Jammu & Kashmir)*
- *Harish Chandra ARSSPL JV v. ACIT, Circle-2(1) (L.T.A. Nos. 116 to 119/CTK/2013/*
- *ITO, Ward-4(3) v. Backbone ARSS JV (ITA No 274 & 275/CTK/2016/*
- *DCIT, Circle 4(1) v. M/s. ARSS Triveni JV (ITA No. 271/CTK/2016]*
- *DCIT, Corporate Circle 1(1) v. ARSS Infrastructure Projects Ltd. (ITA No. 247/CTK/2017)*

- HCIL Adhikarya ARSS JV v. DCIT, Circle-4(1) [ITA No. 81/CTK/2018]
- Sushee Hi Tech Constructions (P1 Lat. DCIT, Crede-32), Hyderabad reported in 12013 58 SOT 111 (Hyderabad Trib) (UNO)
- KAIC Constructions Ltd ACIT, Circle 2(2) reported in (2012) 21 taxmann.com 138 plud
- Somdutt Builders - NCC (JV) ACIT reported in [TS-5050-ITAT-2017 Hyderabad)-0
- ITO, Word -112) M/s Ayyappa Infra Projects Put LAI (ITA No. 1323/Hyd/2018)
- Ayush Ajoy Construction Lid ITO reported in [TS-5240-ITAT-2000ndere)-O]
- Tantia Constructions Limited v. DCIT reported in (TS-6372-ITAT-2016(Kolkata)
- Simplex Som Datt Builders JV ITO reported in (TS-7085-ITAT-2013(Kolkata)
- ACIT ICC)-45 Pratibha Industries Lid reported in 2012] 28 taxmann.com 246 (Mumbai- Trib

1.9] In view of the detailed explanations/justification discussed supra with respect to each observation of the Ld. AO as discussed in the assessment order for disallowing the claim of deduction u/s 80-1A of the Act, it becomes crystal clear that the appellant satisfied all the conditions prescribed u/s 80-1A(4) of the Act for claiming benefit of deduction therein. The deduction claimed by the appellant u/s 80-1A of the Act was within the four corners of law in light of the facts involved in the present case which was duly supported with the findings re- iterated in the numerous judicial precedents cited (supra).

1.10] In view of the elaborate discussion duly corroborated with the findings re-iterated in the Judicial precedents cited supra, it becomes abundantly clear that the appellant satisfied all the conditions prescribed therein for claiming the benefit of deductions u/s 80-1A(4) of the Act. The deductions claimed by the appellant were legitimate and within the four corners of law. The Ld. AO himself did not dispute the fact that the appellant did not satisfy any of the conditions prescribed therein except for the Explanation inserted below sub-section (13) of section 80-1A of the Act wherein it was stated that deduction shall not be allowed in relation to a business which is in the nature of a "works contract". However, the appellant has categorically explained in the previous paragraphs of this submission that it was a contractor performing work in nature of a developer-cum-contractor and was also assuming risks and responsibilities akin to that of a developer and was not engaged merely in works contract. Therefore, the Ld CIT(A) was correct in deleting the addition of Rs. 1,52,72,905/- made to the total income of the appellant on account of disallowance of deduction claimed u/s 80-1A of the Act and Henceforth, the Hon'ble Bench is thereby kindly requested to affirm the findings of Ld CIT(A).

61. We have heard the rival submissions and perused the material available on record. This Bench of the Tribunal in assessee's own case for A.Y.2014-2015 in ITA No.195/CTK/2019, dated 23.12.2021, held as under :-

