IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A' NEW DELHI

BEFORE SMT DIVA SINGH, JUDICIAL MEMBER
AND
SH.J.S.REDDY, ACCOUNTANT MEMBER

I.T.A .No.-3304/Del/2010
(ASSESSMENT YEAR-2004-05)

Bharat Sanchar Nigam Ltd., Corporate Office, Taxation Section, First Floor, Bharat Sanchar Bhawan, Janpath, New Delhi-1110001. **PAN-AABCB5576G** **(APPELLANT)**	vs	DCIT, Circle-2(1), Room No.-398, C.R.Building, I.P.Estate, New Delhi **(RESPONDENT)**

I.T.A .No.-3386/Del/2010
(ASSESSMENT YEAR-2004-05)

DCIT, Circle-2(1), Room No.-398, C.R.Building, I.P.Estate, New Delhi **(APPELLANT)**	vs	Bharat Sanchar Nigam Ltd., Sanchar Bhawan, Janpath, New Delhi. **PAN-AABCB5576G** **(RESPONDENT)**

Appellant by	**Sh. P. Pardiwala, Sr. Adv. & Sh.Anupam Pal Das, Adv.**
Respondent by	**Smt. Anuradha Misra, CIT DR**

Date of Hearing	**12.10.2015**
Date of Pronouncement	**23 .12.2015**

ORDER

PER DIVA SINGH, JM

The correctness of the order dated 30.04.2010 of CIT(A), New Delhi pertaining to 2004-05 assessment year is assailed both by the assessee and the Revenue in their respective appeals on the following grounds:-

ITA 3304/Del/2010

1. *"That on the facts and circumstances of the case and in law, the ld. CIT(A) has erred in holding Rs. 2300 crores received by the appellant, on account of reimbursement of License fee etc. as ancillary income and not allowable for deduction u/s 80IA of the I.T. Act, 1961.*

2. *That on the facts and circumstances of the case and in law, the ld. CIT(A) has erred in holding that the refund received by the appellant from Universal Service Fund of Rs. 310.25 crores, is not eligible for deduction u/s 80IA of the I.T. Act, for the same reasons as have been applied, while denying deduction u/s 80IA to reimbursement of License fee.*
3. *That on the facts and the circumstances of the case and in law, the ld. CIT(A) has erred in holding that the "interest from others" amounting to Rs. 11.79 crores (which includes interest on advances given to employees/suppliers) is not eligible for deduction u/s 80IA of the I.T. Act, 1961.*
4. *That the other passed by the CIT(A) is bad in law and contrary to the facts and circumstances of the case."*

ITA No. 3386/Del/2010

1. *"The ld. CIT(A) has erred in law and on facts in holding that receipts amounting to Rs. 76,71,90,000/- on account of liquidated damages are entitled for deduction u/s 80IA of the I.T. Act ignoring the fact that it is necessary to prove that the receipt generated should be of first degree source of special activity, but not of ancillary and incidental activity of the undertaking.*
2. *The ld. CIT(A) has erred in law and on facts in holding that receipts amounting to Rs. 16,86,63,72,000/- on account of excess provision written back are entitled for deduction u/s 80IA of the I.T. Act ignoring the fact that write back of provision pertaining to earlier years which is no longer required is not an income derived from the business operations of the undertaking for the year under consideration.*
3. *The ld. CIT(A) has erred in law and on facts in holding that other receipts amounting to Rs. 1,42,90,32,000/- on account of sale of directories, publications, forms, waste paper, etc. are entitled for deduction u/s 80IA of the I.T. Act, ignoring that these receipts are on account of income connected with the business and cannot be termed to be explicitly derived from the principal business of the undertaking.*
4. *The appellant craves leave for reserving the right to amend, modify, alter, add or forego any grounds of appeal at any time before or during the hearing of this appeal."*

2. The relevant facts of the case are that the assessee in the year under consideration [as per the assessment order dated 25.09.2009 u/s 263/143(3)] filed its return of income on 31.10.2004. The said return was processed u/s 143(1) and thereafter assessment was made by an order u/s 143(3) which was rectified u/s 154/143(3) wherein the net taxable income under the general provisions was determined at Rs.13136,33,09,623/- and the book profits under MAT the income was computed at Rs.289,20,71,000/-. The assessment was set aside by an order dated 23.03.2009 u/s 263 with the directions to the AO to

frame the assessment afresh after examining the items of profits considered for the purposes of deduction claimed u/s 80 IA. As a result of this the assessment was concluded by computing the income of the assessee under the normal provisions of the Act at Rs. 4817,50,71,000/- by the order dated 25.09.2009 u/s 263/143(3). Since it was more than the book profit as per order u/s 154/143(3) dated 12.02.2008 at Rs.13136,33,09,623/-, the net payable tax was determined under the normal provisions of the Act.

3. Aggrieved the assessee carried the issue before the CIT(A) in appeal where the assessee met partial success. Aggrieved by the order both the parties are in appeal before the ITAT on the above-mentioned grounds in their respective appeals.

4. Detailed arguments supported by synopsis, supplementary synopsis, written submissions etc. on the issue have been advanced by the parties on the various dates, the appeals came up for hearing. Considering the fact that the Ld. Sr. Advocate in his opening arguments took the position that apart from the arguments based on the specific grounds raised in assessee's appeal and of course defending the relief granted in appeal by the CIT(A), he would first want the issue to be considered whether in terms of sub-section (2A) of section 80-IA the income of the assessee has correctly been computed or not. The Ld.AR stated that consideration of the relevant statutory provisions since these flow from the assessment itself thus the issue raised by way of a legal argument encompassing the entire issue addressing both the appeals should be first decided. Even otherwise when the merits of the additions sustained or deleted would necessarily be required to be considered on the touchstone of sub-section (2A) of section 80-IA. It was his stand that in the facts of the present case the

tax authorities have ignored the impact of sub-section (2A) of section 80-IA which would govern the issues raised. Non-consideration of the said provision it was submitted would lead to a gross miscarriage of justice as the relevance and import of the specific sub-section has been lost sight of by the authorities. The issue, it was submitted, has been considered in the light of the context of sub-section (1) of section 80 IA. Decisions rendered considering the wordings "derived from" and "attributable to" have wrongly been relied upon in the facts of the present case namely:-*Cambay Electric Supply Ltd. vs CIT 113 ITR 84 [1978] [SC]; CIT vs Sterling Foods Ltd. 237 ITR 579 [1999] [SC]; and Pandian Chemicals Ltd. vs CIT 262 ITR 278 [SC]* and other decisions right upto the decision of Liberty Shoes. In all fairness it was stated that although the legal issue may not have been raised before the authorities below but the assessee cannot be barred from raising the issue as assessment has to be made and supported on the basis of the legal mandate as set out in the statute and if the assessee is able to show that the relevant provisions have not been correctly applied the assessee cannot be estopped from relying upon the specific provisions of the statute which anyway the Revenue is duly bound to consider. In the course of the hearing before us the Revenue did not dispute the position and offered no objection to the raising the issue and maintained that sub-section (2A) is only addressing the apportionment of profits for the purposes of deduction and does not carve out any exception as canvassed by the assessee. However, these arguments would be addressed in detail after first having addressed the background of the case as brought out on record in the orders of the tax authorities including the statement of facts filed by the assessee before

the CIT(A) and also elaborated in detail in the brief synopsis filed on 22.05.2015; 15.06.2015 and thereafter again supplemented on 12.10.2015.

5. A perusal of the same shows that the assessee was incorporated in 15.09.2000 under the Companies Act, 1956. The assessee as per record was required to provide basic telephone service, cellular operation, internet services, ISDN (Integrated Switching Data Network) and other telecom services through out India (except Delhi and Mumbai) including rural, backward and tribal areas. Prior to the Incorporation of the assessee, the telecommunication services were being provided by the Government of India, Ministry of Communication through its department namely Department of Telecom Services (DTS) and Department of Telecom Operation (DTO). The assessee was incorporated pursuant to the policy of the Government of India (National Telecom Policy, 1999) wherein the business of providing telecom services and operate the same through corporate entity was given to the assessee. The business was handed over by MOU on 30.09.2000 where the business was taken over by the assessee from the erstwhile Department of DTS and DTO with effect from 01.10.2000 on a going concern basis alongwith assets and all the contractual obligations.

