

आयकर अपील[य अधकरण, अहमदाबाद ँयायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
RAJKOT BENCH, RAJKOT
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)
BEFORE SHRI WASEEM AHMEDABAD, ACCOUNTANT MEMBER
And
Ms MADHUMITA ROY, JUDICIAL MEMBER

Sr. No.	ITA No.	Asstt. Year	Name of Appellant	Name of Respondent
1-2	88 & 89/Rjt/2015	2005-06 & 2010-11	M/s Katira Construction Limited, 5, KCL House, New Station Road, Bhuj. PAN: AACCK5024D	The A.C.I.T. Gandhidham Circle, Gandhidham Kutch & The J.C.I.T. Gandhigham Range, Gandhigham
3.	555/Rjt/2012	2009-10	The A.C.I.T. Gandhidham Circle, Gandhidham Kutch	M/s Katira Construction Limited, 5, KCL House, New Station Road, Bhuj. PAN: AACCK5024D

(Applicant)		(Respondent)	
Revenue by	:	Shri Ranjit Singh, CIT.DR	
Assessee by	:	Shri Mehul J. Ranpura, A.R	

सुनवाई क तारख/**Date of Hearing** : 20/07/2020
घोषणा क तारख /**Date of Pronouncement**: 30/07/2020

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeals have been filed by the Assessee and the Revenue against the orders of the Ld. Commissioner of Income-Tax (Appeals)-Ahmedabad (in short "Ld. CIT(A)") involving respective Assessment Years. Since issues involve

in all these appeals are identical, we proceed to dispose of all the appeals by this common order for the sake of convenience and brevity

2. First we take ITA No.89/RJT/2015 for A.Y. 2010-2011. The assessee has raised the following grounds of appeal:

1. *The grounds of appeal mentioned hereunder are without prejudice to one another.*
2. *The learned Commissioner of Income-tax(Appeal)-3, Rajkot [herein after referred to as the CIT(A) erred on facts as also in law in confirming the disallowance of claim of deduction u/s.80IA(4)of the Income-tax Act, 1961 [hereinafter referred as to the "Act"] of Rs.2,35,41,640/- made by the Assessing Officer on the alleged ground that the appellant is not eligible for deduction u/s.80IA (4) as the appellant failed to fulfill the condition specified u/s.80IA(4) of the Act. The order passed by the Id.CIT(A) is totally unjustified on facts as also in law and claim of deduction u/s.80IA (4) may kindly be directed to be allowed.*
3. *The Ld.CIT(A) erred on facts as also in law in confirming the trading addition of Rs.70,00,000/- on the alleged ground that the books of accounts of appellant are not reliable, genuine and incomplete in case of non-80IA projects. The AO may kindly be directed to accept the book results and delete the impugned trading addition of rs.70,00,000/-*
4. *Your Honor appellant craves leave to add, amend, alter to withdraw any or more grounds of appeal on or before the hearing of appeal.*

3. The 1st issue raised by the assessee is that the learned CIT (A) erred in confirming the order of the AO by sustaining the disallowance of the deduction claimed under section 80-IA(4) of the Act, amounting to Rs. 2,35,41,640/- on the reasoning that the conditions specified under the relevant section have not been complied with.

4. Briefly stated facts are that the assessee in the present case is a limited company and engaged in the business of contractors and project developers. There

was a survey conducted under section 133A of the Act, at the premises of the assessee dated 6th November 2009.

4.1 The assessee in the year under consideration along with other income has shown the gross income from the projects of Road Construction being an infrastructure facility carried out as developer amounting to Rs. 46,61,71,103/- only. The assessee against such income has claimed deduction under section 80-IA(4) of the Act for Rs. ₹ 2,35,41,640/- only.

4.2 The AO during the assessment proceedings required the assessee to justify its claim made under section 80-IA(4) of the Act, for ₹ 2,35,41,640/- only. The assessee in response to the question of the AO made various submissions including the submission dated 13th February 2013. The assessee claimed to have infused substantial capital in its business for executing the contracts by investing in the plant and machineries, engaging laborers and the other staff of skilled/semiskilled persons. It has employed engineers in the execution of the infrastructure projects. It has maintained separate books of accounts for infrastructure projects.

4.3 The assessee also claimed that it has been claiming deduction under section 80-IA(4) of the Act, in respect of infrastructure projects with effect from assessment year 2004-05 and onwards which was allowed by the AO, Id. CIT (A) and the ITAT.

4.4 The assessee regarding the applicability of the explanation given below section 80-IA(13) of the Act, submitted that it has developed the projects on BOT basis. As such, the assessee was accountable for the entire activities related to the infrastructure facility right from the excavation of earth to the construction of street light poles on the developed road.

4.5 The assessee also contended that it has engaged machineries, cranes and deployed raw materials such as steel, cements as well as invested its own funds in the infrastructure projects. As the assessee was responsible for the completion of

the projects within the stipulated time, it was exposed to various risks and responsibilities. Therefore it cannot be said that the assessee was merely carrying out part of the main activity of the infrastructure project.

5. However, the AO from the submission of the assessee for the deduction claimed under section 80-IA(4) of the Act, observed certain facts as detailed under:

- i. Sub-clause (b) to clause (i) of sub-section (4) to section 80-IA of the Act, requires the assessee to have 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. But the assessee failed to produce the copy of agreement and has filed only tender documents, letter of intent and work order with respect to 5 projects only out of 17 projects. As such the documents filed by the assessee cannot be considered as agreement as specified under sub-clause (b) of section 80-IA(4)(i) of the Act.
- ii. The assessee is not operating the infrastructure facility constructed by it which is prerequisite for claiming the deduction in pursuance to the sub-clause (c) of section 80-IA(4)(i) of the Act.
- iii. The provisions of sub-section 2 of section 80-IA of the Act mandates that the deduction under section 80-IA of the Act, can be allowed to the assessee for 10 consecutive years out of 20 years beginning from the year in which the enterprise develops and begins to operate the infrastructure facility. However in the present case the assessee did not operate the infrastructure facility.
- iv. The assessee was under the obligation to maintain separate accounts for each undertaking and file audit report in form 10CCB duly certified by the

qualified chartered accountant for each project along the copy of the agreement as discussed above. But the assessee failed to file any agreement, therefore the assessee failed to file complete audit report in form 10CCB.

- v. The assessee instead of claiming deduction under section 80-IA(4) of the Act, for each infrastructure facility separately, has claimed the deduction cumulatively and combinedly for all the 17 road projects in contravention to the provisions of section 80-IA of the Act.

5.1 The AO further observed that the assessee is acting as a mere work contractor in pursuance to the explanation given below section 80-IA(13) of the Act for the reasons as detailed under:

- a. The authorities which awarded the contract to the assessee has made the payment to the assessee after deducting the TDS under the provisions of section 194C of the Act. As such the provisions of section 194C of the Act, are applicable to work contractor. Thus the assessee was treated as the contractor by such authorities.
- b. The assessee is a Government approved 'AA' class contractor and project developer. Similarly, the Government awarded the project to the assessee for the construction of road treating the assessee as contractor registered in a special category. This fact can be verified from the tender notice No. 39 for 2007-08 for the construction of missing link roads from Jakhau to Charopadi Road Km 0/0 to 18/510 and form number B1 in respect of tender for C.R. to Kothara Jakhau road Km 57/0 to 83/00. Further it important to note that the form B-1 is a general form for worker contractor.
- c. Moreover the assessee was merely executing the work assigned by the Government with minor modifications as suggested by it in the

manner as directed to the assessee against the monthly payment on the quantity of work done.