45. In view of foregoing discussion, we are of the considered view that the Id. AR has successfully demonstrated by way of all relevant details and documents that the assessee at present, has undertaken huge risk in terms of deployment of technical persons, plant and machinery, technical knowhow, expertise managerial and financial resources which qualifies the assessee as developer-cum-contractor and the assessee is not merely a contractor who undertakes work contracts only. The financial statements, balance sheet and profit and loss account, clearly demonstrate that the assessee has used its own machinery and equipment of more than Rs.42 crores and has purchased and consumed materials of more than Rs.102 crores, purchased from various vendors during the relevant financial period, which was not provided by the contractee, these factual position has not been controverted by the Id. Pr.CIT in any manner, therefore, we safely presume that the assessee is not merely a contractor discharging works contract but it is a developer-cum-contractor, thus, rider created by the Explanation below Section 80IA(13) of the Act, which clearly provides that the entity doing work contract will not be eligible for benefit of deduction but the assessee cannot be put in the basket of work contractor and keeping in view wider scope of his work and various business risks such as entrepreneur, finance and other risks, the assessee has qualified a position of developer-cum-contractor, thus, proviso below section 80IA(13) of the Act does not create any bar in the allowability of deduction u/s.80IA(4) of the Act to the assessee. 46. From the relevant parts of the impugned revisionary order u/s.263 of the Act, we observe that the Id. Pr.CIT has made vehement emphasis on the precondition for allowability u/s.80IA(4) of the Act that the assessee is required to act as a developer, who is also operating and maintaining infrastructural facilities and has also placed reliance on the judgment of the Hon"ble High Court of Bombay in the case of AVG Heavy Industries Ltd. (supra), On careful and respectful perusal of the judgment of Hon"ble Bombay High Court particularly from paras 22 and 23, it is amply clear that after the amendment to clause (i) of the section 80IA(4) read as (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility, prior to amendment the "or" between three activities were not there, after the amendment the word "or" has been inserted w.e.f.1-4-2002 by Finance Act 2001. The relevant paras 22 & 23 of the judgment of Hon"ble Bombay High Court (supra) are thus, :-

22. Another submission which was urged on behalf of the Revenue is that under clause (iii) of sub-section (4A) of Section 80IA, one of the conditions imposed was that the enterprise must start operating and maintaining the infrastructure facility on or after 1st April 1995. The same requirement is embodied in sub-clause (c) of clause (i) of sub-section (4) of the amended provisions of Section 80IA. On this basis, it was urged that since the assessee was not operating and maintaining the facility, he did not fulfill the condition. This submission is fallacious both in fact and in law. As a matter of fact, the Tribunal has entered a finding that the assessee was operating the facility and this finding has been confirmed earlier in this judgment. That the assessee was maintaining the facility is not in dispute. The facility was commenced after 1st April 1995. Therefore, the requirement was met in fact. Moreover, as a matter of law, what the condition essentially means is that the infrastructure facility should have been operational after 1st April 1995. After Section 80IA was amended by the Finance Act of 2001, the section applies to an enterprise carrying on the business of (i) developing; or (ii) operating and maintaining; or (iii) developing, operating and maintaining any infrastructure facility which fulfills certain conditions. Those conditions are : (i) Ownership of the enterprise by a Company registered in India or by a consortium; (ii) An agreement with the Central or State Government, local authority or statutory body; and (iii) The start of operation and maintenance of the infrastructure facility on or after 1st April 1995. The requirement that the operation and maintenance of the infrastructure facility should commence after 1st April 1995 has to be harmoniously construed with the main provision under which a deduction is available to an assessee who develops; or operates and maintains; or develops, operates and maintains an infrastructure facility. Unless both the provisions are harmoniously construed, the object and intent underlying the amendment of the provision by the Finance Act of 2001 would be defeated. A harmonious reading of the provision in its entirety would lead to the conclusion that the deduction is available to an enterprise which (i) develops; or (ii) operates and maintains; or (iii) develops, maintains and operates that infrastructure facility. However, the commencement of the operation and maintenance of the infrastructure facility should be after 1st April 1995. In the present case, the assessee clearly fulfilled this condition.

23. In the view which we have taken, all the assessment years in question to which this batch of appeals relates would be governed by the same principle. The subsequent amendment of Section 80IA (4A) of the Act to clarify that the provision would apply to an enterprise engaged in (i) developing; or (ii) operating and maintaining; or (iii) developing, operating and maintaining an infrastructure facility was reflective of a position which was always construed to hold the field. Before the amendment that was brought about by Parliament by Finance Act of 2001, we

have already noted that the consistent line of circulars of the Board postulated the same position. The amendment made by Parliament to Section 80IA (4) of the Act set the matter beyond any controversy by stipulating that the three conditions for development, operation and maintenance were not intended to be cumulative in nature.