6. The assessee thus is a fully owned Government of India enterprise and pursuant to the MOU dated 30.09.2000 and commenced its business activities from 01.10.2000. The first assessment year of the company was 2001-02 assessment year. No deductions were claimed by the assessee u/s 80IA on account of the returned loss in the first three years upto 2003-04 assessment year and the assessee had begun exercising its claim for deduction u/s 80IA for

the first time in the year under consideration and onwards. The relevant extract of section 80-IA is reproduced hereunder :-

> ***80-IA.*** *(1) "Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.*
>
> *(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility* ***or*** *starts providing telecommunication service* ***or*** *develops an industrial park or develops a special economic zone referred to in clause (iii) of sub-section (4)* ***or*** *generates power* ***or*** *commences transmission* ***or*** *distribution of power* ***or*** *undertakes substantial renovation and modernisation of the existing transmission or distribution lines :*
>
> ***Provided*** *that where the assessee develops or operates and maintains or develops, operates and maintains any infrastructure facility referred to in clause (a) or clause (b) or clause (c) of the Explanation to clause (i) of sub-section (4), the provisions of this sub-section shall have effect as if for the words "fifteen years", the words "twenty years" had been substituted.*
>
> *(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the deduction in computing the total income of an undertaking providing telecommunication services, specified in clause (ii) of sub-section (4), shall be hundred per cent of the profits and gains of the eligible business for the first five assessment years commencing at any time during the periods as specified in sub-section (2) and thereafter, thirty per cent of such profits and gains for further five assessment years.*
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> *(3) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx*
> *(4) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx*
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> *(13) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx*

6.1. A perusal of the record shows that the AO in terms of the order u/s 263 show-caused the assessee to explain why the following items should not be

excluded from the profits derived from the eligible business for the purposes of deduction u/s 80IA as although the receipts are attributable to the primary/preferred business, they could not be said to have been "derived from the business" of the industrial undertaking:-

1.	*Extra Ordinary Items*	*2300,00,00,000*
2.	*Refund from Universal Service Fund*	*310,24,68,000*
3.	*Interest from others*	*11,79,09,000*
4.	*Liquidated Damages*	*76,71,90,000*
5.	*Excess provision written back*	*1686,63,72,000*
6.	*Others including sale of directories, publications, forms, waste paper, etc.*	*142,90,32,000*

6.2. Not convinced with the explanation offered the additions were made in the computation of income made under the normal provisions of the Act.

7. Aggrieved the assessee went in appeal before the CIT(A). The CIT(A) set out the dispute for adjudication before him in para 2.9 of his order holding as under:-

> *2.9 "These items of income are shown in the P&L Account as extra-ordinary items, as reported by auditors as per Companies Act, and ICAI Act (AS-5). The dispute before me is whether these items of income are business income or income from other sources or other than business income, as per the I.T. Act. Another issue is whether these incomes (profits and gains) are derived by the PSU from the business of providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite services, network of trunking, broadband network, and internet services on or after 01/04/1995, but on or before 31/03/2005. I have to analyze each item of income (profits and gains) discussed in the above table separately with relevant case laws appropriate to the issues."*

7.1. Accordingly individually taking each of the additions made the CIT(A) proceeded to separately consider each of the item of the addition. To the extent of items mentioned at Sl.No. 4 to 6 he allowed the assessee's appeal and the items mentioned in Sl.No.1 to 3 the additions were sustained.

7.2. Aggrieved by this, both the parties are in appeal before the Tribunal on the afore-mentioned grounds.

8. Mr. P.Pardiwala, Sr. Advocate vigorously argued that per se the very section has been wrongly invoked and without prejudice to this main argument canvassed that considering the very nature of assessee's business the first degree nexus contemplated by the various Courts is also fully met.

8.1. Inviting attention to section 80-IA alongwith sub-section (1), (2) and (2A) of the same it was his submission that the qualification of "derived from" has wrongly been relied upon as a criteria for deciding the issues in the facts of the present case. It was his stand that the restrictions placed by the phrase "derived from" as is available in sub-section (1) of section 80IA of the Act cannot be read into sub section (2A) of section 80IA of the Act.

8.2. Relying upon the decision of Apex Court in the case of *Hukumchand vs CIT 63 ITR 362; NHPC 292 ITR 383,* it was submitted that the assessee cannot be barred from raising these arguments as the arguments flow from the provisions of the Act.

8.3. It was argued that section 80IA of the Act can be divided into two broad categories:- **Category (a)** can be said to be applicable to infrastructure undertakings; and **category (b)** can be said to be applicable to the assessee engaged in provision of tele-communication services. The argument is duly reiterated in the synopsis dated 22.05.2015 also. The submission has been that sub-sections (1) & (2) of section 80IA of the Act are omnibus provisions which would cover all business including infrastructure undertaking under **category (a)** and section 80 IA (2A) would be exclusively applicable to the undertakings providing telecommunication services. Thus the benefit of the non-obstante clause would be available only to the **category (b).**

8.4. Carrying us through the relevant section, the Ld. AR submitted that on the one hand the provisions of sub-section (1) of section 80 IA provides that the deduction under the said section shall be available to an enterprise where its gross total income includes "profits derived from" any business (being eligible business) by an undertaking from an eligible business. On the other hand, the tele-communication services, it was submitted is governed by sub-section (2A) wherein the Legislature has consciously used the words "profits and gains of eligible business". Sub-section (2A) it was emphasized, starts with the non-obstante clause "notwithstanding anything in sub-section (1) or sub-section (2)" thereby specifically excluding all undertakings providing tele-communication services from all other undertakings or enterprises specifically in regard to two matters. The first is the manner of determination of deduction available while computing taxable income and the second is the broken time durations for which specific amounts of deduction of 100% and 30% for the first end the next five assessment years would be available to such undertakings providing tele-communication service. Thus it was his submission that in respect of the undertakings providing tele-communication services the legislature has specifically excluded the requirements of the source of profit and gains to be obtained directly from tele-communication services and hence excluded the use of words "derived from" in sub-section (2A), and further including the non-obstante clause in the provision itself so as to over-ride the restrictions imposed upon the business undertakings by sub-section (1) as well as sub-section (2) of section 80-IA of the Act. It was his submission that the inclusion of the non-obstante clause with omission of the words "derived from" in sub-section (2A) makes it clear that the same was inserted for the benefit for the still fledging

tele-communication undertakings. Any interpretation to the contrary it was submitted would be against the legislative intent and thus would be impermissible in law.

8.5. Relying upon the *Principles of Statutory Interpretation* as brought out by *Justice Sh. G.P.Singh (8th Edition)* it was submitted that the non-obstante clause is appended to a section at the beginning of the section in order to give the enacting part of the section an over-riding effect over the other provisions or the Act mentioned in the non-obstante clause. Relying upon the said text it was submitted that the non-obstante clause was used as a legislative device to modify the ambit of the provisions of law mentioned in the non-obstante clause or to over-ride it in specified circumstances. Reliance in support of the said proposition was placed upon *Vishin N.KhanChandani & others vs Vidya Lachmandas Khanchandani 246 ITR 306 (SC).* The said decision it was submitted has also relied upon for the principle that a non-obstante clause is used to avoid the operation and affect of all contrary provisions. It was submitted that the said proposition was further supported by the decisions rendered by the Hon'ble Supreme Court and the Hon'ble Andhra Pradesh High Court in the case of *Ashwini Kumar Ghosh vs Arabinda Bose [1953] SCR 1;* and *Parsuramaiya vs Lakshman AIR 1965 AP 220*. In the said background it was submitted that the Legislature has provided for a specific over-ride in sub-section (2A) of section 80IA of the Act over the provisions of sub-section (1) & (2) of section 80IA of the Act. It was submitted that it is not a mere general over-ride and therefore, the provisions of sub-section (2A) should prevail over the sub-sections (1) & (2) of section 80IA.

8.6. Accordingly it was his submission that the enterprise engaged in the business of providing tele-communication services as per the legislative intent is entitled to the deduction u/s 80IA of the Act in respect of all profits and gains from tele-communication business regardless of its source and the deduction can not be restricted to profits directly "derived from" eligible business of telecommunication undertaking.

8.7. It was further submitted that had the legislature only meant to distinguish the rates of exemption allowed and the period of deduction to the companies providing tele-communication services as provided in sub-section (2A) of section 80IA of the Act, it could have been done by way of "Proviso" and not by means of an insertion of a new sub-section altogether.