- d. The assessee in its submission claimed to execute the project on BOT basis which is totally wrong as the assessee is not operating any of the project awarded by the government.
- e. The AO upon analyzing the tender documents of one of the contract awarded to the assessee for the construction of missing link roads from Jakhau to Charopadi Road Km 0/0 to 18/510 as discussed above held that the assessee is acting mere of work contractor. The analysis of the AO for the ready reference stands as under:
 - (a) *For starting of work, assessee is only require to submit 10% of bid amount as earnest money deposit.*
 - (b) *Further assessee will submit the monthly bill. Thus total investment in infrastructure facility by assessee is hardly 20%, 10 % as bid amount & rest 10% as working capital for carrying out the work for about one & half or two months, till the first payment is released.*
 - (c) *Infact this 20% becomes much less, if we see that assessee is also eligible for mobilisation advance up to 5% of cost offender (Clause no.75 page no.41).*
 - (d) *Further whatever material, machinery contractor bring on site, for which it can take upto 75% of advance of the value. This coupled with other facts, in fact require less than 5% of working capital. (clause72,73,74 page41).*
 - (e) *Assessee has to submit monthly bill specifying quantum of each work done, and get monthly payment according to quantity of work done. (Clause 10, page 19)*
 - (f) *Assessee does not have any risk, as even the rates of its each type of work, / digging work, earth work, embankment, filling with murrum, embankment if any, < even diversion of roads during progress of work, concreting, laying bitumen mix, f even for numbers of sign boards used, are secured against most of change in \\ rates of material, labour etc. (clause 60m page 36). This provides how rates / would be calculated for change in rates of labour, material, other than steel, /; cement, asphalt, and petrol, diesel, oil, lubricants, & for cement, steel & asphalt/ /*
 - (g) *Government at many a times also provides major items to assessee.*

- (h) Contractor shall confirm exactly, fully & faithfully to the design & drawings and instructions in writing for the work as given by the Engineer-In Charge, (clause 13 page2Q) It is further specified that in case of defective description or ambiguity, the engineer incharge is entitled to issue further instruction, direction, manner the work is to be done. The contractor cannot take advantage of any apparent error or omission in the specification.
 - (i) Contractor is nowhere responsible for design, development but only for timely & satisfactory quality of work as given by Government.
 - (j) Clause29, page-28, further says 'all works to be executed by-contractor shall be .under the direction subject to the approval in all respect-OF Superintending Engineer, who shall be entitled to DIRECT AT WHAT EVER POINT OR POINTS AND IN WHAT MANNER THEY ARE TO BE COMMENCED AND TIME TO TIME CARRY ON.
 - (k) Clause 34 page 29, Defines the work, "expression work or works to mean the work, or works, as under virtue of the contract.
 - (l) Clause 42, page 31 says that contractor cannot even start work on its own.
 - (m) Clause 57, from page 33 to 36 even specify that what type of arrangements have to be made for labour, like, hut, canteen, urinal, and how much in number,
 - (n) Details specification of each type of work, and its rates are provided, which is given in about 100 pages, which shows that assessee has to follow even small to small specification. In fact assessee is even given guidelines for storing of material at site (item no.4(A) to 4(F) from page no. 19 to23, which says what should be of stones what has **to** be of stones, how stacking should be done, even the payment for stacking of material. Similarly, what type of road signboard, what would be size, at what height, of what size of letter, how the same has to be **fixed**, how much cement & concrete in and what would be per signboard (stem§6, 56A page no.74)
 - (o) **Infact**, in respect of each small to small type, detail procedure of work, detail specification, what material to be used, even in case of important material from whom to be purchased, has been given.
- ix. These all facts from detailed tender document which runs in 200 pages, shows that assessee is not developing but only executing (the used at every place) the work as per the designs, drawing, specification, instructions & direction given by Engineer-In-charge under direct supervision OF Superintending entitled to A7 OR **MANNER THEY ARE TO BE** Assesses need not to invest except very little in plant & machinery, for that also advance is given by government, and earnest money for bid, & very small working capital. Assessee do not have any risk as its rates are subject to change for change in

rates of labour, material, diesel, etc. Assessee's risk is limited to earnest money that to subject to completion of good work as desired by engineer-in-charge. The top of form 3-1, and definition of work as defined in contract Cleary says that it is contract for work.

5.2 In view of the above, the AO held that the assessee is acting as a mere work contractor and therefore it is not eligible for deduction under section 80-IA(4) of the Act. Accordingly, the AO disallowed the deduction claimed by the assessee for ₹ 2,35,41,640/- and added the same to the total income of the assessee.

Aggrieved assessee preferred an appeal to the learned CIT (A).

6. The assessee before the learned CIT (A) submitted that it has entered into the agreements with the local authorities of the State Government which were filed before the AO during the assessment proceedings on sample basis. These were filed on sample basis for the reasons that all the tender documents were in the prescribed format. Moreover, the AO also asked the assessee during the assessment proceedings to furnish the tender documents on sample basis. Accordingly the assessee filed the copy of the tender of roads and building divisions, Bhuj with respect to the SR to Lakhpat Koteswar Road and Naliya to Narayan Sarovar Road along with other letter of intent /work order issued by the local authorities.

6.1 The enterprise engaged only in the development of infrastructure facility is eligible for deduction under section 80-IA (4) of the Act. Accordingly the assessee does not require to operate and maintain such infrastructure facility. Thus the provisions of section 80-IA(2) and 80-IA (4)(i)(c) of the Act cannot be applied in the present case.

6.2 The assessee also submitted that it has claimed deduction under section 80-IA (4) of the Act with respect to the infrastructure projects carried out by it in the year under consideration. The assessee with respect to such projects has carried out all the activities for the development of infrastructure projects after utilizing its

machines, manpower and finances. Thus the assessee has undertaken the full responsibility and risk involved in the projects carried out by it during the year. Hence the assessee cannot be treated as mere work contractor as provided under explanation attached with section 80-IA(13) of the Act. The assessee also contended that it has been claiming deduction under section 80-IA (4) of the Act with respect to the infrastructure projects awarded by the local authorities of the state governments and the same were allowed during the proceedings/by the learned CIT (A)/by the Hon'ble ITAT. As per the assessee the explanation introduced by the Finance Act 2009 with retrospective effect 1.4.2000 was clarificatory which implies that the law was the same from the very beginning. Thus it is not a case of introduction of new provision of law by retrospective effect. Accordingly the assessee claimed that it should be allowed the deduction under section 80-IA(4) of the Act as it was allowed in the earlier assessment years as well and therefore the same cannot be denied merely on the basis of explanation as discussed above brought in the statute.

6.3 The assessee also contended that the object of section 80-IA of the Act was to promote the industry which was not possible without providing the requisite infrastructure facilities. Therefore such provision of section 80-IA (4) of the Act was brought in the statute to provide the incentives/exemption to the certain class of assessee. Accordingly the provisions of section 80-IA(4) of the Act should be read/interpreted liberally as held by the Hon'ble Supreme Court in the case of Bajaj Tempo Ltd versus CIT reported in 196 ITR 188

6.4 The assessee also claimed that it has provided the report in form 10 CCB as provided under section 80 IA(7) of the Act combinedly and cumulatively for all the infrastructure projects treating itself as one undertaking. Similarly the action point provided under form 10 CCB requires that report should be obtained and retained by the assessee but the same is not required to be attached along with the return of income.

7. However, the learned CIT (A) disagreed with the contention of the assessee and confirmed the order of the AO by observing that issue of deduction under section 80-IA (4) of the Act as claimed by the assessee has been very beautifully dealt with by the AO in his assessment order. Accordingly he was of the view that no interference in the order of the AO is required.