47. Therefore, in view of above observations in the judgment of the Hon^{ble} Bombay High Court in the case of AVG Heavy Industries Ltd. (supra), we clearly and respectfully note that the amendment by Parliament to section 80IA(4) of the Act settled the issue by stipulating that the three conditions for development, operation and maintenance were not intended to be cumulative in nature and the provision would apply to an enterprise engaged in (i) developing; (or) (ii) operating and maintaining ; (or) (iii) developing, operating and maintaining an infrastructure facility was reflective of a position which was always construed to hold the filed. In view of above discussion and after careful consideration of business and contract work undertaken by the present assessee, out of which impugned income, on which deduction/s.80IA(4) has been allowed by the AO, was accrued to the assessee from the business activity conducted or undertaken in the capacity of developer-cum-work contractor and not in the capacity of merely a work contractor. Therefore, in view of above factual matrix of the case, we reach to a logical conclusion that the assessee is a developer-cum-contractor and was engaged in the work of developing infrastructure facilities, thus, complying with the condition (i) of section 80IA(4) of the Act would be eligible for deduction u/s.80IA(4) of the Act and, thus, the assessment order granting deduction u/s.80IA(4) of the Act cannot be tagged or alleged as erroneous and prejudicial to the interest of revenue. This view taken by the Hon^{ble} Bombay High Court has also followed by the ITAT Rajkot Bench in the case of Katira Constructions Ltd. (supra), ITAT Indore bench in the case of Saneer Infrastructure Pvt. Ltd.(supra), and the order of ITAT Kolkata Bench in the case of SPML Infra ltd. (supra).

47.1 We are of the considered opinion that the assessee did not merely employ its labour while executing the project but it was also provided with the material and other requisites of technical and financial support by the contractee to carry out the desired work, therefore, we reached to a logical conclusion that the work relating to development of infrastructure facility did not partake the character of merely work contract and at the same time we are of the fortified opinion that the development work of infrastructure facility had been undertaken by the assessee out of which impugned amount of profit accrued to the assessee, hence, the Id. Pr.CIT was not justified and correct in distinguishing the judgment of Hon^{ble} High Court of Bombay in the case of AVG Industries (supra) and other related judgment on this issue.

47.2 The Id. AR has also placed strong reliance on the order of ITAT Kolkata Bench in the case of ACIT Vs. Ho Hup Simplex JV

[2018] 92 taxmann.com 108 (Kolkata-Trib.). In this case, the assessee was awarded a contract to construct Road by NHAI and it was to procure raw material, make arrangements for power, water, plant machinery etc., and conduct all other activities needed for construction, assessee was a developer and not a mere works contractor and, accordingly was held eligible for deduction u/s.80IA of the Act and similar facts exist in the present case and, thus, this proposition also supports the ground of assessee on merits.

47.3 The Id. CITDR has placed vehement reliance on the decision of Hon^{ble} Madras High Court in the case of Covanta Samalpatti Operating (P) Ltd. (supra) and the order of ITAT Bangalore in the case of Yojaka Marine (P) Ltd. (supra). On careful and respectful perusal of these judgments, we are in agreement with the contentions of the Id. AR that these judgments are related to the assessees, who were engaged only in the contract of repair and maintenance and not doing any development of infrastructure facility akin to the business of present assessee, therefore, we respectfully hold that benefit of these judgments is not available for the revenue in the present case. The order of the ITAT Mumbai "L" Bench in the case of M/s Marriot International Licensing Company BV (supra) is not pertaining to the issue of Transfer Pricing and not pertaining the issue of allowability of claim u/s.80IA(4) of the Act.

47.4 The Id. CITDR has also placed reliance on the order of ITAT Delhi Bench in the case of Parnika Commercial & Estates (P) Ltd [2016] 72 taxmann.com 177 (Delhi-Trib.), where the Assessing Officer rejected the claim of deduction under section 80-IA(4) of assessee, engaged in Civil Contract Work, on ground that it was not engaged in eligible business as per section 80-IA(4), but before denying claim of assessee, AO did not make thorough enquiry in matter regarding nature of agreements, terms of payments, maintenance of account books with respect to project separately, etc., and matter was restored to the file of AO for readjudication after allowing due opportunity of hearing to the assessee but in the present case such position does not exit as the assessee by way of relevant documentary evidence, accounts, copies of the contract agreements and other facts has successfully demonstrated that the impugned income was earned to it from the business activity conducted in the capacity of developer-cum-contractor, therefore, benefit of this citation in favour of revenue is not available.