8.8. Reliance was also placed upon the commentary of *Kanga Palkivala & Vyas "The Law and practice of Income Tax", 12th Edition (page 32)* wherein the function of proviso is explained as under:-

> *"the normal function of proviso is to carve out or except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment…….*
>
> *A proviso is not applicable unless the substantive clause is applicable to the facts of the case; the proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. "*

8.9. In support of the said proposition reliance was placed on the following decisions of the Apex Court :-

1. *A.N.Sehgal & Others vs Raje Ram Sheoran 1991 AIR 1406 (SC);*
2. *Allied Motors vs CIT 224 ITR 667 (SC); and*
3. *CIT vs Pyari Lal Kasam Manji & Company 198 ITR 110 (Orissa High Court).*

8.10. Even otherwise it was submitted that by applying the various Rules of Interpretation the scope and ambit of section 80IA (2A) of the Act cannot be

restricted and the phrase "derived from" cannot be read into Section 80-IA(2A) of the Act.

8.11. It was further submitted that as per the well-settled Rule of interpretation as considered by the Courts the first attempt of a Court or a tribunal it is well-accepted should be to apply the literal interpretation. Applying this primary Rule of Interpretation the Courts are clear that the language employed in a statute is the determinative factor of legislative intent and it should be literally and strictly interpreted. Relying on the same it was submitted that following the Rules of construction the Court is bound to interpret the provisions of the Act as they stand without going behind the wisdom of the legislature.

8.12. It was further submitted that it is well accepted and is a settled legal position that every word of a statute has to be assumed to have been deliberately and consciously incorporated therein by the legislature and where the language of the statute is clear and explicit effect must be given to each word. It was submitted that the Court can only interpret the section, it cannot re-write, re-cast or re-design the section as the Court does not have the power to legislate.

8.13. The following decisions were relied upon so as to canvass that in the absence of any ambiguity/absurdity or conflict in the statutory language principle of literal interpretation should be applied to interpret the meaning and scope of the said section:-

1. *Hirala Ratan STO AIR [1973] SC 1034;*
2. *Union of India & Others vs Deoki Nandan Aggarwal 922 Suppl. (1) SCC 323;*
3. *State of Kerala vs Mathai Verghese & Others [1986] 4 SCC 786.*

8.14. Reliance was further placed upon *Rishabh Agro Industries Services vs PNB Capital Services [2000] 5 SCC 515;* and *Padman Sundra Rao vs State of Tamil*

Nadu [2002] 255 ITR 147 (SC), for the proposition that it is one of the fundamental principles of interpretation of statute that omissions in statute as a general Rule cannot be supplied by construction. It was submitted that it is well-settled that while interpreting a provision a Court only interpret the law and cannot legislate. Even if a provision of law is misused and or is subjected to the abuse of the process of law it was submitted that it is for the legislature to amend, modify or repeal if deemed necessary. The Court it was submitted cannot make good the omission, if any in the statute. It was submitted that it is only where the statute is ambiguous or its meaning is uncertain that the Court can ascertain what the legislature meant.

8.15. In the facts of the present case it was submitted there is no ambiguity or uncertainty in the wording used in the statute. Referring to the relevant provisions of the Act it was submitted that non-inclusion of the phrase "derived from" is not a case of "casus omisus" since the difference between the phrases "profits of the business" and "attributable from" and "derived from" has not only been recognized by the legislature in different provisions of the Act but has also been recognized and approved by a catena of decisions of the Apex Court since long back as far as 1978 and thereafter followed through right upto the decision of Liberty Shoes.

8.16. It was further submitted by the Ld.AR that the concept of "derived from" was introduced by the legislature as far back as in 1978 and was well understood and since the legislature has not used the phrases "profits of the business"; "attributable from" and "derived from" interchangeably but has used the phrases "attributable from" and "derived from" whenever they wanted to restrict the benefit. It was further submitted that before the re-structuring of

section 80 IA by the Finance Act, 2001, the phrase "derived from" was used even for telecom undertaking. However, it was only during the Finance Act, 2001 that the legislature thought it appropriate to categorize infrastructure undertakings into different segment and provide benefit accordingly. For the said purpose it was submitted that a reference may be made to the *"Notes to clause"* to *Finance Bill 2001 (extracts of section 80IA)* of the Act as it stood prior to amendment in Finance Act, 2001 Section 80IA as it stands post Finance Act, 2001 and relevant extract Notes to clause to Finance Bill 2001, it was submitted is annexed as Annexure A.

8.17. Relying upon *Pennar Paterson Ltd. (Re) 2002 (*36*)* SCL 525 *(Andhra Pradesh)*, it was submitted that where different words/terminology has been used in different sections having different meanings then they necessarily have to be given different meanings. Accordingly, it was his submission that where different expressions have been used in different sections of the Statute they should be given a different meaning. Thus it was submitted that when the legislature has taken care of using different phrases in different section then normally different meaning is required to be assigned to the language used. Relying upon *DLF Qutab Enclave Complex Educational Charitable Trust vs State of Haryana AIR [2003] SC 1648* and *Oriental Insurance Company Ltd. vs Hansraj Bhai [2001] 5 SCL 175,* it was submitted that it is well-settled that in relation to the same subject matter, if different words/terminology of different import are used in the same statute then there is a presumption that they are not used in the same sense. Thus the non-use of the term "derived from" in section 80IA (2A) it was submitted has to be given due weightage and the fact that the legislature was always aware of its implication is an undisputed fact. It was

submitted that whenever intended the legislature has used the phrase "derived from" in the provision starting with non-obstante clause to carve out of different specified assessees. For the said purpose, attention was invited to section 80IB(II) which being a non-obstante clause provides an exception to the general time limits as provided in section 80IB but uses the words *"deriving profits from business of……."*. Thus it was submitted that the phrase has been used differently by the legislature as it was always aware of the implications of non-use of the phrase ""derived from". It was submitted that such non-use cannot be stated to be the result of "casus omisus".

8.18. Inviting attention to the doctrine of purposive construction considered to be the golden rule and which is an exception to the rule of literal interpretation it was submitted would also lead to the same conclusion. Referring to the decision of *Grey vs Pearson [1857] 6 HL Cas 61* it was submitted that it is well-settled that the Golden Rule of Interpretation can be applied only in cases where resorting to grammatical and ordinary sense of the words in the statute would lead to some obscurity or inconsistency with the rest of the statute. Only in such cases, the words are modified so as to avoid obscurity and inconsistency but no further. However, in the case of a taxing statute it was submitted it is well-settled that literal rule would gain precedence over the Golden Rule as it is often remarked that equity and taxation are strangers. Thus, in view of the fact that where there is no obscurity or inconsistency in section 80IA (2A) of the Act and the fact that the provision of section 80IA (2A) have been specifically made to over-ride anything contrary contained in section 80IA (1) of the Act. Therefore, any interpretation which would make the provisions of section

80IA(2A) subject to section 80IA(1) will lead to make such non-obstante clause otiose and redundant.

8.19. Reliance was placed upon on *Union of India vs Popular Construction Company [2001] 8 SCC 470* for the proposition that Parliament cannot be presumed to make superfluous legislation. Thus any interpretation which renders a word or phrase in a statutory provisions redundant or otiose, can never be justified.

8.20. When considered from the premises of the Heydon's Rule i.e. the mischief sought to be addressed, it was submitted that since the intention of the legislature was never to rectify drafting errors and the intention through out the being that the benefit of deduction was to be given to certain core infrastructure sector which it was submitted is evident from the fact that the legislature had restricted the provision of section 80IA(1) of the Act twice i.e once by the Finance Act, 1999 then again by the Finance Act, 2001. Under both the Finance Act, it was submitted that the legislature has tried to expand or re-structure and revamp the benefit and has not to sought to rectify any mischief. Hyden's Rule it was submitted prescribed that where there is a ambiguity in the language used the real meaning can be arrived at by finding out the aim, scope and object of the whole Act by considering the position of law before the Act was passed; the mischief or defect which the law had not prevented; what remedy the Parliament has provided and the reason for remedy.

8.21. Considering from the perspective of the Rule of beneficial construction and the Rule of harmonious construction also it was submitted that these principles prescribed that provisions must be so construed that the meaning of

the provision must harmonious with the intention of the legislature behind the provision in particular and the enactment in general.

8.22. At the cost of reiteration it was submitted that if the intention of the legislature was only to provide an exception to the telecom industry for rates of deduction then this purpose could have been achieved by way of a proviso to sub-section (1) of section 80IA. However, the legislature instead has introduced by the Finance Act, 2001, a separate sub-section (2A) which clearly depicts that the intention of the legislature was not only to differentiate between the rates of deduction allowable to telecommunication service provider but also to distinguish the method of computation of profits for the telecom industry.