7.1 The learned CIT (A) has also put his reliance on the judgment of Hon'ble Gujarat High Court in case of the assessee versus Union of India reported in 352 ITR 513 wherein it was held that the deduction under section 80-IA(4) of the Act will not be available to the assessee who is engaged in the execution of the project in the nature of works contract.

Being aggrieved by the order of the learned CIT (A), the assessee is in appeal before us.

8. The learned AR before us filed a paper book running from pages 1 to 620 and reiterated the submission as made before the authorities below by contending that the assessee has been carrying out the infrastructure project as developer. So, the assessee cannot be denied the deduction under section 80-IA of the Act.

9. On the other hand the learned DR before us filed a written submission which is reproduced as under:

Sub: Submission in the case of M/s Katira Construction Ltd. ITA No. -555/Rjt/2012, ITA No. 88/Rjt/2015, ITA No. 89/Rjt/2015 for assessment year 2009-10, 2005-06,2010-11 and, date of hearing fixed on 20.07.2020 through Cisco-Webex -reg,

1. In the above appeals reliance is place on the following case laws:

1. State Of Gujarat (Commissioner Of ... vs M/S. Variety Body Builders on 26 April, 1976 [1976 AIR 2108, 1976 SCR 131]

2. Hindustan Aeronautics Ltd vs The State Of Orissa on 16 December, 1983 [1984 AIR 753, 1984 SCR (2) 267]

3. State Of Tamil Nadu vs Anandam Viswanathan on 24 January, 1989 [1989 AIR 962, 1989 SCR (1) 301]

4. *Gmr Tambaram Tindivanam ... vs Deputy Commissioner Of Income Tax ... on 26 November, 2018 [ITA 545, 546, 1130 & 1131/BANG/2018]*

5. *Yojaka Marine Pvt. Ltd. Bs. Assistant Commissioner of Income-tax, Circle 1(1), Mangalore on 14 June, 2012 [(2012) 25 taxman.com 260 (Bang.)]*

Relevant portion of case law.

1. *State Of Gujrat (Commissioner Of ... vs M/S. Variety Body Builders on 26 April, 1976 [1976 AIR 2108, 1976 SCR 131]*

"Although the submission on the first blush is attractive and appears to be of some force, it will not bear close scrutiny. Perusal of clause 17 itself upon which great reliance has been placed by Mr. Desai shows that "dates of completion of the building work will be deemed to be the respective dates on which the Chief Mechanical Engineer or his authorised representative certifies each coach as having been built to his satisfaction". It is also apparent from the contract that the contractor has to complete two coaches each month after expiry of the first six months of the contract. It is also clear that the contractor has to get payment by submitting running bill; on completion of the coaches every month. In the above context when clause 17 refers to a fictional completion or the building work on the date of certificate by the Chief Mechanical Engineer or his authorised representative there is no requirement for a further ritual of delivery or handing over to which reference made in clauses 15 and 23 respectively. The work is undertaken in the Railway premises, people are admitted on gate passes for building the railway coaches on the under frames supplied by the Administration. Some materials such as electrical goods, were supplied by the Railway. Besides, there is cooperation of Railway's labour with the contractor's labour in construction of the coach the hand-rake arrangements in the Guard's compartment are also agreed to be done by the Railway. Regular inspection of the contractor's work is carried out at all times and instructions to rectify defects have to be carried out immediately. Unless a close inspection of the work is carried out from day to day, it may be difficult to rectify defect after the work progresses. All this would go to show that the predominant element in the contract is the work and labour aspect and supply of materials is only accessory although the materials were definitely necessary for execution of the work. There is yet another important clause which throws a flood of light on this issue Clause 25 deals with the contractor's insolvency or death. It is agreed between the parties, as per clause 25, that if the contractor dies, his legal representatives shall have no interest whatsoever in this agreement save in respect of a claim for the money due for the work already done under the contract and for the return of the security deposit subject to other provisions. This would also clearly show that the contract is a works contract and unfinished work would become the property of Railway and the legal representatives will be entitled only to claim for the value of the work done. There is no provision in the agreement in that event for handing over of the unfinished railway coach by the respondent or his legal representatives or assignees to the Railway Administration. The Railway Administration automatically becomes the owner of the unfinished property which was lying in its premises. This is another reason why no exaggerated importance can be assigned to the words "delivery" and "handed over" in clauses 15 and 23 respectively as urged by Mr. Desai.

This is therefore, not a contract where it can be said that there is an agreement to supply a completed railway coach which when produced will be the property of the contractor. Along with those of the contractor's materials and labour of Railway are also required to be ITHIS PAGE IS NOT WELL SCANED the value of the materials is conclusive although such matters may be taken into consideration in determining in the circumstance of a particular case whether the contract is in substance one for work and labour or one for the sale of the chattel".

It can be treated as well-settled that there is no standard formula by which one can distinguish a contracts of sale from a contract for work and labour. There may be many common features in both the contracts, some neutral in particular context and yet certain clinching terms in a given case may fortify a conclusion one way or the other. It will depend upon the facts and circumstances of each case. The question is not always easy and has for all time vexed jurists all over.

In Commissioner of Commercial Taxes, Mysore v. Hindustan Aeronautical Ltd.(1) a bench of five Judges of this Court to which my learned brother was a party had to deal with a works contract With regard to manufacture and supply of railway coaches. This Court after consideration of all the facts In that case and the salient features of the contract came to the conclusion that it was a pure works contract with Court further held that the case was in line with the decision in State of Gujarat v. Kailash Engineering Co.(2). Indeed Kailash Engineering's case (supra) was relied upon by the respondent before us. It was held in that case that as the terms of the contract indicate that the respondent was not to be the owner of the ready railway coaches and that the property in those bodies vested in the Railway even during the process of construction, the transaction was clearly a works contract and did not involve any sale.

Purshottam Premji(3) dealt with the difference between a contract of work or service and a contract for sale of goods in the following passage:

The primary difference between a contract for work or service and a contract for sale of goods in that in the former (1) (1968) 21 S. T. C. 215. (2) (1965) 16 S. T.C. 240.(3)(1970)26S.T. C, 38.

there is in the person performing work or rendering service no property in the thing produced as a whole notwithstanding that a part or even the whole of the material' used by him may have been his property. In the case of a contract for sale the thing produced as a whole has individuals existence as the sole property of the party who produced it at some time before delivery and the property therein passes only under the contract relating there to the other party for price. Mere transfer of property in goods used in, the performance of a contract is not sufficient; to constitute a sale there must be an agreement express or implied relating to the sale of goods and completion of the agreement by passing of title in the very goods contract the to be sold. Ultimately the true effect of an accertion made pursuance to a contract has to be judged not by an artificial rule that the accretion may he presumed to have become by vitrue of affixing to a chattel part of that chattel but from the intention of the parties to the contract.

We are fortified by all the above decisions of this Court in our conclusion in favour of the assessee.

We are therefore clearly of opinion that the contract in the present case is one of works contract and the High Court is not in answering the question in favour of the assessee. The appeals therefore fail and are dismissed with costs. One hearing fee for counsel."