47.5 We find it relevant to go through the memorandum explaining the provisions in the Finance Bill 2007, which clearly lays out that the purpose of extending tax benefit u/s.80IA of the Act was to encourage investments from the private sector, hence, work contracts i.e. contracts involving merely labour or mere execution of construction work without making investment have been kept outside the purview of the provision of the section 80IA(4) of the Act. At the same time, from the said memorandum which reproduced below, clearly explains the purpose of tax benefit for encouraging private sector participation by way of investment in

developing of the infrastructure sector and not to the persons who merely executes the civil construction work or any other works contract. The memorandum has been reported in (2007) 289 ITR(St.) 292 at page 312, which reads as under :-

"Section 80-IA, inter alia, provides for a ten-year tax benefit to an enterprise or an undertaking engaged in development of infrastructure facilities, industrial parks and special economic zones. The tax benefit was introduced for the reason that industrial modernization requires a passive expansion of, and qualitative improvement in, infrastructure (viz., expressways, highways, airports, ports and rapid urban rail transport systems) which was lacking in our country. The purpose of the tax benefit has all along been for encouraging private sector participation by way of investment in development of the infrastructure sector and not (or the persons who merely execute the civil construction work or any other works contract.

Accordingly, it is proposed to clarify that the provisions of section 80-IA shall not apply to a person who executes a works contract entered into with the undertaking or enterprise referred to in the said section. Thus, in a case where a person makes the investment

and himself executes the development work, i.e., carries out the civil construction work, he will be eligible for tax benefit under section 80-IA. In contrast to this, a person who enters into a contract with another person (i.e., undertaking or enterprise referred to in section 80-IA) for executing works contract, will not be eligible for tax benefit under section 80-IA.

This amendment will take retrospective effect from April 1, 2000 and will accordingly apply in relation to the assessment year 2000-01 and subsequent years."

47.6 The above noted factual matrix, placed before the bench by way of relevant documentary evidence, copies of the contract development agreements and other legal propositions and citations on the issue pertaining to present assessee M/s Balaji Engicon Pvt. Ltd. (ITA No.195/CTK/2019) have not been controverted by the Id. CITDR. Therefore, we hold that the AO was right in allowing the claim of assessee u/s.80IA(4) of the Act after due examination and verification of the relevant materials, documents, copies of the contract and evidence etc., thus, on merits the assessment order cannot be alleged as erroneous and prejudicial to the interest of revenue.

62. As the revenue has submitted that the assessee has worked as work contractor in execution of the projects, however, no material was put before us to controvert the findings given by this Tribunal in assessee's

own case for A.Y.2014-2015, which are reproduced hereinabove, therefore, by respectfully following the decision of the coordinate bench of the ITAT Cuttack in ITA no.195/CTK/2019, we are of the considered view that the assessee is a developer executed the work awarded to it by various government authorities which are in the nature of infrastructure facilities. However, the hon'ble Supreme Court in the case of Wipro Ltd. (supra) and in the case of Checkmate Services Pvt. Ltd. (supra), has held that taxation issues are to be construed strictly. Thus, we should look into the nature of each work executed by assessee to ascertain whether any new infrastructure facility is created or not. The details of work executed by the assessee for the year under appeal are reproduced hereunder which have been incorporated by the AO in the assessment order at pages 4 to 9 :-

Sl. No.	Name	Particulars of Work	Contractual Receipts	Net Profit Claimed	Deduction Claimed u/s 80IA
1.	<u>East Coast Railways</u>	Provision of washable apron on Platform No. 3 at Sbp. station Provision of Limited subway	1,01,75,818	6,66,281	6,66,281
	1. 49/SBP/Washable Apron/PF-1&3/SBP				

	1. 20/SBP/LHS/DT-7/ SBP-A	between Sbp.-Angul section of Sbp	3,51,838	22,302	22,302
	1. 91/SBP/PF Shelter/ SBP-ANGL&BRGA-TIG	Provision of 1 bay standard platform shelters at various stations of Sambalpur Division	32,76,618	2,00,448	2,00,448
2.	<u>S.E Central Railway</u>				
	a) 137/DEN-BSP/2013-14	Extension of BOCM 3&4 to create new sidings	1,83,61,656	10,02,724	10,02,724
	b) 151/Ballast JSG- BPH/CEC/SECR/13	Supplying & stacking of 74,500 cum machine crushed stone	4,69,30,144	30,41,080	30,41,080
	c) 159/Ballast/JMG- BPH/CEC/SECR/13	Supplying & stacking of 91,480 cum machine crushed stone	7,03,47,046	42,70,061	42,70,061
	d) 141/EW/MIN BR/JMG	Execution of earth work, construction of minor bridges	16,92,128	91,214	91,214
	e) 06/EN-BSP/2015-16	Execution of earth work, construction of bridges culvert Construction of E.I. Buildings	2,21,50,554	14,83,881	14,83,881
	f) 233/EI/Bldg/RIG- JSG/CEC/SECR/15-16	Construction of E.I.Bldgs including electric installation	94,25,218	7,13,585	7,13,585
	g) 235/QRTS/BRJN/ SECR- 15-16	Construction of 70 units of quarters	1,49,49,550	10,56,706	10,56,706