8.23. It was submitted even the Notes to the clauses of the Finance Bill 2001 specify that *"sub-section 2A shall be inserted."*

8.24. Carrying the argument further it was submitted that the circular subsequent to the amendment by the Finance Act, 2001 uses the word "profits of business" in the context of section 80IA of the Act.

8.25. It was also argued that it is well settled by the Courts that the provisions for deduction should be interpreted liberally, reasonably and in favour of the assessee and it should be construed to give effect the object of the legislature and not to defeat it. Reliance was placed upon *Bajaj Tempo vs CIT 196 ITR 188; Mysore Minerals vs CIT 239 ITR 775; CIT, Madras vs South Arcot District Co-operative Marketing Society Ltd. 176 ITR 117.*

8.26. Inviting attention to sub-section (2A) it was submitted that the legislature has used the words "shall" in the sub-section (2A) and accordingly it makes the said sub-section mandatory for the Revenue Authorities. Inviting attention to *CIT vs Anjum Ms Ghaswala & Others 252 ITR 1 (2001)* it was submitted that the

Hon'ble Apex Court has held therein that wherever the word "shall" has been used in the Act the clear intention of the legislature in this regard was to make the provision mandatory. Thus by resorting to the word "shall" the legislature has intended the afore-said section to be made mandatory in providing telecommunication services to claim deduction on the profits and gains of the eligible business.

9. Without prejudice to the above primary submission, the Ld. AR in the course of his arguments supplemented by letter dated 15.06.2015 and the submissions dated 12.10.2015 also addressed each of the items of the additions made by the Assessing Officer. It was his submission that considering what constitutes the business of the assessee each of these items of additions made by the AO where as a result of partial relief granted by the CIT(A) both the parties were in appeal before the ITAT the requirements of the tests judicially settled by Courts even for "derived from" would make the addition sustained bad in law. Referring to the record it is submitted that it is well accepted that the assessee has taken over the running business from the two Departments of the Ministry of Communication acting through Department of Telecom and Department of Telecom Operations. It was submitted that it is also not in doubt and is a well-accepted factual position that pursuant to the National Telecom Policy the assessee having taken over the erstwhile business from the Department of Telecom was required to be re-imbursed where the costs incurred were for ensuring last mile connectivity to the sparsely populated out lying areas of the country at times in difficult terrain etc. providing telephone services at affordable prices right upto the village panchayat levels. In order to achieve the socially desired aims and objects of the policy where no private player in the

sector would want to invest as the costs vis-à-vis the profits are detrimental and not commercially viable. Thus these costs and expenses; the license fee etc. was to be reimbursed by the Government of India only because of the peculiar business requirements of the assessee as mandated. The compensation made by the Government of India it was submitted is so planned marking part compensation for the tariff differential in the provision of rural telephone services by the assessee vis-à-vis the tariff charge in the urban areas. Thus these compensations are directly the consequence of the assessee undertaking the business of provision of telecommunication services in India. Thus it was submitted it was required to be considered that it flows from the very same business activity and thus is "derived from" the telecommunication business. Accordingly even on this touchstone the claim was allowable.

9.1. It was submitted that for the subsequent years i.e 2007-08 to 2009-10 assessment year, the deduction u/s 80IA in respect of such income on record stands allowed by the AO himself and the CIT(A) in his order for 2005-06 assessment year has held such income is derived from the eligible business and against this finding no appeal has been filed before the ITAT by the Revenue.

9.2. Accordingly the income for 2007-08 to 2009-10 assessment year and for 2005-06 assessment year has been held to be derived from the eligible business.

9.3. Similarly addressing the addition sustained by the CIT(A) qua the Universal Service Obligation Fund for the USO Fund it was submitted that the USO Fund was given a statutory status by the Indian Telegraph (Amendment) Act 2003. The fund it was submitted is to be utilized by the Government of India exclusively for providing access to telegraph services (including telecommunication services) to rural and remote areas at affordable and

reasonable price and is collected from all telecom operators including the assessee (except those providing pure value added services). Referring to the scheme of USO Fund it was submitted that any telecom services provider which provides telecom services in the rural, backward inaccessible and mountain areas which the activity is not commercially viable is compensated from the USO Fund for the losses incurred. On facts it was submitted that the compensation was given only to the assessee as the assessee was the only operator investing in establishing the telecom infrastructure in rural areas of India. Referring to the accepted fact where as per the mandate from the Government of India the assessee was obligated to provide telecom services thus the compensation in the form of a refund from USO Fund is evidently income "derived from" the business of telecom undertaking of the assessee.

9.4. Addressing the issues of liquidity damages, excess provision written back agitated by the Revenue in their appeal and other miscellaneous income the submissions made before the CIT(A) and the decisions relied upon by the CIT(A) and before the CIT(A) as summarized in the written submissions dated 15.06.2015 was relied upon. The common stand being that each of the income considered by the AO sustained by the CIT(A) or deleted by the CIT(A) was on facts allowable even if considered by importing the play of sub-section (1) in section (2A) of section 80-IA by considering them in the light of the phrase derived from the business of telecom undertaking and thus even otherwise the additions have been rightly deleted by the CIT(A) dismissing the departmental grounds and is to be allowed by accepting the assessee's grounds.

9.5. However, consideration of these issues it was submitted would arise only if the assessee failed in the preliminary argument that the wordings and phrase

of sub-section (1) of section 80-IA cannot be imported in sub-section (2A) as it would be running foul of the intention of the legislature which was clear, explicit and unambiguous.

10. The Ld. CIT DR in reply relying upon the impugned order submitted that the language employed in section 80IA is very clear and self-sufficient and the said section provides an incentive for profits to undertakings limited to the extent that the profits are to be "derived from" the eligible business. Accordingly it was her stand that the arguments advanced in the context of the fact that the source of the assessee's business is providing telecommunication services to the remote areas/rural areas is of no significance as the statute contemplates that incentive is to be given to only those profits which are "derived from" the eligible business. Consequently it was submitted that the source of income which has no direct nexus with the profits of the business undertaking does not help the assessee in any manner. The position it was submitted has been addressed at length and settled by the Apex Court way back in the case of *Cambay Electric Supply Ltd.; CIT vs Sterling Foods Ltd.; and Pandian Chemicals Ltd. (cited supra)*. Thus it was her submission that the arguments and submissions advanced in the face of the clear language used by the statute is of no help to the assessee. It was her argument that section 80A(I) specifically uses the phrases and term *"eligible business"* and *"derived from"* and the insertion of the non-obstante clause in sub-section (2A) of section 80IA does not make the wording *"derived from"* in section 80IA(I) irrelevant. Sub-section (2A) it was submitted only addresses the manner in which the incentive is to be apportioned and the only rule of interpretation which is required to be resorted to is the rule of strict interpretation, by giving effect to the requirements and

exception carried out in section (I) of section 80IA. Any interpretation which does away with the legislative intent coming from sub-section (1) of section 80IA, it was her submission, would be contrary to the legislative intent. It was her argument that the Court cannot interpret the statute negating sub-section (1) of section 80IA for telecom industries.

10.1. Apart from relying upon the clear intent of the legislature, reliance was also placed upon the decision of the *Madras High Court in the case of CIT vs Gangotri Textile Ltd. [2013] 40 Taxmann.com 399 (Madras)* [copy filed in the Court]. Attention was invited to the following head note of the said decision:-

> *"Section 80IA of the Income tax Act, 1961 – Deductions – Profit and gains from infrastructure undertaking [Computation of deduction] – Assessment year 1998-99 – assessee suffered fire accident on 11.3.1996 – It subsequently made claim before insurance company and admittedly, same was compensated – assessee claimed that insurance money was paid to it for loss of production due to accident and, therefore, same would be considered for grant of relief u/s 80IA – Whether given fact that fire accident had taken place as early as 11.3.1996 and there being no nexus between claim before insurance company and subsequent loss arising out of industrial activity, compensation could be considered for purpose of granting relief u/s 80IA – Held, no [para 4] [In favour of revenue]."*

10.2. Reliance was also placed upon the decision of the Mumbai Bench of the ITAT in the case of *Essar Power Ltd. vs ACIT [2013] 32 taxmann.com 346 (Mumbai Trib.)* copy of the same was also filed in the Court and specific reliance was placed upon the following head note:-

> *II. "Section 80-IA of the Income Tax Act, 1961 – Deductions – Profits and gains from infrastructure undertakings [Computation of deduction] – Assessment year 2003-04 – Whether deduction u/s 80IA would not be allowed on interest on employee's loan and advances, interest on margin money and interest income on dues towards income tax refund – Held, yes [para 9] [In favour of revenue]."*

10.3. Carrying us through the departmental ground, it was her stand that the CIT(A) has not kept in mind the settled legal position addressed by the Apex

Court in the case of Liberty Shoes Ltd. on the requirements of a direct nexus. Thus on each of the counts on which relief was granted by the CIT(A), reliance was placed upon the provision of the Act and the decision of the Apex Court in the case of Liberty Shoes so as to contend that the departmental appeal deserves to be allowed.