2. Hindustan Aeronautics Ltd vs The State Of Orissa on 16 December, 1983 [1984 AIR 753, 1984 SCR(2)267]

"We have referred to the several correspondence which, according to us, indicate that the property in the aircrafts, in the equipments and the materials had always been with the Government. The materials imported under the licence or procured indigenously for the manufacture were always and had always remained the property of the Government. The appellatant had no property, in any part thereof, and had no right to dispose of or disposal over these materials and spares. These had to be regulated by the procedure envisaged in

the agreement between the parties. The test by which these transactions should be judged in deciding whether this was a works contract or a contract of sale of any part of the material has been emphasised in several decisions of this Court. Some of these principles have been reiterated in the decision of M/s Hindustan Aeronautics Ltd. vs. State of Karnataka in Civil Appeal Nos. 1386-91 (NT) of 1977 of this Court.(I) As emphasised by this Court, there is no rigid or inflexible rule applicable alike to all transactions which can indicate distinction between a contract for sale and a contract for work and labour. But the tests indicated in the several decisions of this Court merely focused on one or the other aspect of the transaction and afforded some guidance in determining the question, but basically and primarily, whether a particular contract was one of sale or for work and labour depended upon the main object of the parties in the circumstances of the transactions. In a contract for sale, the main object of the parties is to transfer property in and delivery of possession of a chattel as a chattel to the buyer. It has to be emphasised, taking into consideration the correspondence and circumstances under which this entrustment had to be understood that at no point of time before the delivery of M1G engines, H.A.L. was the owner of the property either in the equipment or in the spares or in the aircrafts and as such there could not have been transfer of any property from H.A.L. to the Government of India. The H.A.L. only performed the job entrusted to them for and on behalf of the Government and all incidental steps naturally entering into contract, procurement, payment of price and billing and invoices had to be done in that light. There was no transfer of property in the M1G Aero Engines by H.A.L. to the Government of India. The materials and equipments sent by the Government of U.S.S.R. and the M1G Aero Engines assembled by H.A.L. from such materials belonged to the Government of India at all material times. The appellant had no ownership in the materials which were all supplied by the Government of U.S.S.R. nor in the finished products and no question of sales tax on the impugned transaction could arise. Even on the indigenous materials procured or manufactured by the appellant in the process of fitting in and assembling, the appellant had no disposing power as the appellant was never the owner of these materials."

3. State Of Tamil Nadu vs Anandam Viswanathan on 24 January, 1989 [1989 AIR 962,1989 SCR (1) 301]

"The court has to find out the primary object of the transaction and intention of the parties. In this connection, it is necessary to rely on the observations of this Court in Hindustan Aeronautics Ltd's case (supra) at pages 327,333-334 of the report.

The primary difference between a contract for work or service and a contract for sale is that in the former there is in the person performing or rendering service no property in the thing produced as a whole, notwithstanding that a part or even the whole of the material used by him may have been his property. Where the finished product supplied to a particular customer is not a commercial commodity in the sense that it cannot be sold in the market to any other person, the transaction is only a works contract. See the observation in The Court Press Job Branch, Salem v. The State of Tamil Nadu, 54 STC 383 and Commissioner of Sales Tax, M.P. v. Ratna Fine Arts Printing Press, 56 STC 77. In our opinion, in each case the nature of the contract and the transaction must be found out. And this is possible only when the intention of the parties is found out. The fact that in the execution of a contract for work some materials are used and the property/goods so used, passes to the other party, the contractor undertaking to do the work will not necessarily be deemed, on that account, to sell the materials. Whether or not and which part of the job work relates to that depends as mentioned hereinbefore, on the nature of the transaction. A contract for work in the execution of which goods are used may take any one of the three forms as mentioned by this Court in The Government of Andhra Pradesh v. Guntur Tobaccos (supra).

In our opinion, the contract in this case is one, having regard to the nature of the job to be done and the confidence reposed, for work to be done for remuneration and supply of paper was just incidental. Hence, the entire price for the printed question papers would have

been entitled to be excluded from the taxable turnover, but since in the instant case the deemed notes prepared by the assessee showed the costs of paper separately, it appears that it has treated the supply of paper separately. Except the materials supplied on the basis of such contract, the contract will continue to be a contract for work and labour and no liability to sales-tax would arise in respect thereof. The High Court was, therefore, right in the view it took in Civil Appeals Nos. 2346-2347/78.

The facts in the other appeals are identical. All these appeals are dismissed accordingly but without, in the facts and circumstances of the case, any order as to costs."

4. Gmr Tambaram Tindivanam ... vs Deputy Commissioner Of Income Tax ... on 26 November, 2018 [ITA 545, 546,1130 & 1131/BANG/2018]

"1. The Government of India has by notification no S.O. 92 dated December 19th 1988 entrusted NHAI with the stretch of National Highway from km 28/0 to km 121/00 in Tambaram Tindivanam Section on NH-45 in the State of Tamil Nadu. NHAI in discharge of its functions, envisaged under section 16 of the NHAI Act was keen to implement the aforesaid stretch of NH-45, a Project envisaging strengthening of the existing 4 lanes from km. 28/0 to km 67/0 and widening thereof to the existing 2 lane from km 67/0 to km 121/0 to 4 lane dual carriageway, with private sector participation on Build, Operate and Transfer (BOT) basis.

With regard to the argument of the assessee that the service lane was developed by the assessee pursuant to the agreement we have considered opinion definition of service road and main lane as mentioned in Schedule D to agreement, are different and laying down of the service lane cannot be entitled the assessee to claim the benefit of laying down of the new infrastructure, we do not find that the benefit of maintenance and creation of service road can be given to the assessee.

16. The nature of activity which was undertaken by the assessee as we had understood from scope of work (supra) was only of maintaining and operating of the existing four lanes 28 km to 67kms. If we allow this kind of activity to fall with the ambit of Section 80IA, it will not be in consonance with the aims and objects for which this section has been introduced. The Explanation to section 80IA(4) provides the development of highway project including housing project to be integral part of highway projects. Hypothetically if we permit the claim of the assessee for repairing and maintenance of the existing infrastructure then this provision would be subjected to misuse and unscrupulous contractors would claim benefit of 80IA, who were into redeveloping, repair or re-plaster the existing houses. In our understanding the same cannot be permitted as it would be beyond the scope of Section 80IA of the Act. Further there is a distinction between the widening of the existing road by constructing additional lanes as part of the highways project ITA.545, 546, 1130 & 1131/Bang/2018 Page - 25 vis-a-vis, improving, maintaining, refurbishing the existing road. Circular No,4 of 2010 of the CBDT only provides the scope of section 80IA to include within its ambit the widening of the existing road, but the road which exists or the infrastructure which is existing cannot form part of the development of the infrastructure because the infrastructure which is already developed is incapable of being developed again. Hence the assessee is not entitled to any relief pertain to disallowance relating to existing four lanes 28 km to 67kms."