	h) 255/BOCM/CEC/SECR/ 15-16 .	Execution of earth work, construction of bridges etc	98,19,997	7,28,278	7,28,278
3.	<u>NH - JSG</u>				
	a) SBD 01 of 2014-15	Construction of two minor bridges over Siripali Nallah	3,97,79,444	24,44,215	24,44,215
4.	<u>R & B-Sambalpur</u>				
	a) 34 P1 of 2015-16	Widening & strengthening of Kuchinda-Bamara Rd	9,97,97,491	57,95,054	57,95,054
	b) 20 P1 of 2015-16	Construction of HL Bridge over Dhobijore Nallah	1,45,72,252	10,10,800	10,10,800
5.	<u>R & B-Sundargarh</u>				
	a) 735 P1 of 2014-15	Four-Laning of Sundargarh- Lephrpara Road	88,57,673	6,03,736	6,03,736
	b) 1164 P1 of 2014-15	Construction of by-pass road at Ujjalpur to Sundargarh	11,96,95,699	80,41,492	80,41,492
	c) 40 P1 of 2014-15	Construction of HL Bridge over river Utiali	3,56,49,612	24,67,421	24,67,421
	d) 01 EPC of 2013-14	Widening & strengthening to Karamdihi-Talsara-Lulkidhi Rd Improvement to Bandhapali- Kinjirkela Road	24,47,27,788	1,53,17,989	1,53,17,989

	e) 736 P1 of 2014-15	Improvement to Talsara-Luhakera Road	1,77,45,617	11,53,587	11,53,587
	f) 442 P1 of 2014-15		61,89,671	4,67,406	4,67,406
6.	<u>R & B-Jharsuguda</u>				
	a) 140 P1 of 2014-15	Improvement to Laikera-Sahaspur-Bamra Road	27,20,69,459	1,74,96,427	1,74,96,427
	b) 503 P1 of 2014-15	Improvement of Kolabira-Samasingha Road	4,69,24,447	26,58,949	26,58,949
	c) 2418 P1 of 2013-14	Improvement of Jharsuguda-Arda Road	5,29,72,470	34,14,426	34,14,426
	d) 13 P1 of 2015-16	Improvement of Amati-Jhiripali road	1,70,41,565	10,72,144	10,72,144
	e) 2560 P1 of 2013-14	Construction of bridge over Balijor nallah	3,82,51,703	23,56,859	23,56,859
	f) 2419 P1 of 2013-14	Improvement to Laikera-Kirimira Road	1,08,67,890	7,06,551	7,06,551
	g) 342 P1 of 2013-14	Improvement to Samasingha-Laikera-Bagidhi Road	1,47,32,530	8,92,495	8,92,495

7.	<u>RWD-Sundargarh</u>	Improvement of Podmundi-Bijadihi Road	4,47,16,350	23,78,496	23,78,496
	a) 1294 F2 of 2014-15				
	b) 1172 of 2013-14	Construction of HL Bridge over river Safic	1,52,13,839	10,50,171	10,50,171
8.	<u>RWD-Sambalpur</u>	Construction of HL Bridge, Podabalanda-Badmal Rd	2,71,22,963	16,70,861	16,70,861
	a) 440 F2 of 2013-14				
	b) 2121 of 2013-14	Construction of HL Bridge, Porpetta Nallah	2,55,34,703	17,41,525	17,41,525
	c) 2945 of 2013-14	Construction of HL Bridge, Kerandi Nallah	1,42,73,470	10,30,575	10,30,575
	d) 15 P1 of 2015-16	Construction of HL Bridge over River Veden	50,00,000	3,12,368	3,12,368
9.	<u>S.E. Railways</u>	Execution of protection works for bridge no. 21 etc	2,23,56,003	13,93,985	13,93,985
	a) CE/CON/GRC/8/2015				
	b) CE/CON/GRC/9/2015	Construction of Station Bldgs, Staff Qtrs, Service Bldgs etc	1,79,77,601	11,72,214	11,72,214
		Execution of the railway formation by earthwork in			