10.4. Since in the course of the hearings written submissions were also filed by the Ld.CIT DR the same are extracted hereunder for ready-reference:-

> *"While going through the Assessment order framed by the AO and taking into consideration the ground of appeal filed with the Appellate Authorities, it is clear that the income shown in the credit of P&L A/c was not actually been derived from the main line of business undertaken by the enterprise. These incomes are from ancillary sources like reversal of provisions on account of excess provision written back and liquidated damage etc.*
>
> *All these sources have no direct nexus with line of business, which is directly linked to the provisions of Sec.80lA. Reversal of past provisions is not actual business profits. Law is clear in providing the incentives of business enterprise in allowing the benefits, incomes have been categorized as mandatory condition to take the benefits of incentives, the ancillary profits are not meant for taking advantage of incentive schemes given under the Act. In such situation it will be a mandatory condition to establish how these incomes have been arrived and were it derived from the line of business undertaken by the enterprise. Therefore, when Section 80-IA/80-1B refers to profits derived from eligible business, it is not the ownership of that business which attracts the incentives. What attracts the incentives under Section 80-IA/80-IB is the generation of profits (operational profits). For example, an assessee company located in Mumbai may have a business of building housing projects or a ship in* ***Nava Sheva.*** *Ownership of a ship per se will not attract Section 80-1B (6). It is the profits arising from the business of a ship which attracts sub-section (6). In other words, deduction under sub-section (6) at the specified rate has linkage to the profits derived from the shipping operations. This is what we mean in drawing the distinction between profit linked tax incentive and investment linked tax incentives. It is for this reason that* ***Parliament has confined deduction to profits derived from eligible businesses mentioned in sub-sections(3) to (llA) [as they stood at the relevant time].***
>
> *The phrase "Derived from" has been a very contentious issue while applying the provisions of Sections 80lA and 80lB of the Act and other similar provisions contain same phrase. The issue revolves around the contention whether deduction is applicable for all receipts/income of the ,assessee or is it restricted to profits and gains "derived from". The phrase derived from used in the Sections 80IA(1) and 80IB(1) of the Act IS highlighted for reference below:-*

"80-IA(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise ..... a deduction of an amount equal to hundred per cent of the profits and gain derived from such business for ten consecutive assessment years.

*The issue has been discussed in detail in various judgments, which clearly brings about the concept of "income derived from" in contrast to other related concept like "**income attributable to".** The decision of the Apex Court in the case of **Cambay Electrical Supply Co. Ltd.** 113 ITR 84 highlights the distinction between the two expressions. According to the Hon'ble Apex Court, the expression 'attributable to' has a much wider import than the expression 'derived from' thereby intending to cover receipts from sources other than the actual conduct of the business of the industrial undertaking. In other words, it can be understood to mean that there can be receipts which are incidental to the actual conduct of the business of industrial undertaking yet the same may not fall within the expression of '**derived from**' so as to be eligible for the benefits envisaged under Section 80-IA of the Act.*
*Another notable judgment on the issue is in the case of **Sterling Foods 237 ITR 53 (SC).** Herein also, the Apex Court opined that where the nexus between the income and the industrial undertaking was not direct but was only incidental, it would not fall within the expression 'profits derived from industrial undertaking'. Similar is the decision of the Hon'ble Apex Court in the case of **Pandian Chemicals Ltd. 262 ITR 278(SC).** Their Lordships, in the aforesaid case, were dealing with the question as to whether the interest derived from the deposit made with the Electricity Board could be construed as a profit derived from the industrial undertaking of the assessee for the purposes of deduction under Section 80HH. According to the Hon'ble Apex Court, the said income was not eligible for the purposes of the claim under Section 80HH. Therefore, certain income falling within the parameters of being incidental to business, can fall within the scope of the business of the assessee, yet it cannot be said to have been derived from the eligible industrial undertaking of the assessee, so as to be eligible for deduction under section 80-IA of the Act.*

After giving a careful consideration to the relevant provision of the Act, facts of the case and judicial pronouncements, it is unambiguously clear that the incentive in the Act is meant for the eligible business and not for the source of income which has no direct nexus with the profit of the business of the undertaking, therefore the income shown as ancillary is not eligible for the deduction u/ s 80IA of the Act."

10.5. The detailed arguments advanced by the assessee in support of its case that the additions sustained by the CIT(A) claimed to be derived from the eligible business was disputed by the Ld.CIT DR again relying upon Liberty Shoes and it

was her argument that the relief granted is contrary to the said decision and the clear mandate of law. Reliance was also placed upon the assessment order.

10.6. Though the Ld.CIT DR had initially taken the stand in passing after advancing her arguments that the legal position was not canvassed by the assessee before the CIT(A) and thus in the absence of any discussion in the impugned order the issue may be sent back to the CIT(A). However, the argument as observed was made in passing after addressing the departmental position and was not carried further on any of the subsequent dates when the issues came up for hearing. Accordingly the raising of the said argument stands unopposed on record.

11. Reverting to the counter arguments of the Ld. Sr. Advocate addressing the departmental request that the issue may be sent back it was submitted that it is a legal argument and can be taken at any stage. It was further submitted that no handicap can be stated to have been caused to the department by arguing this law point and no jurisprudence needs to be cited in order to canvass that the relevant provision of the statute have to be correctly interpreted.

11.1. Inviting attention to the decisions rendered by the Mumbai Bench of the Tribunal relied upon by the Ld. CIT DR in the case of *Essar Power* it was his submission that a reading of para 7 of the said decision would show that it was a case of a loss and the assessee was not eligible for deduction u/s 80IA. In view of this fact, the issue was not addressed by the assessee and can be said to be given up. Accordingly it was his submission that it cannot be said that the Mumbai Bench of the Tribunal has laid down a legal proposition which the Delhi Bench is required to follow as the issue was infact given up by the assessee itself in view of the peculiar facts of the case. The relevant extract

brining out this fact relied upon and found to be correct is reproduced hereunder for ready-reference:-

> *7. "At the time of hearing the ld. Sr. counsel for the assessee, at the outset, submits that the Tribunal in assessee's own case in Dy. CIT vs. Essar Power Ltd. and vice versa in ITA No. 6430/Mum/2003 & 439/Mum/2005 and ITA No. 6395/Mum/2003 & 4448/Mum/2005 for assessment years 2000-01 & 2001-02 order dtd. 11.8.2008 vide para 13 of the order has upheld the order of the ld. CIT(A) on this account. He further submits that since it is a case of loss, therefore, the assessee for the year under consideration is not eligible for deduction u/s 80IA of the Act. He, therefore, submits that the issue may be decided accordingly."*

11.2. Inviting attention to the decisions rendered by the Hon'ble Madras High Court relied upon by the Ld. CIT DR namely *Gangotri Textile Ltd. (cited supra)* was also relied upon by the Ld. CIT DR, it was submitted that a bare reading of para 6 of the said order would show that no facts were placed either before the ITAT or before the Hon'ble High Court and it is on this count that the finding of the ITAT was reversed. The issue therein it was submitted was the compensation received, stated to be from the business activities and for want of necessary supporting facts it was held that the compensation could not be held to be derived from the undertaking for the purposes of inclusion u/s 80IA of the Act.

11.2.1. Thus in the absence of relevant material the nexus was held to be not borne out from the record. The submission is found to be correct and is evident from the relevant extract reproduced hereunder for ready-reference:-

> *6. "As far as the Tribunal's order is concerned, reliance placed on the decision of the Delhi Bench of the Tribunal rendered in the case of Rollatainers Ltd. (supra) is totally misplaced, since, as is evident from the order of the Tribunal, the case dealt with by the Delhi Bench related to the compensation received on the goods damaged while in transit. As far as the present case is concerned, even though we directed the assessee to produce the details regarding the fire accident and the policy, the assessee could not produce the same before this Court to substantiate its contention, and there being no material to substantiate*

the contention of the assessee linking the loss to the fire accident, we do not find any justifiable ground to accept the order of the Tribunal which is not based on factual findings. In the circumstances, we have no hesitation in accepting the plea of the Revenue, thereby, set aside the order of the Tribunal."