5. Yoiaka Marine Pvt. Ltd. Bs. Assistant Commissioner of Income-tax, Circle 1(1), Mangalore on 14 June, 2012 [(2012) 25 taxman.com 260 (Bang,)]

"The learned CIT(A) in his order after detailed examination of the assessee's claim at paras 3 to 20 thereof held that the assessee was not entitled to be allowed deduction under section 80IA of the Act in the facts and circumstances of the case as also discussed in paras 4.1 to

5.3 above. In doing so, he has followed and applied the decision of the Special Bench of the Hon'ble ITAT, Mumbai in the case of *M/s. B.T. Patil & Sons, Belgaum Construction Pvt Ltd. Vs. ACIT in ITA Nos.1408 & 1409/PN/2003 dt.26.10.2009*. In this case, the Special Bench of the Tribunal held that the insertion and substitution of the Explanation to section 80IA of the Act with retrospective effect from 1.4.2000 was only in order to clarify that the deduction. 80IA of the Act would not be allowed in relation to a business in the nature of works contracts. The Special Bench ITA No. 30 & 31/Bang/2010 observed that the claim of the assessee for deduction. 80IA failed because it was neither a developer of infrastructure, nor did it develop, maintain and operate infrastructure facility. It was also clarified that the deduction under section 80IA of the Act would not be allowable to a person who executes a works contract entered into with the undertaking or enterprise who developed the infrastructure facility. On careful consideration, we are of the considered view that the facts and circumstances of the above cited case are identical to those of the assessee in the present case on hand and therefore it is clear that the assessee is not eligible to be allowed deduction under section 80IA of the Act. In the course of arguments, the learned Departmental Representative had cited and placed reliance on the decision of the Chennai Tribunal in the case of *ACIT Vs. Indwel Linings P. Ltd. (2009) 313 ITR (AT) 118*. We have perused the cited decision and find that the assessee in that case we engaged in undertaking works for in situ lining for water supply project and anti-corrosive lining and had claimed deduction under section 80IA of the Act. The Tribunal after examining the facts of the case held that the benefit of deduction under section 80IA was available only to a developer as it was a condition precedent for grant of the benefit of this section that the undertaking or enterprise must derive income from carrying on the business of developing an infrastructure facility. The Tribunal held that the assessee had entered into a contract for executing works contract and therefore the benefit of deduction under section 80IA would not be available to it. We find that the facts of the cited case are identical to that of the present case and are therefore of the view that the assessee is not eligible for being allowed deduction under section 80IA of the Act."

3. In view of the above decisions which are applicable to the present appeal, the assessee is not entitled to deduction u/s 80IA(4).

10. The Id. DR vehemently supported the order of the authorities below.

11. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that the AO has denied the deduction claimed under section 80-IA(4) of the Act to the assessee for the series of the reasons which are enumerated below:

5.9 In light of above facts & discussion, I disallow the deduction u/s 80IA claimed by assessee on all of the grounds given below (which were all necessary together):

A. Assessee has accepted that it does not have any agreement with any government authorities for all of 17 road projects.

C. Submission of assessee, that tender documents, LOI, LOA should be considered equivalent to agreement, is not acceptable. In fact assessee has submitted tender documents also only in five out of 15 cases.

D. As assessee do not started operating and maintaining infrastructure facility, thus not eligible in light of 80IA(4)(i)(c).

E. Assessee has not submitted separate form 10CCB for each infrastructure facility.

F. Assessee has not attached the desired agreement with 10CCB, thus it was incomplete in light of rule 18BBB(3) & action point 4, below 80IA.

G. From the facts appearing from tender documents, it has been ascertained that assessee is merely a contractor for work, thus covered under explanation below 80IA(13).

11.1 The 1st allegation of the AO for denying the deduction claimed by the assessee is that the assessee has no formal agreements with the concerned authorities as the assessee failed to produce the copy of the same as specified under Sub-clause (b) of section 80-IA(4) of the Act. For better understanding the relevant clause of the section reads as under:

(4) This section applies to—

(i) any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility which fulfils all the following conditions, namely :—

*(a) ******

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

11.2 A perusal of the above provision reveals that it is mandatory for the assessee to have an agreement with the authorities as discussed above for claiming the deduction under section 80-IA of the Act. However, we note that the assessee has filed the copies of the tender documents along with 'letter of intent' and 'work award order' before us on sample basis which are available in the paper book. On perusal of the tender documents we note that these tender documents contains all the terms and conditions for the contracts awarded to the assessee which are equivalent to the agreements.

11.3 The legal meaning of the word agreement is "a negotiated and typically legally binding arrangement between parties as to a course of action". Further the word agreement has been defined under section 2(e) **The Indian Contract Act 1872**. The section 2(e) of the Act defines an **agreements** as detailed under:

*"every promise and every set of promises, forming the consideration for each other is an **agreement.**"*

Further section 2(b) of the Indian contract Act define promise as:

"When the person to whom the proposal is made signifies his assent there to, the proposal is said to be accepted. Proposal when accepted, becomes a promises."

Section 2(a) of the Indian contract Act define proposal as under:

"When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal"

11.4 From the above, it is cumulatively transpired that promises/understanding made between the parties against the consideration which is enforceable under the law can be called an agreement. In the light of the above definition, we note that the tender documents coupled with letter of intent and work order are legally enforceable in the eyes of law. As such the tender documents along with letter of intent and work order contain all the features of a valid agreement.

11.5 It is also pertinent to note that the assessee claimed to have deduction under section 80-IA of the Act in the year under consideration with respect to 36 projects as evident from page 1 of the paper book number 3 whereas the AO has given finding that the assessee has claimed deduction with respect to 17 projects only. We further note that out of 36 projects, there were 17 projects awarded by the Road and Building Division, Bhuj, Government of Gujarat. The assessee with respect to such projects has filed the sample copy for 1 tender for the work "SR to Lakhpat Koteswar Road and Naliya to Narayan Sarovar Road along with other letter of intent /work order issued by the local authorities.

11.6 In addition to the above, we also find that the learned AR has also filed the sample copies of various work orders of the projects awarded by the local authorities/government undertakings which are placed on pages 2 to 25 of the paper book. On perusal of these work orders, we find that the assessee with respect to every project has furnished the security deposits and performance bond. These

work orders are sufficient enough to prove that the assessee has entered into agreements with the government authorities for the projects in respect of which the deduction under section 80 IA of the Act was claimed. Thus it becomes pertinent to note that in the event where the assessee fails to provide the copies of the agreements, the AO was empowered under the provisions of section 131/133(6) of the Act to call for the requisite information from the authorities which awarded the contract to the assessee. But we find that the AO has not done so despite having all the necessary details of such undertakings /local authorities of the government of Gujarat.

11.7 We also note that the requirement of having the valid agreement with the Government was also there in the provisions of the Act before the amendment in the year 2002 by the Finance Act 2001. In other words the assessee on the basis of these tender documents was claiming deduction in the earlier assessment years which was allowed by the Revenue. Therefore, we are of the view that the AO in the under consideration cannot change his stand. Therefore, the deduction claimed by the assessee under section 80-IA of the Act cannot be denied to the assessee merely on the reasoning that there was no valid agreement furnished by the assessee in the present situations as there were other materials available before the AO.

12. The 2nd allegation of the AO is that the assessee can claim the deduction only after it begins operating and maintaining the infrastructure facilities as per sub-clause (c) to section 80-IA (4) of the Act and as provided under sub-section 2 of section 80-IA of the Act. But the activity of the assessee is limited to the extent of constructing the infrastructure facilities. As such there was no question of operating and maintaining the infrastructure facilities by the assessee, therefore there is no possibility for allowing the deduction under section 80-IA(4) of the Act.

12.1 Before going into the issue on hand as raised by the AO we need to analyze the provision of section 80-IA (4) of the Act. The section 80-IA was first introduced

by the finance Act 1991 for providing the deduction to the industrial undertaking. The purpose of providing such deduction was for the modernization and expansion of industrial undertaking.

12.2 However the provision of this section was amended by Finance Act 1995 for the reason that the legislature realized that the modernization of industrial undertaking requires development of infrastructure facility. This fact can be verified from the memorandum explaining the amendment in the section as reproduced below:

Industrial modernisation requires a massive expansion of, and qualitative improvement in, infrastructure. Our country is very deficient in infrastructure such as expressways, highways, airports, ports and rapid urban rail transport systems. Additional resources are needed to fulfil the requirements of the country within a reasonable time frame. In many countries the BOT (build-operate-transfer) or the BOOT (build-own-operate-transfer) concepts have been utilised for developing new infrastructure.