	c) CE/CON/GRC/9/2016	cutting, blanketing etc	6,98,98,743	41,23,620	41,23,620
		Execution of the railway formation including minor bridges & other misc. works			
	d) CE/CON/GRC/21/2013		1,54,97,276	9,80,948	9,80,948
10.	<u>Belpahar Municipality</u>				
	a) 01 P1 of 2014-15	Improvement & upgradation of road from Belpahar Fatak towards TRL Stadium	2,43,71,334	14,44,243	14,44,243
11.	<u>ICZMP</u>				
	a) OTDC/ICZMP/W-8/2011-12 of 2013-14	Development of Eco-Tourism Complex at Brkul-Part-II	2,84,13,012	17,85,936	17,85,936
	<u>TOTAL</u>		1,55,77,31,182	9,82,61,053	9,82,61,053

63. From perusal of the particulars of work, we find that the works provide in Sl.No.(b), 2(c) & 10(a) are not in the nature of new infrastructure facilities rather they related to either of supply and stacking of machine crushed stone or improvement of existing road, which do not create any new infrastructure facility. The profits earned on such projects

cannot be eligible for deduction u/s.80IA(4) of the Act. However, remaining projects undertaken are in relation to the development of infrastructure facilities, therefore, we are in agreement with the order of the Id. CIT(A) to such extent and the profits earned from those projects is allowed as deduction u/s.80IA(4) of the Act and direct the AO to exclude the profits of these three projects from the eligible amount of deduction u/s.80IA of the Act.

64. Thus, the appeal of the revenue is partly allowed.

ITA No.89/CTK/2023 (AY:2017-2018) (by the assessee)

65. In this appeal, the assessee has raised the sole ground with regard to disallowance of additional claim of Rs.6,02,75,436/- for deduction u/s.80IA of the Act in respect of the profit earned from work undertaken by the assessee as a member of the consortium in respect of the projects undertaken by the joint ventures/consortiums.

66. This issue has already been discussed and decided against the assessee in assessee's appeal for A.Y.2011-2012 in IT(SS)A No.77/CTK/2023, the facts of the year under appeal are identical and the arguments put forth by the assessee are also same. Both the parties has stated that facts existed in the year under appeal are identical to facts in A.Y.2011-2012. Thus, following the reasoning given in the said appeal of the assessee for A.Y.2011-2012, this ground of appeal i.e. ground No.4 is also dismissed.

67. Thus, the appeal of the assessee is dismissed.

ITA No.142/CTK/2023 (AY:2017-2018) (by the revenue)

68. The sole issue involved in the appeal of the revenue is with regard to allowability of deduction u/s.80IA(4) of the Act while deciding the appeal of the revenue for A.Y.2016-2017, we observed that the assessee is eligible for deduction u/s.80IA(4) of the Act being a developer creating new infrastructure facilities and restricted the deductions for the projects where new infrastructure facilities were developed by the assessee and disallowed the profits from such projects where no new infrastructure facility was developed by the assessee. In the year under appeal i.e. for A.Y.2017-2018, the total claim of the assessee was of Rs.9,34,24,300/-, however, precise details of the projects independently undertaken by the assessee during the year on which the deduction u/s.80IA(4) of the Act was claimed are not available, therefore, this issue is sent back to the file of the AO for the limited purpose with the direction that the assessee is entitled for deduction u/s.80IA(4) of the Act on the projects where new infrastructure facilities is developed which includes widening and strengthening of the existing roads as well as creation/construction of the railway over bridge projects, etc. however, no deduction be allowed to the assessee where no new infrastructure facilities is created. With this direction, the matter is set aside for the limited purpose to the AO to identify those projects where no new infrastructure facilities is created and disallowed u/s.80IA of the Act only on such projects and the profits for the remaining projects where new infrastructure facilities have been

developed, the assessee is entitled for deduction u/s.80IA(4) of the Act.

We direct accordingly.