11.3. Addressing the decision of the Apex Court in the case of *Liberty Shoes Ltd. (cited supra)* it was submitted that the said decision would have no relevance to the facts of the present case. The relevant extract of the synopsis filed on behalf of the assessee is extracted hereunder for ready-reference:-

"The appellant reiterated that the primary contention of the appellant is that the appellant is solely engaged in the business of providing telecommunication services. It's claim of deduction u/s 80IA of the Act has to be governed by the provisions of section 80IA(2) of the Act. The appellant further submitted that provisions of section 80-IA(2A) of the Act starts with a non-obstante clause to provide for deduction to an eligible undertaking in respect of 'profits and gains of the eligible business', and overrides anything contained to sub-section (1) and (2) of section 80-IA of the Act. The appellant is only engaged in undertaking telecommunication business (being the eligible business), and accordingly, the question of applying the concept of 'derived from' to the facts of the appellant does not arise.

The appellant also wishes to highlight the following judgements of jurisdictional Delhi High Court in the case of CIT vs Hirtnik Exports ITA 219/2014 and 239/2014 decided on November 13, 2014 and judgement by Karnataka High Court in case of CIT v Motorola India Electronics (P) Ltd. and Special bench order in the case of Maral Overseas Ltd. v ACIT 136 ITD 177, wherein in context of provisions of section 10b of the Act, it has been held that though section 10B(1) of the Act refers to profits 'derived', the formula prescribed under section 10B(4) of the Act does not require an assessee to establish a direct nexus with the business of the undertaking and once the income forms part of the business of the undertaking, the same would be included in the profits of the business of the undertaking and be eligible for deduction. In other words, the above judicial precedents support the view that where the language employed does not include the phrase 'derived from' the same cannot be read into the provisions of the Act."

12. We have heard the rival submissions and perused the material available on record. It is seen that the Ld. AR in the course of his arguments, apart from addressing the specific grounds raised by the assessee and addressing the specific grounds raised by the Revenue has raised a preliminary objection to the maintainability of the additions based on the restrictions placed by sub-section

(1) if section 80-IA. The objection has been raised on the ground that the restriction of "derived from" contained in sub-section (1) cannot be read into the provision of sub-section (2A) of section 80-IA. The argument has been that this issue which should have been addressed at the threshold as a preliminary issue has been left unaddressed. It has been submitted that none of the additions could have been made as the reasoning for sustaining the same by the CIT(A) is against the legislative intent as set out in sub-section (2A) of section 80IA. Accordingly it was submitted that the issue needs to be decided at the threshold as a preliminary issue. The issue if decided in assessee's favour it was submitted would make the other grounds in the assessee's appeal and the grounds in the Revenue's appeal academic in nature. In support of raising this issue, reliance has been placed on the decisions of the Apex Court in the case of *Hukumchand vs CIT 63 ITR 362* and *NHPC 292 ITR 383* (SC). We find that since the Revenue has not objected to the raising of this preliminary objection taken as Ground No.4 in the grounds raised by the assessee, we need not deliberate on the well-accepted judicial precedent settled therein in the peculiar facts of the case. We note that the Ld. CIT DR has repeatedly on each of the days the appeals came up for hearing has relied upon the relevant provisions, and argued that the interpretation given by the Ld.AR to the said provisions is in fact contrary to the legislative intent. Accordingly, we find that in view of the raising of the preliminary objection by the Ld.AR in the above-mentioned legal and factual position on record where the argument has not been opposed by the Revenue and has infact been addressed at length during the course of the arguments by both the parties, it would be appropriate to first consider the relevant provisions of section 80-IA of the Act.

13. Having so held, we now propose to examine the relevant provisions of Section 80-IA of the Income Tax Act in order to decide whether the legislature intended that the words *"derived from"* should be read into sub-section (2A) or not. While so deciding, we are guided by the following observations of justice Gajendragadkar "the first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself" in *Re Kanailal Sur vs. Paramnidhi Sadhukhar 1958 SCR 360.* The primary test and the fundamental principle of interpretation is therefore to examine the language employed in the Act and where the words are clear and plain, the Court is bound to accept the expressed intention of the legislature. Hence we need to examine the scheme of the relevant Section in order to determine the true meaning of the words used in any one or more of the sub-sections. The provisions cannot be taken in an isolated or detached manner dissociated from the context where the "referents" i.e. the business undertakings or enterprises to whom it is said provisions are to be applied are clearly specified and distinguishable from one another. Yet, it is necessary to determine first whether the language used is plain or ambiguous for which purpose the provisions of section 80-IA would be required to be read as a whole. Ambiguity could be said to arise only where a provision contains a word or phrase which, in the particulars context, is capable of having more than one meaning.

13.1. We find from the submissions of the parties that both the sides have canvassed that the intention of the legislature is very clear on a literal reading of the Section, though both the parties have taken a contrary view on the manner in which the words used in the provision are to be construed in the context for imposition of tax or allow deduction.

13.2. On a reading of sub-section (1) of section 80-IA, we find that the legislature specifically uses the words meaning and import of which is plain and unambiguous in the context it is to be construed. Deduction under section 80-IA in terms of sub-section (1) is available to *"gross total income"* of an assessee where "gross total income" is restricted to *"profits and gains derived by..... from any business referred to in sub-section (4)". The deduction is available of an . amount equal to hundred percent of the profits and gains derived from such business for ten consecutive assessment years"* subject to the provisions of the section. The meaning and intention of the legislature has been legally settled and well understood to mean that only those profits come under the ambit which can be said to be *"derived from"* such business. The intention of the legislature on a plain reading of the said sub-section is loud and clear. Reference to the decisions which establish a nexus of the first degree at this stage is refrained from as the position is well-settled legally and at this stage is not an issue for consideration in the present proceedings as both the parties agree that sub-section (1) of section 80-IA envisages only first degree nexus for the purposes of claiming deduction. The fact that deduction is available to hundred percent of the profits for a period of ten consecutive years is also not an issue under debate and even otherwise we find that the above provision in the said extent is clear and unambiguous.

13.3. What we may take note of is that on reading of only this sub-section in isolation what emanates clearly is that the deduction is applicable to any undertaking or an enterprise from any business referred to in sub-section (4) of section 80-IA which the legislature describes as "eligible business". The said sub-section sets out in unequivocal terms that the deduction is available to the

gross total income of such undertaking/enterprise which "includes" "profits and gains derived from" such business. The meaning and limits of first degree nexus of the said phrase is well-understood by the tax payer, the tax collector and the Legislature. The said sub-section also sets out the period and extent of deduction available as hundred percent for ten years.

13.4. Proceeding to a perusal of sub-clause (2) of section 80-IA it is seen that the said sub-section gives the assessee the option that the profits so computed complying with the mandate of sub-section (1) of section 80-IA may be claimed for ten consecutive assessment years out of fifteen years beginning from the first year in the case of the defined enterprise/undertakings etc. It is relevant to note that the restrictive meaning put to the available profits as only those profits which come under the ambit of first degree nexus continues to remain in play as is evident from the opening line itself. The said sub-section retains hundred percent deduction for a period of ten years but provides an option to claim the deduction for ten consecutive years from the expanded period of 15 years beginning from the year in the case of enterprises and undertaking develops and begins to operate any infrastructure facility or starts providing tele-communication service or develops an industrial park or develops a special economic zone etc. Upto this stage, we find that there is no ambiguity as the legislature giving due weightage to the long gestation periods, for certain infrastructural activities where profits available for deduction may not be there in the initial 5 years also permits the option to claim deduction for the period of ten consecutive years from the first 15 years. Thus full play of the restriction placed on the profits available for deduction has been permitted and upto this stage both the parties have no objection to the literal meaning of the said sub-

section to be construed in the above manner.

13.5. It is seen that the Legislature by the Finance Act, 2001 w.e.f 01.04.2005 substituted the original proviso to sub-section (2) by inserting the following proviso, the same is again extracted hereunder for ready-reference:-

> ***80-IA.*** *(1) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx*
> *(2) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx*
> ***Provided*** *that where the assessee develops or operates and maintains or develops, operates and maintains any infrastructure facility referred to in clause (a) or clause (b) or clause (c) of the Explanation to clause (i) of sub-section (4), the provisions of this sub-section shall have effect as if for the words "fifteen years", the words "twenty years" had been substituted.*

13.6. A plain reading of the above proviso to sub-section (2) of section 80-IA shows that the legislature further carves yet another exception for such an assessee who develops or operates and maintains any infrastructural facility referred to in clause (a); (b) or (c) of Explanation to clause (i) of sub-section (4) of section 80-IA. For these undertakings the legislature has extended the period during which deduction can be claimed from fifteen years to twenty years. The fact that the restrictions placed on the eligible business by sub-section (1) of section 80-IA shall continue to be read into sub-section (2) of section 80-IA is made clear in the opening words of sub-section (2) itself and as observed in the earlier part of this order is not in doubt and the restrictions of “derived from” have not been diluted either in sub-section (2) or in the proviso to sub-section (2) of section 80-IA. Accordingly it is seen that the “referent business” i.e. the undertakings or enterprises covered under the proviso, have been enabled to exercise their option for claiming deductions for ten consecutive years from a period of twenty years.

13.7. Thus, we find that the meaning and intent of sub-section (1); (2) and the proviso to sub-section (2) of section 80-IA is clear and unambiguous. It is seen

that the legislature having set out the referent enterprise/undertaking as developing/starting infrastructure, telecommunication or industrial park/ SEZ etc. the duration in sub-section (2) for the purposes of deduction for ten years is retained at hundred percent for those profits of eligible business as could show first degree nexus. The existence of the said requirement is well-understood by one and all and there is no ambiguity arising on a reading of the above as the profits and gains contemplated for deduction are "derived from" as the clear reference to sub-section (1) in the very first line makes it clear. The intention that the deduction can be claimed for ten consecutive years from the first fifteen years depending upon the referred to enterprises/undertaking falling under sub-section (2) and for 20 years for those undertaking/enterprise falling under the proviso to sub-section (2) is well understood. The purpose may have been guided by the fact that certain enterprise/undertaking may show profits after a considerably longer time is also plainly clear.

13.8. A plain reading of sub-section (2A), it is seen shows that it starts by giving effect to the legislative intent by inserting the well understood word "Notwithstanding". The meaning and the consequent legislative intent can clearly be understood by the subsequent words used "anything contained in …….". Thus as literally as it can be read the legislative intent of "Notwithstanding" "anything contained in sub-section (1) or sub-section (2)" is plain and clear. The clear meaning of this non-obstante clause, which is reflected upto this stage is that whatever may have been contained in sub-section (1) or sub-section (2) of section 80-IA is to be excluded. This position is fortified by the conscious inclusion of the word "anything contained in" which qualifies "notwithstanding". The meaning and import of the term

"notwithstanding" is well-settled and understood and by itself cannot be said to be leading to any ambiguity. The said term by itself would have been sufficient and complete to convey the legislative intent that whatever may have been said in sub-section (1) and (2) but the legislature has not rested there and has taken care to qualify the word with the all encompassing, all inclusive, well understood word "anything" contained in sub-section (1) or (2). The meaning, use and import of the said word does not lead to any confusion or ambiguity. Thus prima-facie to our understanding when considering the para phrasing used by the legislature in its plain and literal meaning there cannot be any doubt about what the intention of the legislature is as it is loud and clear in stating that while considering and deciding the intent of sub-section (2A) the mandate of sub-sections (1) and Sub-section (2) are not required to be imported in respect of the referent undertaking or enterprises providing telecommunication services.

13.9. A further reading of the said sub-section makes it clear that the deduction in computing the total income is available only to an undertaking which is providing telecommunication services and that too which have been specified in clause (ii) of sub-section (4). Thus by virtue of this sub-section, a specified class of undertakings have been identified and the fact that the assessee falls under this category is an accepted fact and thus not an issue in the present proceedings. Reverting back to the said sub-section it is seen that the legislature sets out that the deduction is to be allowed at hundred percent of the profits and gains *"of the eligible business"* for a period of five years as opposed to the enterprise/undertakings in sub-section (1) and (2) wherein hundred percent of deduction is available for ten consecutive years. The deduction after five years in the case of an assessee in section (2A) is to be for the remaining five

years upto 30 percent of the amount available for deduction. Having over-ridden the requirements of sub-section (1) and (2) by use of the words *"profits and gains of eligible business"* in sub-section (2A) and not *"profit and gains derived by an undertaking or an enterprise from"* as used in unequivocal terms in sub-section (1) and (2) the legislature makes its intention known loud and clear. The fact that after specifying the period and apportionment of the profits available for deduction as hundred percent in the first five assessment years and thereafter thirty percent for the next five assessment years it is seen that the legislature also alive to the nature and extent of deductions wanted to give to specified enterprise or undertaking therefore makes a conscious reference to the ousted sub-section (2) in the opening lines for the purposes of bringing into play the extended timeline of 15 years for exercising the option contained in sub-section (2) by making a specific reference to it. Thus conscious of the fact that sub-section (1) and (2) had completely been over-ridden for an assessee falling in section (2A) reference to sub-section (2) is made only for the purposes of increasing the timeline from which the assessee could opt for selecting ten consecutive years out of the total 15 years.

13.10. Thus the dispute of bringing sub-section (1) into play for a tax payer falling in sub-section (2A) of section 80-IA to our minds cannot arise. According to the assessee sub-section (2A) does not put the restriction contemplated in sub-section (1) of section 80-IA in the face of the non-obstante clause coupled with the specific omission to use the well understood term "derived from". This argument is notwithstanding the argument that considering the assessee's nature of business the direct nexus presumed by sub-section (1) of section 80-IA is also fulfilled. On a careful reading of the above provisions, we find that the

legislature has left no ambiguity in the wording of the sub-section (2A). Having started with the non-obstante clause in sub-section (2A) which over-rides the mandate of sub-section (1) and (2), the legislature is well aware that the phrase "derived from" has been used only in sub-section (1). The meaning of the said terms is judicially well-accepted and understood and it is not the case of that Revenue that the legislature was not conscious of the said term. It is seen that the import of this term continues to exist for an assessee covered under sub-section (2) of section 80-IA. The legislature has consciously retained it for enterprise/undertaking falling in sub-section (2) and the proviso thereto only keeping in mind the nature of the enterprises/undertakings contemplated under sub-section (2) the option of claiming deduction in any ten consecutive years is given to be claimed from the first fifteen years of beginning operation is given.

13.11. Thus, we find that the legislature being alive to providing tax deductions to business enterprises and undertakings, wherever it wanted to curtail the time line during which deduction can be claimed and also addressing the extent upto which it can be claimed has consciously carved out an exception to specified undertakings/enterprises whose needs and priorities differ has taken care to expand the time line for claiming deductions. It has consciously enabled those undertakings/enterprise who fall under sub-section (2A) to claim 100% deduction of profits and gains of eligible business for the first five years and upto 30% for the remaining five years in the ten consecutive assessment years out of the fifteen years starting from the time the enterprise started its operation. The legislature having ousted applicability of sub-section (1) and (2) in the opening sentence brought in for the purposes of time line sub-section (2) into play but made no efforts whatsoever to put the assessee under sub-section

(2A) to meet the stringent requirements that the profits so contemplated were to be "derived from". The requirements of the first degree nexus of the profits from the eligible business has not been brought into play.

13.12. The cardinal Rule of Interpretation is that the statute must be construed according to its plain language. Neither should anything be added nor anything be subtracted therefrom unless there are adequate grounds to justify the inference that the Legislature clearly so intended. It is also well settled that in a taxing statute one has to look merely at what is clearly stated. The meaning and extent of the statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be considered to be just or expedient. To put in the words *Rowlatt J.* as held in *Cape Brandy Syndicate vs Commissioners of Inland Revenue [(1921) 1 KB 64, 71]. In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

13.13. Interpretation postulates the search for the true meaning of the words used in the statutes as a medium of expression to communicate a particular thought. The task is not easy as the language used even in ordinary conversation or correspondence is capable of being mis-understood, however in such cases the person using the language can be approached for a clarification. The language used in a statute till it is amended, repealed or modified remains static as the Legislature cannot be approached for clarification. After having enacted a law or an act, the legislature becomes *functus officio* as far as the particular Act is concerned and it cannot itself thereafter interpret it. Though

the Legislature retains the power to amend or repeal the law so made and can also declare its meaning but this can be done only by making another law or statute after undertaking the whole process of law making once again. Accordingly statutory interpretation requires the Courts to seek, ascertain the meaning of the words used by the legislature through the medium of authoritative forms in which it is expressed. Interpretation differs from construction, whereas interpretation is finding out the true sense of any form, construction would mean drawing of a conclusion in respect of subjects that lie beyond the direct expression of the text.

13.14. It is well understood that the Court only interprets the law and cannot legislate. Even if a provision of law is presumed to be misused and subjected to the abuse of the process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary as held in *Padma Sundara Rao vs State of Tamil Nadu (2002) 255 ITR 147 at pages 154 to 155 (SC); Prakash Nath Khanna vs CIT (2004) 266 ITR 1 at page 9 [SC]; Union of India vs Rajeev Kumar AIR (2003) SC 2917 at 2923.* Courts cannot reframe the words used by the legislature as they have no powers to legislate. A matter which, for the sake of an argument, should have been provided for in a statute cannot be supplied by the Courts as to do so will be an act of legislation and not of interpretation. Reliance may be placed on *Smt. Kanta Devi vs Union of India (2003) 4 SCC 753 & 757*.

13.15. A legal fiction treating something not done as done, requires legislative authority and without it, it can neither be indulged in by Courts not it can be created by an administrative order. No doubt, it is the bounden duty and obligation of the Court to interpret the statute but the duty is to interpret, the statute as it is and not by adding or supplying words to it. It is contrary to all

rules of construction to read words into statute which the legislature in its wisdom has deliberately not incorporated as held in *CIT vs Tara Agency [2007] 292 ITR 444 at 464 (SC).*

13.16. The true function of the Court is to interpret the law not to make it. It is well-settled that even if the legislature falls short of the mark, the Court can do nothing more than declare it be thus, giving its reasons, so that the Legislature may take notice and promptly remedy the situation. Reliance can be placed on *Standard Chartered Bank vs Directorate of Enforcement [2005] 275 ITR 81 at page 86 (SC).*

13.17. The settled principles of interpretation are that the Court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The Court must, as far as possible, adopt a construction which will carry out the obvious intention of the Legislature. Undoubtedly, if there is a defect or an omission in the words used by the Legislature, the Court would not go to its aid to correct or make up the deficiency. The Court could not add words to statutes or read words into it which are not there, especially when the literal reading produces intelligible results. Reference may be made to *Dadi Jaganath Dham vs Jammullu Ramulu AIR [2001] (SC) 2699 at 2703.* Any presumption to the contrary in the absence of any ambiguity would be contrary to the settled legal position as the legislature as far as possible is presumed to know what it intends to stay.

13.18. Thus reverting again to considering the words use in sub-section (2) the proviso thereto and sub-section (2A) it is seen that whereas in sub-section (2) and the proviso thereto the restrictions on the profits as set out in sub-section (1) is retained and intended businesses are given to option of any ten years from

fifteen years the proviso introduced to sub-section (2) of section 80-IA, it is seen that for an assessee who is developing or operating and maintaining infrastructure referred to in clause (a) or clause (b) or clause (c) of Explanation to clause (i) of sub-section (4) is given a further leeway of exercising its option in any of the ten consecutive years from the first twenty years instead of fifteen years as contemplated under sub-section (2) of section 80-IA from the beginning developing or operation and maintaining the infrastructure facility. Thus the legislature in its wisdom giving due consideration to still longer gestation periods which may be required by such high investment infrastructure related enterprises which may need more time for generating profits. However, the requirements of "derived from" as set out in sub-section (1) has not been done away with. When *juxta-posed* with this the language used in sub-section (2A) is considered the legislature has been very clear in its mandate and has consciously used not only the well-accepted and judicially well-settled phrase of "Notwithstanding" but has also underlined the import and extent of the over-ride provided by adding the word "anything contained in sub-section (1) or sub-section (2)" in its opening lines. Thereby removing all doubts. There was nothing stopping the legislature to use the term "notwithstanding sub-section (1) or sub-section (2)" and proceeded to lay down the period and apportion the percentages to the extent of which deduction was to be allowed. The use of the term "anything contained in" pre-fixed by notwithstanding by the legislature makes the meaning and intention of the legislature crystal clear. The arguments to the contrary advanced by the Revenue relying on case laws based on different sets of provisions is of no help as the clear meaning of the words used by the legislature leads to only one conclusion namely that sub-section (1)

and (2) of section 80-IA for the purposes of an undertaking providing telecommunication services which are covered under clause (ii) of sub-section (4) have to be ignored and have no play. There is no doubt that the assessee falls under clause (ii) of sub-section (4) and is such an enterprise providing telecommunication services. After having over-ridden the requirements of sub-section (1) and (2) completely the legislature in its wisdom has directed that hundred percent *"of the profits and gains of the eligible business"* and not "the profits and *gains derived from"* can be claimed as a deduction in the first five assessment years by such an enterprise commencing at any time during the periods as specified in sub-section (2) and thereafter thirty percent of *"such profits"* for further five assessment years. Thus giving due recognition for the peculiarities of the telecommunication services where heavy investment costs in the initial years are a necessity they have been allowed to be recovered by way of profits to the extent of hundred percent from that activity in the first five years and thereafter the allowable deduction is substantially reduced to thirty percent in the next five years presuming that by then the heavy infrastructural costs would have been recovered and/or the objectives of the governmental policy would have been attained. Keeping in mind the services and functions performed by such an assessee towards the aims of the government policy wherein gestation period necessarily looking at the nature of the undertaking is very long. Thus, for the purposes of the time frame the legislature has given the timeline of fifteen years from which ten consecutive years could be opted. The fact remains that the legislature aware of the differences in the use of terms used consciously ensures that *"profits and gains derived from"* used in sub-section (1) is not used in sub-section (2A). Instead in sub-section (2A) the term

used is *"profits and gains of eligible business" juxta posed* with the glaring fact that the sub-section (2A) starts with a non-obstante clause namely "Notwithstanding" qualified further by the use of the words *"anything contained in".* In the face of the clear and unambiguous statutory provisions we find ourselves unable to agree with the arguments advanced by the Ld. CIT DR however valiantly as what the law is has very clearly been enunciated and set out in the relevant provision giving cause to no debate whatsoever.

13.19. We find that in the course of the arguments both the sides have advanced their case duly supported by case laws, relying on principles of interpretation as settled by the Magnum Opus of *Justice G.P.Singh's "Principles of Statutory Interpretation"* and *Kanga Palkivala & Vyas "The Law and practice of Income Tax"* and various decisions of the Courts wherein applying those yardsticks the decisions have been rendered. Reference to the specific principles invoked and the proposition of law and the ratio laid in the decisions relied upon are not being separately addressed as in the facts of the present case, we find that the meaning of the statute does not lay itself open to any other meaning. Thus though reference is not being made to the decisions, we have given our careful consideration to the ratios of the decisions relied upon by the parties and the principles laid down in the two texts cited before us. We are indebted to the erudite and well-prepared effective representation made by both the sides. By way of greater caution, we have required the parties to address their respective stands by written submission and synopsis being conscious of the fact that the preliminary argument if allowed would address the issues raised in both the appeals and more so since these arguments admittedly on the legal issue were not so argued before the tax authorities. We record our appreciation for the

confident and effective representation of Ld. CIT DR, Ms. A.Mishra. We also put on record our appreciation for the well-seasoned and tempered arguments advanced by Sr. Advocate, Mr. P. Pardiwala supported by the synopsis and updated synopsis prepared and filed by his team of lawyers. However having minutely gone through the case laws and the proposition relied upon which we have brought out in the earlier part of this order, we find that in the face of the clear mandate of law addressing the case laws which are on entirely different facts and considering different set of provisions reference thereto would be out of context as it would be of no help to decide the issue which we find is clear from the very language used by the Legislature in the statutory provisions under consideration. The meaning which the Revenue would want us to read into the said provision would be in violation of the basic fundamental principles of interpretation of statutes namely that the Courts cannot write the laws as legislation is the domain of the Legislature, the Courts can only interpret the law; any Interpretation which negates the very purpose of introducing the sub-section cannot be given as the Courts while interpreting cannot supply the words which the Legislature in its wisdom has chosen to exclude etc. on which we have deliberated upon in passing in the earlier paras.

14. In view of the detailed discussion hereinabove, we find that the assessee succeeds in its preliminary argument raised in Ground No.4. Thus the issues raised in the departmental appeal and the additions sustained in the assessee's appeal become academic. Accordingly the departmental appeal is dismissed, Grounds No. 1 to 3 raised in assessee's appeal also in view of our detailed finding in Ground No.4 become academic as the assessee succeeds in its preliminary arguments canvassed under Ground No.4.

15. In the result, assessee's appeal is allowed to the extent as mentioned above on the preliminary issue and the departmental appeal is dismissed.

The order is pronounced in the open court on 23rd of December, 2015.

Sd/-	**Sd/-**
(J.S.REDDY)	**(DIVA SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated:23/12/2015
Amit Kumar & Kavita

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

ASSISTANT REGISTRAR
ITAT NEW DELHI