Applying commercial principles in the operation of infrastructure facilities can provide both managerial and financial efficiency. In view of this, it is proposed to allow a five year tax holiday for any enterprise which builds, maintains and operates any infrastructure facility such as roads, highways, or expressways or new bridges, airports, ports and rapid rail transport system on BOT or BOOT or similar other basis (where there is an ultimate transfer of the facility to a Government or public authority). The enterprise must have entered into an agreement with the Central or State Government or a local authority or any other statutory authority for this purpose. The period within which the infrastructure facility has to be transferred needs to be stipulated in the agreement between the undertaking and the Government concerned. The tax holiday will be in respect of income derived from the use of the infrastructure facilities developed by them.

12.3 Hence the legislature inserted sub-section 4A to section 80-IA of the Act w.e.f. 1st April 1996 for providing the deduction to the enterprise or undertaking engaged in the business of development and operating & maintaining of infrastructure facility.

12.4 Further w.e.f. 1st April 2000 the subsection-4A was re-numbered as subsection- 4 of section 80IA of the Act. Subsequently, the major changes were brought in the Finance Act 2001 w.e.f. 1st April 2002, where the requirement for developing and operating & maintaining of infrastructure facility simultaneously was done away. Now the deduction under section 80-IA(4)(i) is also available to assessee who is

engaged only in development of infrastructure facility or only engaged in operation & maintenance of infrastructure facility or engaged in both developing, operating and maintaining any infrastructure facility. The amended provision of section 80-IA(4)(i) of the Act reads as under:

(4) This section applies to—

(i) any enterprise carrying on the business ⁹¹[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) XXX

⁹³[(b) XXX

(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

12.5 A plain reading of the above provision reveals that under the amended provisions of section 80-IA(4) of the Act, the assessee is entitled for such benefit, even if it is engaged only in developing the infrastructure facilities. Thus if the contention of the AO is believed to be true that the deduction is available to the assessee only after infrastructure started or starts operating then the assessee who only develop the infrastructure facility will not be entitled for the deduction under section 80-IA (4) of the Act as he will never operate and maintain such infrastructure facility. Furthermore, the assessee who will start operating and maintaining such infrastructure facility after its development by developer would be eligible for such deduction and not the developer. It is because the assessee who has developed and the assessee who is operating & maintaining the infrastructure facility cannot claim the deduction simultaneously for the same project. This can be evident from the proviso attached to sub-clause (c) of section 80-IA(4) of the Act as reproduced above.

12.6 The above proviso itself allows the assessee to transfer the infrastructure facility after its development and stipulates the condition that the transferee can claim the deduction under section 80-IA (4) of the Act for the remaining period. It is also pertinent to note that the condition stipulated for the starting of the project on or after 1st of April 1995 was to allow the benefit of the deduction to those assessee who starts operating and maintaining the infrastructure facility after the said date. In other words the infrastructure facilities started prior to 1 April 1995 were not eligible for such deduction. Thus the sub clause (c) provides the jurisdiction to the assessee for claiming the deduction only with respect to the projects which started or starts operating on or after 1 April 1995. In holding so we draw support and guidance from the order of Hon'ble Mumbai ITAT in case of ACIT vs. Bharat Udyog Ltd reported in [2009] 118 ITD 336 wherein it was held as under:

Sub-clause (c) of section 80-IA(4) is applicable to an enterprise which is engaged in 'operating and maintaining' the infrastructure facility on or after 1-4-1995. It is not applicable to the case of an enterprise, which is engaged in mere 'development' of infrastructure facility and not its 'operation' and 'maintenance'. Therefore, the question of 'operating and maintaining' of infrastructure facility by such an enterprise before or after any cut off date cannot arise. When the Act provides for deduction under section 80-IA(4), undisputedly for an enterprise, which is only 'developing' the infrastructure facility, unaccompanied by 'operating and maintaining' thereof by such entity, there cannot be any question of providing a condition for such an enterprise to start operating and maintaining the infrastructure facility on or after 1-4-1995. Since the assessee was only a developer of the infrastructure project and it was not maintaining and operating the infrastructure facility, sub-clause (c) of sub-section (4) of section 80-IA was not applicable. [Para 8]

12.7 Thus the interpretation that the deduction shall be allowed only with respect to the infrastructure facility upon the commencement of operation and maintenance, does not hold good, particularly in a situation where the assessee is engaged only in the development of infrastructure facility.

12.8 Proceedings further, we find that the AO has alleged that the assessee has not filed the form 10CCB separately with respect to each infrastructure project being considered as an undertaking as mandated under rule 18BBB of Income Tax Rules which reads as under:

18BBB. (1) *The report of the audit of the accounts of an assessee, which is required to be furnished under sub-section (7) of section 80-IA or sub-section (7) of section 80-I, except in the cases of multiplex theatres as defined in sub-section (7A) of section 80-IB or convention centres as defined in sub-section (7B) of section 80-IB [or hospitals in rural areas as defined in sub-section (11B) of section 80-IB], shall be in Form No. 10CCB.*

(2) *A separate report is to be furnished by each undertaking or enterprise of the assessee claiming deduction under section 80-I or 80-IA or 80-IB [or 80-IC] and shall be accompanied by the Profit and Loss Account and Balance Sheet of the undertaking or enterprise as if the undertaking or the enterprise were a distinct entity.*

(3) *In the case of an enterprise carrying on the business of developing or operating and maintaining or developing, operating and maintaining an infrastructure facility, the form shall be accompanied by a copy of the agreement of the enterprise with the Central Government or the State Government or the local authority for carrying on the business of developing or operating and maintaining or developing, operating and maintaining the infrastructure facility.*

12.9 From the above provisions, it is clear that the assessee was under the obligation to treat each project as separate and distinct undertaking for the purpose of claiming the deduction under section 80 IA (4) of the Act. However, we find important to mention/highlight the fact in the present facts and circumstances that what would be the impact on the deduction claimed by the assessee with respect to all the projects where the assessee furnished the reports combinedly and cumulatively. At the threshold, there is no ambiguity to the fact that all the development projects carried out by the assessee are the infrastructure projects/facilities as provided under the statute in explanation attached to section 80 IA (4) of the Act. This fact can be verified from the finding of the AO which reads as under:

*" 5.7.1 There must be a infrastructure facility i.e. a Road { definition below 80IA(4)(i)}
From the details, submitted by assessee, it was perused that assessee is taking work contract for roads. Thus no adverse inference is called for."*

12.10 In view of the above we are of the opinion that there cannot be any dispute regarding the deduction claimed by the assessee under section 80-IA (4) of the Act based on combined and cumulative audit report for all the projects/infrastructure facilities in the present facts and circumstances. It is because there cannot be any dispute about the quantification of the amount for the deduction claimed by the assessee in the present facts of the case as all the projects are eligible projects and the assessee has furnished the audited profit & loss account and form 10CCB

combinedly along with the income details of each project eligible for deduction under section 80-IA of the Act which are placed on pages 26 to 42 and 58 to 95 of the paper book.

12.11 Besides the above, we also note that the assessee during the assessment proceedings has also contended that it has maintained separate books of accounts for each infrastructure projects. This contention was not rejected by the authorities below. Thus in the present facts and situation, we are of the view that the assessee should not be penalized merely for non-furnishing the separate report for each project.

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-IA 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-IA was inserted by the Finance Act, 2007 and later on amended by the Finance (No.2) Act, 2009 but the same was made applicable with retrospective effect i.e. 1-4-2000. This explanation 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.

13.1 The contract shall be for the whole works as described in Sub-Clause 1.1, based on priced Bill of Quantities submitted by the Bidder.

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The Bidder shall furnish, as part of his Bid, a Bid security in the amount as shown in column 4 of the table of IFB for this particular work.

XX

Within 21 days of receipt of the Letter of Acceptance, the successful Bidder shall deliver to the Employer a Performance Security in any of the forms given below for an amount equivalent to 5% of the Contract price.

XX

The Contractor shall employ the key personnel named in the Schedule of Key Personnel as referred to in the Contract data to carry out the functions stated in the Scheduled or other personnel approved by the Engineer.

XX

All risks of loss of or damage to physical property and of personal injury and death which arise during and in consequence of the performance of the Contract other than the excepted risks are the responsibility of the Contractor.

XX

The Employer shall give possession of all parts of the Site to the Contractor.

XX

The Contractor shall be responsible for the safety of all activities on the Site.

XX

The contractor shall be responsible to make good and remedy at his own expenses any defect which may develop or may be noticed before the period mentioned hereunder from the certified date of completion.

XX

The Contractor shall pay liquidated damages to the Employer at the rate per day stated in the Contract Data for each day that the Completion Date is later than the Intended Completion Date.

XX

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 any 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- IA(13) does not apply to the assessee.

13.7 Going forward, we find in this context, the **Hon'ble Pune Tribunal** in the case of ***B.T. Patil& Sons Belgaum Constructions (P.) Ltd. [2013] 34 taxmann.com 97/59 SOT 61 (URO)*** after referring to decision of the Hon'ble Bombay High Court in the case of *CIT v. ABG Heavy Industries Ltd. [2010] 322 ITR 323/189 Taxman 54* has laid down certain parameters for contractors to be eligible for deduction. The said parameters for a contractor to be eligible for deduction are as follows:—

- (a) Undertaking financial risk by making investment.
- (b) Shouldering technical risk.
- (c) Liable for liquidated damages.
- (d) Employment of technical and administrative qualified team.

If above parameters are satisfied, the contractors would be held eligible for the deduction under section 80-IA. Thus, the above parameters may act as guiding factors to decide whether a contractor may be considered as a deemed developer eligible for deduction under section 80-IA(4) of the Act.

13.8 Further, in case of ***Asstt. CIT v. Pratibha Industries Ltd. [2012] 28 taxmann.com 246/[2013] 141 ITD 151 (Mum.)***, the **Hon'ble Mumbai Tribunal** held that where the assessee had invested his own funds, it would be assumed that the assessee was acting as a developer and not as a contractor. Relevant extract of the above decision is reproduced as under :

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There are letters exchanged, written by the assessee and various Government departments, which indicate that the assessee was awarded the job, wherein the assessee had placed the bank guarantee, against the tendered cost, which proved beyond doubt that the assessee, itself was doing the development of infrastructure facility, on behalf of the Government, besides placing its own funds at risk and peril."

13.9 Reference is also invited to the decision of the **Hon'ble Hyderabad Tribunal** in the case of ***Sushee Hi Tech Constructions (P.) Ltd. v. Dy. CIT [2013] 33 taxmann.com 236/58 SOT 111 (URO)*** wherein it has been held that where contracts involve development, operating, maintenance, financial involvement and defect correction and liability period, then such contracts cannot be called as simple works contracts so as to deny deduction under section 80-IA(4) to assessee. Such contracts are eligible for deduction under section 80-IA and same is applicable in case of work allotted by Government corporation/Government bodies also.

13.10 We also extend the support and guidance from order of **Mumbai Tribunal in the case of *Bhinmal Contractors Property and Land Developers (P.) Ltd. Vs. ACIT/DCIT reported in 93 taxmann.com 296*** wherein it was held that merely because, in the TDS certificate tax at source was deducted u/s. 194C being applicable to a contractor cannot be the reason for treating a genuine developer as a contractor. The same cannot detract the assessee from the position of being a developer; nor should it debar the assessee from claiming deduction under section 80-IA(4). Therefore, the assessee, who is only engaged in developing the

infrastructural facility, i.e., road, is entitled to the benefits of the deduction under section 80-IA(4) of the Act.

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. In this regard, we find draw support and guidance from the judgment of Hon'ble Supreme Court in the case of Bajaj Tempo Ltd (*supra*) wherein it was held as under:

A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally. Since a provision intended for promoting economic growth has to be interpreted liberally the restriction on it too has to be construed so as to advance the objective of the section and not to frustrate it. Under clause (i) of sub-section (2) of section 15C formation of the undertaking by splitting up or reconstruction of an existing business by transfer to the undertaking of building, raw material or plant used in any previous business results in denial of the benefit contemplated under sub-section (1).

13.12 It is also pertinent to note that the Hon'ble Gujarat High Court in the own case of the assessee (*supra*) has decided the issue of the applicability of the explanation attached below section 80-IA (13) whether such explanation was applicable retrospectively in the case on hand. The assessee challenged the vires of *Explanation* inserted below sub-section (13) of section 80-IA of the Income-tax Act, 1961 by Finance (No. 2) Act of 2009 with retrospective effect from 1-4-2000. By adding the impugned *Explanation*, the Legislature provided that nothing contained in the 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 and executed by an undertaking or enterprise. The central question is, whether in the present case, the explanation below sub-section (13) to section 80-IA introduced by the Finance Act No.2 of 2009 with effect from 1.4.2000 transgresses the legislative

competence of the Parliament. The Hon'ble court decided the issue in favour of the revenue that such explanation brought with retrospective effect from 01-04-2000 by the Finance Act No. 2 of 2009 was very well within the competence of the Parliament. As such, there was no issue whether the assessee is acting as a developer or works contractor. Therefore, in our considered view no reference can be made to such judgment for deciding the issue on hand whether the assessee is acting as a developer or the works contractor.

13.13 The case laws quoted by the Id. DR of the Hon'ble Supreme Court as discussed above were rendered in the context of sales tax/ service tax much before the insertion of section 80-IA of the Act whereas the issue before us relates to the provisions of income tax. Furthermore, there was no issue in the cases cited by the learned DR whether the assessee is acting as a developer or as contractor for claiming the deduction under section 80-IA (4) of the Act. Similarly, in the case of Gmr Tambaram tindivanam (*supra*) there was issue of relating to the fact whether the assessee carried out the activity of infrastructure facility which is not the issue in the case on hand. Likewise, the issue in the case of Yojaka Marine Pvt. Ltd. (*supra*), the issue was in relation to the applicability of the explanation below to below 80-IA (13) of the Act which is not the issue before us. Accordingly we hold that, the case law cited by the learned DR or distinguishable from the present facts of the case.

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.

14. The 2nd issue raised by the assessee is that the learned CIT (A) erred in confirming the addition made by the AO for ₹70 Lacs against the income other than

the income of 80-IA projects on the ground that the books of accounts are not reliable.

14.1 The AO during the assessment proceedings found certain defects in the books of accounts and audited financial statements. Accordingly he was of the view that the books of accounts of the assessee were not reliable and accordingly genuineness of the expenses cannot be established. The defects as observed by the AO are detailed as under:

- i. Assessee was not able to produce site-wide trading/P&L account, quantitative work details, quantitative consumption of material etc. as asked to assessee vide query-no,(h) order sheet dated 16.01.2013, again asked on 28.02.2013 by query no. 1. During the hearing on 16.03.2013 A.R shown its inability to produce the same as it involve huge exercise.*
- ii. In respect of Consumables, procurement and disbursement register maintained at sites were no produced.*
- iii. Assessee not able to produce job cards or any other evidence maintained at site in respect of labour employed.*
- iv. Many of the expenses were booked in the books of the assessee on basis of self made vouchers,*
- v. Assessee failed to match details like transportation of materials to various sites vis-a-vis purchase of material.*
- vi. During survey it was found that assessee has debited few expenses without any supporting evidence just on the basis of cash vouchers on which even the names of the persons was not available.*
- vii. There was a decline in GP ratio of assessee in post survey period.*

14.2 However, the assessee before the AO contended that the gross profit and net profit for the year under consideration is better than the earlier years. Similarly, the rate of profit for the projects eligible for deduction under section 80-IA and the projects not eligible for deduction under section 80-IA of the Act is almost similar. Accordingly, there should not be any disallowance of the expenses.

14.3 However, the AO disagreed with the contention of the assessee and held that the assessee agreed for lump-sum disallowance. Accordingly he made the

disallowance of ₹70 Lacs against the non 80 IA project income which was added to the total income of the assessee.

15. Aggrieved assessee preferred an appeal to the learned CIT (A) who confirmed the order of the AO by observing as under:

6.3 I have carefully considered the contention of the appellant and the /assessment order. The lumpsum disallowance of Rs.70 lakhs has been made by the A.O. on account of defects in the books of accounts which are mentioned in para-6.1 of the assessment order. In para-6.2, it is contended by the A.O. that , the appellant has accepted this addition. It is also mentioned by the A.O. that it was clarified to the AR / -ssessee and noted in the order-sheet entry dt. 16/3/2013 that this addition does not cover the defective vouchers found and impounded during survey as discussed in para-8 of the assessment order. It is obviously implied that since the appellant had agreed to this disallowance, he must have automatically agreed to the above finding of the A.O. of this disallowance not covering the defective vouchers found during the course of survey. The plea of the appellant that this disallowance therefore covers the addition made on account of defective vouchers is not tenable and acceptable.

Being aggrieved by the order of the learned CIT (A), the assessee is in appeal before us.

16. The learned AR before us submitted that there cannot be any disallowance of the expenses on ad hoc basis particularly in a situation when the gross profit and net profit is greater than the profit declared in the earlier years.

17. On the other hand the learned DR vehemently supported the order of the authorities below.

18. We have heard the rival contentions of both the parties and perused the materials available on record. Indeed it is the duty of the assessee to furnish the requisite details of the expenses shown by it in the books of accounts. In case the assessee fails to satisfy the AO about the correctness/ completeness of its books of accounts, then the AO is empowered to reject the books of accounts and estimate the income on relational basis.

18.1 However in the case on hand undisputedly the books of accounts of the assessee have not been rejected. In such a situation, the onus is on the AO to point out the specific expenses which were not incurred in connection with the business and thereafter he can make the disallowance under the provisions of section 37 of

the Act or any other provision of the Act as the case may be. As such there is no provision provided under the Act empowering the AO to make the disallowance on ad hoc basis despite the fact that the assessee consents for such disallowance during the assessment proceedings. In this connection a reference can be made to the CBDT instructions issued vide F. No. 286/98/2013-IT(Inv.II) dated 18th of December 2014 whereby the officers were discouraged to make any addition merely on the basis of the statement. The relevant extract of the circular is reproduced as under:

"Instances/complaints of undue influence/coercion have come to notice of the CBDT that some assessees were coerced to admit undisclosed income during Searches/Surveys conducted by the Department. It is also seen that many such admissions are retracted in the subsequent proceedings since the same are not backed by credible evidence. Such actions defeat the very purpose of Search/Survey operations as they fail to bring the undisclosed income to tax in a sustainable manner leave alone levy of penalty or launching of prosecution. Further, such actions show the Department as a whole and officers concerned in poor light.

2. I am further directed to invite your attention to the Instructions/Guidelines issued by CBDT from time to time, as referred above, through which the Boards has emphasized upon the need to focus on gathering evidences during Search/Survey and to strictly avoid obtaining admission of undisclosed income under coercion/undue influence.

3. In view of the above, while reiterating the aforesaid guidelines of the Board, I am directed to convey that any instance of undue influence/coercion in the recording of the statement during Search/Survey/Other proceeding under the IT Act, 1961 and/or recording a disclosure of undisclosed income under undue pressure/coercion shall be viewed by the Board adversely."

18.2 In view of the above, and after considering the facts that the gross profit and the net profit declared by the assessee in the year under consideration was greater than the earlier years viz a viz the profit declared for non-eligible projects was accepted. Accordingly we are of the view that no addition in the given facts and circumstances is warranted in the hands of the assessee on ad-hoc basis. Hence, we do not find any reason to uphold the finding of the learned CIT (A). Thus, the ground of appeal of the **assessee is allowed.**

19. Coming to the ITA number 88/Rjt/2015 for A.Y.2005-06. The assessee has raised following grounds of appeal.

1. *The grounds of appeal mentioned hereunder are without prejudice to one another.*
2. *The learned Commissioner of Income-tax(Appeal)-3, Rajkot [hereinafter referred to as the CIT(A) erred on facts as also in law in confirming the disallowances of claim of deduction u/s.80IA(4) of the Income-tax Act, 1961 [hereinafter referred as to the "Act"] of Rs.14,01,366/- made by the Assessing Officer on the alleged ground that the appellant is not eligible for deduction u/s.80IA(4) as the appellant is executing a works contract. The order passed by the ld.CIT(A) is totally unjustified on facts as also in law and claim of deduction u/s.80IA(4) may kindly be directed to be allowed.*
3. *Your Honor's appellant craves leave to add, amend, alter or withdraw any or more grounds of appeal on or before the hearing of appeal.*

19.1 Both the sides consented that identical issue is involved in this appeal too. Thus, for parity of reasons noted above, our view in ITA No. 89/RJT/2015 for AY 2010-11 above shall apply *mutatis mutandis* to this appeal captioned above. In the result, the appeal of the Assessee in ITA No. 88/RJT/2015 for AY 2005-06 is **allowed.**

20. Coming to the ITA number 555/Rjt/2012. The Revenue has raised following grounds of appeal

1. *The Ld.CIT(A) has erred in law and on facts in deleting the addition made on account of rejection of claim of deduction u/s.80IA (4) of Rs. 4,66,62,542/-*
2. *The Ld.CIT(A) has erred in law and on facts in deleting the addition made on account of disallowance of Labour Work Expenses of rs.10,00,000/-*
3. *On the facts and in the circumstances of the case the Ld.CIT(A) ought to have upheld the order of the Assessing Officer.*
4. *It is, therefore prayed that the order of the Ld.CIT(A) be set aside and that of the Assessing Officer be restored to the above extents.*

20.1 Both the sides consented that identical issue is involved in this appeal too. Thus, for parity of reasons noted above, our view in ITA No. 89/RJT/2015 for AY 2010-11 above shall apply *mutatis mutandis* to this appeal captioned above. In the result, the appeal of the Revenue in ITA No. 555/RJT/2012 for AY 2009-10 is **dismissed**.

21. In the combined results, the appeals of the assessee bearing ITA Nos.88 & 89/Ahd/2015 for A.Y. 2005-06 & 2010-11 are **allowed** and appeal of the Revenue bearing ITA No.555/Rjt2012 for A.Y. 2009-10 is **dismissed**.

Order pronounced in the Court on 30/07/2020 at Ahmedabad.

-Sd-
(Ms MADHUMITA ROY)
JUDICIAL MEMBER

-Sd-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated 30/07/2020
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