69. Thus, appeal of the revenue in ITA No.142/CTK/2023 is partly allowed for statistical purposes.

ITA No.13/CTK/2023 (AY : 2018-2019)(by the revenue)

70. The revenue in its appeal has raised the following grounds :-

1. *The CIT(A) erred in law in allowing deduction u/s 801A(4) to the assessee when the assessee doesn't satisfy the requisite conditions to be eligible to get the deduction u/s 801A(4) of the Act.*
2. *The CIT(A) ought to appreciate that in the facts and circumstances of the case the meaning of works contract' as in Explanation to Section 801A as borrowed from section 194C applies only to labour contract and not to a composite contract of construction of an infrastructure facility.*
3. *The CIT(A) was not correct in holding that the infrastructure facility executed by the assessee (Contractor) can be considered to be owned by it within the meaning of item (a) of clause (i) of sub section (4) of Section 801A.*
4. *The CIT(A) erred in treating the Contract receipts received by assessee- company in lieu of execution of contract work be considered as profit and gains of business for deduction u/s 801A.*
5. *The deduction u/s 801A as per the condition in item (c) of clause (i) of sub section (4) of Section 80 IA can be availed only after the infrastructure facility has started (i.e got completion Certificate). However, the assessee being a contractor does not get any compensation after completion of project. In view of the above, whether the CIT(A) was justified in holding the eligibility of assessee company for deduction u/s.80IA on receipts accrued prior to completion of the project.*
6. *Any other ground of appeal that may arise at the time of hearing.*

71. The issue raised by the revenue has already been decided by us while considering the appeal of the revenue for A.Y.2017-2018, wherein we have directed the AO to identify those projects where no new

infrastructure facilities is created and disallowed u/s.80IA of the Act only on such projects and the profits for the remaining projects where new infrastructure facilities have been developed, the assesee is entitled for deduction u/s.80IA(4) of the Act. Thus, following the same reasoning, we also restore this issue to the file of AO with the above directions.

72. Thus, this appeal of the revenue is partly allowed for statistical purposes.

CO No.02/CTK/2023 (AY : 2018-2019) (by the assesee)

73. The cross objections raised by the assesee are as under :-

1. *That on the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in not allowing additional claim of Rs. 5,26,73,234/- as lodged during the course of appellant proceedings even when it was eligible for deduction u/s 80-IA of the Act in respect of profit earned from work undertaken by the respondent as a member of the consortium in respect of the projects undertaken by the joint ventures/ consortiums.*
2. *That on the facts and in the circumstances of the case and in law, the appellant is also eligible for deduction of Rs. 5,26,73,234/- under section 80-IA of the Income-tax Act, 1961 in respect of profit earned from work undertaken by the respondent as a member of the consortium in respect of the projects undertaken by the joint ventures/consortiums.*

74. This cross objection is filed by the assesee arising out of the appeal of the revenue for A.Y.2018-2019 in ITA No.13/CTK/2023, the assesee has raised two cross objections both of them are in relation to the disallowance of additional claim of Rs.5,26,73,234/- for deduction u/s.80IA of the Act in respect of the profit earned from work undertaken by the assesee as a member of the consortium in respect of the projects undertaken by the joint ventures/consortiums.

75. This issue has already been discussed and decided against the assessee in assessee's appeal for A.Y.2011-2012 in IT(SS)A No.77/CTK/2023, the facts of the year under appeal are identical and the arguments put forth by the assessee are also same. Both the parties has stated that facts existed in the year under appeal are identical to facts in A.Y.2011-2012. Thus, following the reasoning given in the said appeal of the assessee for A.Y.2011-2012, all the cross objections of the assessee are dismissed.

76. Thus, the CO No.02/CTK/2023 filed by the assessee is dismissed.

77. In the result, appeals of the assessee in IT(SS)A No.77, 296, 88&89/CTK/2023 along with CO No.02/CTK/2023 are dismissed, whereas appeals of the revenue in ITA Nos.141&89/CTK/2023 are dismissed and ITA Nos.142&13/CTK/2023 are partly allowed for statistical purposes.

Order pronounced in the open court on 07/01/2025.

Sd/-
(GEORGE MATHAN)

न्यायिक सदस्य / JUDICIAL MEMBER

कटक Cuttack; दिनांक Dated 07/01/2025

Prakash Kumar Mishra, Sr.P.S.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कटक / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

सत्यापित प्रतिलिपि //True Copy//

Sd/-
(MANISH AGARWAL)

लेखा सदस्य/ ACCOUNTANT MEMBER

आदेशानुसार/ BY ORDER,

(Assistant Registrar)
आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack