

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE**

**BEFORE SHRI R. K. PANDA, VICE PRESIDENT
AND
MS ASTHA CHANDRA, JUDICIAL MEMBER**

**ITA No.291/PUN/2020
Assessment Year : 2016-17**

T and T Infra Limited A-1, Vishnu Vihar, Bibwewadi Kondhwa Road, Market Yard, Pune – 411037	Vs.	ACIT, Circle – 7, Pune
PAN: AAECT3902H		
(Appellant)		(Respondent)

Assessee by : Shri Tarun Ghia
Department by : S/Shri Ajay Kumar Keshari and
Sourabh Nayak

Date of hearing : 10-07-2024
Date of pronouncement : 01-10-2024

ORDER

PER ASTHA CHANDRA, JM :

This appeal filed by the assessee is directed against the order dated 26.12.2019 of the CIT(A), Pune-5, Pune, relating to assessment year 2016-17.

2. Facts of the case in brief, are that the assessee is a company engaged in contracting business such as Bridges & Aqueducts, concrete road, development projects, etc. It filed its return of income on 15.10.2016 declaring total taxable income of Rs.1,65,33,130/-. The case was selected for complete scrutiny under CASS and statutory notices u/s 143(2) and 142(1) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') were issued and served on the assessee to which the assessee filed the details from time to time.

3. During the course of assessment proceedings the Assessing Officer noted that the assessee has undertaken various projects, the customers of which are as under:

- a) *Public Works Department, Maharashtra Govt. Maharashtra*
- b) *Pimpri Chinchwad Municipal Corporation, Pimpri*
- c) *Pune Municipal Corporation, Pune.*
- d) *Private Sector Aamby City Developers Ltd. Vilage Ambavane.*
- e) *Irrigation Department Maharashtra Govt. Maharashtra.*

4. The Assessing Officer further noted that the assessee during the year under consideration has claimed deduction u/s 80IA(4) of the Act at Rs.7,21,32,410/-. He therefore, asked the assessee to explain as to how the assessee is entitled to claim such deduction especially when similar disallowance was made in the preceding assessment years. In response to the same, the assessee filed its submissions justifying its claim, the details of which have been reproduced by the Assessing Officer and which read as under:

"The assessee has claimed deduction 80IA(4) of the Income Tax Act in respect of 44 infrastructure facilities developed by it. The list of these infrastructure facilities along with description of the infrastructure facilities the name and address of the Government Authorities Awarding the project, the date of the allotment of the project and the turnover in respect of each infrastructure facilities has been furnished while making the claim of the deduction. Out of the 44 infrastructure facilities/projects, 39 infrastructure facilities/projects have been directly awarded by the Government Authorities to the assessee and 5 infrastructure facilities/projects are third party Infrastructure facilities/projects, which have been awarded by the Government Authorities to other persons who have in turn passed on the said infrastructure facilities/projects to the assessee. The turnover in respect of infrastructure facilities/projects directly awarded by the Government Authorities to the assessee comes to Rs. 87,90,27,043/- and the turnover in respect of the third party infrastructure facilities/projects comes to Rs. 7,23,66,581/-. The infrastructure facilities/projects developed by the assessee are relating to Flyovers, Bridges across rivers. Widening of Roads, DP Roads, approach roads,

Earthwork and structures on Cannals, Submersible Bridges, retaining walls of Dams, Railway Bridges, Bus Stations, Bridges over Roads, Cannal Bridges, Four laning and Strengthening of Highways etc. These infrastructure facilities/projects have been awarded by the Government Authorities like Municipal Corporations, Public Works Department of the Government of Maharashtra, the Executive Engineer National Highways etc.

2.2.1 As per sub clause (i) of sub sec 4 of sec 80 IA of the Income Tax Act an assessee who fulfills the followings condition is eligible to claim the deduction.

It is carrying on the business of developing or operating and maintaining or developing, operating and maintaining any infrastructure facility which fulfills the following conditions namely:-

(a) It is a company registered in India or by a consortium of such companies (or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act,

(b) It has entered into an agreement with the Central Government or a State

Government or a local authority or any other statutory body for

(i) developing or

(ii) operating and maintaining or

(iii) developing, operating and maintaining a new infrastructure facility,

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

3. The assessee is a company incorporated under the companies act. The assessee has entered into various agreements with the Government Local Authorities/others statutory bodies through the process of the tenders awarded to the assessee company for development-of-new infrastructure facilities/projects. The assessee has started developing all the infrastructure facilities/projects, for which deduction has been claimed, after 1st April 1995

In view of the above the assessee fully qualifies for the deduction u/s 80IA(4) of the Income Tax Act

4. It is further submitted that the process of the assessee company, bidding for various projects through the process of tenders etc and the projects being awarded to the assessee and the accepting the projects amounts to entering into an agreement with the project awarding Government / local Authority or other Statutory Body, as the case may be.

5.1 It is further submitted that the various infrastructure facilities/projects awarded to the assessee company cannot be described as mere works contracts. It is submitted that under the various infrastructure facilities/projects awarded to the

assessee company the assessee does not act as a mere works contractor but the assessee's role is that of a developer of infrastructure facilities/projects. The Agreements/Contracts entered into by the assessee with the Government Authorities for development of Infrastructure facilities involve designing the infrastructure facilities/project, the development of the infrastructure facilities/projects, financial involvement and defect removal during the liability period in all such projects, infrastructure facilities/projects the Government Authorities have handed over the possession of project-sites to the assessee company. The assessee utilized its funds, its employs, its expertise and took over the responsibility of development of the infrastructure facilities. On completion of the infrastructure facilities the assessee handed over the same to the Government Authority. Thereafter the assessee had to undertake the maintenance of the said infrastructure facilities for periods running from 48 months to 60 months. During this period if any damages were occurred it would be responsibility of the assessee. It can be seen that the assessee has undertaken all the risks in terms of development of infrastructure facilities/projects, maintaining the technical personnel, keeping plant and machinery, providing technical know how, its expertise and financial resources. Therefore the assessee was the developer of the infrastructure facilities and not a works contractor."

5. Relying on various decisions it was argued that the assessee is entitled to claim such deduction u/s 80IA(4) of the Act.

6. However, the Assessing Officer was not satisfied with the arguments advanced by the assessee. The Assessing Officer analyzed the provisions of section 80IA(4) of the Act and observed that the usage of word 'developing' in juxtaposition to infrastructure facility indicates that what is eligible for deduction under this sub-section is the profits and gains derived from the development of infrastructure facility and not something de hors it. He analyzed the following projects which were undertaken by the assessee which do not fall within the definition of infrastructure facility:

<i>Infrastructure facility</i>	<i>Detail of the infrastructure project</i>	<i>Govt. Authority awarding the project</i>	<i>Profits from project claimed under 80IA(4) (in Rs.)</i>
<i>Reconstruction of Bus station with sub work at Karad in Satara Division</i>	<i>Reconstruct of old bus stand as per tender drawing</i>	<i>The Executive Engineer, S.T. Pune Region.</i>	<i>12,70,977/-</i>
<i>Clinic for Primary Health sub center at Gojubavi, Tal. – Baramati, Dist. – Pune</i>	<i>Purposed Clinic for Primary health centre and Staff Quarters to be constructed in the Building</i>	<i>The Executive Engineer, Pune Zilla Parishad, Work dept (S), Pune</i>	<i>3,69,484/-</i>
<i>Retaining wall from Khadakwasla Dam to NadedPhata (Ch.0 to 3710) (including Construction 7 Structural Work)</i>	<i>Construction of RCC retaining wall as per drawings at the location as indicated & / or instructed by the client along with alignment.</i>	<i>The Commissioner, Pune Municipal Corporation, Pune</i>	<i>2,22,621/-</i>

The construction of bus stand, Clinic for primary health centre and retaining wall (a structure which retains or holds soil behind it and in no way it can be said to be a water supply project) do not fall within the category of infrastructure facility as envisaged in the provisions of sec.80IA(4). Therefore deduction claimed u/s 80IA(4) on profits from these projects of Rs.18,63,082/- is disallowed and added to the returned income.”

7. The Assessing Officer further noted from the list of projects submitted that the assessee has claimed deduction u/s 80IA(4) of the Act even on profits derived from projects which were received on sub-contract basis from independent private parties and not from the Central Government / State Government / Local authority. According to the Assessing Officer, as per provisions of section 80IA(4) of the Act, to be eligible for deduction, the assessee should have entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for development of infrastructure facility. He noted

that the assessee has claimed deduction u/s 80IA(4) of the Act on the profit of Rs.40,91,541/- from the following projects, the details of which are as under:

<i>Sl No</i>	<i>Name of party from whom contract is obtained</i>	<i>Profits derived and claimed as deduction u/s 80IA(4) (in Rs)</i>
1	<i>Gammon India Ltd.</i>	<i>7,61,207/-</i>
2	<i>Modern Road Makers Pvt. Ltd.</i>	<i>4,85,303/-</i>
3	<i>Manisha construction</i>	<i>13,01,833/-</i>
4	<i>S.K. Yewale and Co</i>	<i>5,59,873/-</i>
5	<i>Sadhbhav Engg Ltd</i>	<i>9,83,325/-</i>
	<i>Total</i>	<i>40,91,541/-</i>

8. Applying the provisions of section 80IA(4)(b)(i) of the Act, the Assessing Officer disallowed the claim of deduction u/s 80IA(4) of the Act of Rs.40,91,541/-. So far as the balance amount is concerned, the Assessing Officer noted that the Explanation below section 80IA(13) as inserted by the Finance Act, 2009 with retrospective effect from 01.04.2000 makes it clear that the benefit of section 80IA(4) of the Act shall not be extended to a person who executes a works contract. It has been clarified that the provisions of section 80IA(4) of the Act shall not apply to a person who executes a works contract entered into with the undertaking or enterprise referred to in the said section. With a view to clarify the position beyond any doubt, the said Explanation was substituted by the Finance Act, 2009 with a new Explanation to clarify that the deduction is not available to a person referred to in sub-section (4) which is in the nature of 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). Relying on various decisions, the Assessing Officer disallowed the claim of deduction u/s 80IA(4) of the Act by observing as under:

“5.9. It is also required to be examined as to whether the assessee can be called as 'developer' within the meaning of section 80IA(4) or is only a works contractor. The words 'developer' and 'contractor' have not been defined in or for the purposes of section 80-IA. The primary question which arises is that how to find out the meaning of a word or an expression which is not defined in the Act. The Honourable Supreme Court in the case of CWT Vs Officer-in-charge (court of wards), Baigah [(1976) 105 ITR 133 (SC)] in which it was held that the ordinary dictionary meaning of a word cannot be disregarded. According to Oxford Advanced Learner's dictionary. "developer" is a person or company that designs and creates new products, whereas "contractor" is a person or a company that has a contract to do work or provides services or goods to another. The new shorter Oxford dictionary defines the word "contractor" as "A person who enters into a contract or agreement, a person or firm that undertakes work by contract, esp. for building to specified plans". In the light of the meaning ascribed to these words by the dictionaries it is observed that the developer is a person who designs and creates new products. He is the one who conceives the project. He may execute the entire project himself or assign some parts of it to others. On the contrary the contractor is the one who is assigned a particular job to be accomplished on the behalf of the developer. His duty is to translate such design into reality. There may, in certain circumstances, be overlapping in the work of developer and contractor, but the line of demarcation between the two is thick and unbreachable. When the person acting as a developer, who designs the project, also executes the construction work, he works in the capacity of contractor too. But when he assigns the job of construction to someone else, he remains the developer simpliciter, whereas the person to whom the job of construction is assigned, becomes the contractor. The role of developer is much larger than that of the contractor. It is no doubt true that in certain circumstances a developer may also do the work of a contractor but a mere contractor per se can never be called as a developer, who undertakes to do work according to the pre-decided plan.

5.10. The contracts executed by the assessee, pursuant to which it has claimed a deduction u/s 80IA(4) must therefore, be measured from the above metrics laid down by the Supreme Court in the matter of works contract. I have perused the copies of the agreements/tender documents (the same has been made available by the assessee during the assessment proceeding in assessee's own case for AY 2015-16) with various undertakings which were executed by the assessee for executing the impugned contracts, which are claimed to fall within the domain of section 80IA(4). The facts which emerge from the above agreements are as under:

- i. None of the projects were conceived by the assessee itself. All the projects were conceived by the government authorities who in turn awarded the contract to the assessee by a tendering process. Assessee company does not own the bridge/road that is to be build and there is no transfer of property on chattel to chattel basis from assessee company to authority awarding the contract. The ownership rests with the authority giving the contract for a particular project through tendering process.*
- ii. Competent authorities have specified the technical designs and plans as per which the assessee has to carry out the required project. Any change in*

plan or design has to be done with the approval of the officer designated by the authority as mentioned in the agreement.

iii. Agreement also specifies the exact nature of machinery/equipment that is to be used for execution of the project along with the technical specifications and brand/make of each of the machinery/equipment.

iv. Material used for execution of the project has also been specified and the agreement even goes on to state the material has to be procured from government approved suppliers only. The agreement also elaborates the technical specifications and quality of the material to be used.

v. Assessee has to adhere to the timeline for completion of the project which will be supervised by designated officers and must submit timely progress reports to the authority

vi. The assessee is required to submit RA bills at regular intervals and accordingly payment will be received from the Government authority.

vii. The assessee carries no risk in the contract. As per the financial statement of the assessee mobilization/material advance received by assessee as on 31/03/2016 and 31/03/2015 is Rs.5,49,04,424/- and Rs.3,04,61,293/-. Thus assessee is protected from financial liability by the authority awarding the contract. The financial risk to the assessee is 'Nil' as is evident from the advances received Assessee is also receiving funds from authorities at regular intervals on submission of RA bills (running account bills).

5.11. It is clear from the above discussion that the assessee is merely an executing agency carrying out the works contract strictly as per the terms laid down in the agreement/tender document and assessee has no control over development of infrastructure facility at any stage. The assessee has executed a works contract in respect of each of the projects for which it has claimed a deduction u/s 80IA(4) of the Act. In view of the above, deduction u/s 80IA(4) of Rs 6,61,77,787/- (Rs.7,21,32,410/- less Rs.18,63,082/- (already disallowed as per para 5.3) less Rs.40,91,541/- (already disallowed as per para 5.4)] is disallowed and added to the returned income.”

9. In appeal, the Ld. CIT(A) upheld the action of the Assessing Officer by observing as under:

“[7] I have perused the material on record and the contention of the Appellant carefully, in the assessment order, the AD has carried out a detailed analysis on why the deduction claimed u/s. 80-1A(4) is not allowable to the assessee/appellant. The crux of this claim lies in the fact as to whether work

carried out by the appellant falls within the definition of a "developer" or a "works contract". In this regard one has to critically examine the intention and wording of the Explanation below section 80-1A(13) inserted by the Finance Act 2007 subsequently substituted that the new Explanation by the Finance Act 2009 with retrospective effect from 01.04.2007. The said Explanation reads as under:

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

7.1 A bare reading of the above makes it crystal clear that the benefit under sub-section 4 is not available to any business, even though it may fall under the category of eligible business as defined therein, if the said undertaking or enterprise carries out work which is in the nature of "works contract". This situation shall remain unchanged even if such a contract is awarded by a Central or State Government and executed by an enterprises referred to in sub-section 1. Since "works contract" has not been defined in section 80-1A or elsewhere in the Act the ordinary dictionary meaning of such a word, or the legal interpretation given to the same has to be considered while arriving at a decision as to whether the Appellant falls under the category of a "developer" or a "works contract I find that the AO in para 5.9 to 5.11 of his assessment order has given a clear factual analysis along with support of multiple case laws to arrive at a understanding of what constitutes a "works contract" In a number of judgments the Apex Court has had occasion to discuss this including the following cases:

a) HAL Ltd. vs. State of Orissa, reported in 55 STC 327

b) State of Tamilnadu vs. Anandam Vishwanathan [1989] reported in 1 SCC 613 (SC)

c) State of Gujarat vs. Variety Body Builders AIR reported in 1976 SC 2108

d) State of Andhra Pradesh vs. Kone Elevators (India) Ltd., reported in 3 SCC 389 [2005]

7.2 I find that the Assessing Officer has very elaborately and cogently discussed the various issues to reach a conclusion that the projects undertaken by the Appellant do not satisfy the criteria that would define a "developer". On the other hand, the nature of these projects is such that they appear to be clearly assigned to the Appellant as a works contract.

7.3 For instance, it is the say of the AO that none of the projects were conceived by the assessee itself. This fact could not be rebutted by the appellant in any of the submission made before me as it is seen that the work given to them is through a tendering process in which the exact specification and nature of the work to be carried out is already defined. Another argument which can be given against the

Appellant's claim as developer is that the ownership of the project sites does not transfer to the appellant and remains with the Central State Body.

7.4 It is very clear on going through the contracts awarded to the appellant that the exact design and specification have been given to the appellant which need to be strictly followed. Any change in such design can be done only with the approval of the Contracting Authority. Along with this, the exact nature of machinery, equipment and material which is to be used for completing such work has been specified in the agreement. This point, in my opinion, clearly indicates that authority granting the contract to the appellant have retained all the authority and decision making regarding the design and development of the Infrastructure projects and it is only an execution of such projects which is handed over to the appellant company.

7.5 Another important point is to determine whether the appellant company carries any financial risk in the said projects. With regard to this, the Assessing Officer has clearly brought out that during the financial year 2014-15, the appellant has received Mobilization/material Advance to the tune of Rs.3,04,61,293/- and Rs. 6,17,28,807/-. Apart from this, the appellant has also regularly submitted RA Bills and was getting payments against the same from the Government Authorities. It is therefore clear that the appellant company itself does not bear any financial risk while executing these projects. Though this fact was clearly stated in the Remand Report, before me the appellant has not put forth any argument to contradict the same. It is stated that the appellant utilized its own funds employees and expertise while carrying out the work, but this statement is not borne out by any evidences. Therefore, it is clear that no risk is taken by the appellant in executing these contracts

7.6 In view of the above discussion, I am of the considered opinion that the nature of work carried out by the appellant company is such that it cannot be defined as development of infrastructure facility. On the other hand the facts as elaborated by the Assessing Officer lead to the conclusion that the Appellant company is merely carrying out work execution of "works contract" with little or no risk to itself and as per detailed directions and specifications provided to it The view of the AO in this regard is therefore correct and confirmed.

7.7 The appellant, further, referred to a decision of the Hon'ble Madras High Court in the case of Chettinad Lignite Transport Services (P) Ltd. 207 taxmann.com 12 (Madras) wherein it was held that proviso to section 80IA(4) does not require that there should be a direct agreement between the assessee and the specified authority for availing the benefits u/s. 80IA of the Act. Reliance was also placed on the decision of the Hon'ble Gujarat High Court in the case of Ranjit Project Pvt. Ltd. 94 taxmann.com 320 (Gujrat) contending that in the said decision the Hon'ble High Court held that where the assessee had entered into an agreement for road development project with Gujarat State Road Development Corporation (GSRDC), in view of fact that GSRDC was a Government Agency as defined u/s. 2(e) of Gujarat Infra Structure Development Act, 1999 and, moreover, it was totally controlled by State Government, its claim for deduction u/s. 80IA could not be rejected on the ground that the assessee had failed to fulfill the

conditions of clause (b) of section 80IA (4) of the Act. It was further submitted that the SLP filed by the Department in the said case before the Hon'ble Supreme Court was dismissed. However, I find that the said SLP of the Revenue was dismissed by the Apex Court on grounds of delay in filing appeal and there was no discussion on the merits of the case. In his submission, the appellant has further relied on multiple case laws in support of their claim that the work carried out by them constitutes development of infrastructure facilities. However on going through these case laws, it is seen that most of them can be distinguished from the current case on the basis of facts. For instance in the case of BVG Enterprises and of M/s ABG Heavy Industries vs. CIT (Bom) it is seen that the issue was related to infrastructure facilities on BOLT basis (built operate and transfer basis), in the case of GVPR Engineers Vs. ACIT(ITAT Hyd.) the issue related to the ownership of the company carrying out the projects. Hence, the said case laws cannot be said to come to the assistance of the Appellant.

7.8 I find the submission and contention of the appellant are not acceptable for the reasons that the AO had demonstrated that the appellant had not carried out the Infrastructure facilities work as a developer for the works of the Government or the various statutory bodies as detailed above but had carried out the works, as a contractor. In respect of the contract of Manisha Construction a private concern from which profit was derived at Rs. 27,10,960/- and on which deduction was claimed u/s. 80IA(4) the same was given as a sub-contract to the Appellant. The AO also had stated that the construction of Talathi Office building cum quarters in Daund Taluka, Dist. Pune and the retaining wall from Khadakwasla Dam to Naded Phata in which deduction u/s. 80IA(4) was claimed, could not be construed as the projects falling under the definition of infrastructure facility. Hence, the deduction claimed u/s. 80IA(4) of the I. T. Act in respect of these contracts is very clearly not allowed. Further, I find that the appellant has given a number of Government construction receipts furnishing copies of work orders during appellate proceedings. Such work orders, ipso-facto, do not prove that the appellant had fulfilled the conditions as laid down in section 80IA(4) of the Act for the detailed reasons given by the AOs in different assessment years for AY 2014-15 to 2015-16 to which I am inclined to agree. Fourthly, the appellant has cited a number of decisions in his written submissions as discussed above, which, I find are not applicable on the facts of the case of the appellant. In view of above, I hold that on merit of the case when considered, the appellant is not eligible to such deduction u/s. 80IA(4) of the Act. However, after examining and analyzing the facts of the case, it is decided that the appellant is not entitled to the deduction u/s. 80IA(4) of the Act of Rs. 4,87,32,327/- as claimed it in the grounds of appeal for the facts as detailed above. The claim of the Appellant made during Appellate proceedings is therefore, disallowed and these grounds of the Appeal are dismissed.”

10. Aggrieved with such order of CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:

The following grounds are taken without prejudice to each other -

On facts and in law

1. *The learned CIT(A) has erred in confirming the disallowance of deduction u/s 80IA(4) made by the AO amounting to Rs.7,21,32,410/- without appreciating the contention of the appellant that:
 - a. *The appellant company qualifies for the deduction u/s 80IA(4) of the Act.*
 - b. *The various infrastructure facilities/projects awarded to appellant company cannot be described as mere works contract but the appellant's role is that of developer.**
2. *The learned CIT(A) has further erred in confirming the disallowance of deduction u/s 80IA(4) made by the AO amounting to Rs.18,63,082/- in respect of three projects namely Bus station, Primary health clinic sub-centre and retaining wall from Khadakwasla Dam to Nanded Phata without appreciating the contention of the appellant that:
 - a. *Bus station will also have to be regarded as an infrastructure facility since it is an integral part of the highway system.*
 - b. *The retaining wall from Khadakwasla Dam to Nanded Phata is a part of both water supply project and an irrigation project and thus it is eligible for deduction as per clause (c) of the explanation to sub section (4) of section 80IA of the Act.*
 - c. *Primary health clinic sub-center is also an infrastructural facility eligible for deduction u/s 80IA(4).**
3. *The learned CIT(A) has further erred in confirming the disallowance of deduction u/s 80IA(4) made by the AO amounting to Rs.40,91,541/- in respect of five third party projects by holding that appellant violated the provisions of section 80IA(4)(b)(i) of the Act.*
4. *The learned CIT(A) while confirming the disallowance of deduction u/s 80IA(4) made by the AO has erred in holding that appellant company failed to prove that it had fulfilled the conditions as laid down in section 80IA(4) of the Act without giving any valid and logical reason as well as without bringing on record any corroborative evidence in support of the same.*

The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal.

11. The Ld. Counsel for the assessee strongly challenged the order of the CIT(A) in confirming the disallowance u/s 80IA(4) of the Act made by the Assessing Officer. He submitted that the provisions of section 80IA(4) of the Act were introduced to encourage the private sector to participate in infrastructure development in the country which is very necessary for the economic development of the country. Referring to para 5.1 of the assessment order, the Ld. Counsel drew the attention of the Bench, according to which the assessee had undertaken the various projects, the customers of which are as under:

- a) *Public Works Department, Maharashtra Govt. Maharashtra*
- b) *Pimpri Chinchwad Municipal Corporation, Pimpri*
- c) *Pune Municipal Corporation, Pune.*
- d) *Private Sector Aamby City Developers Ltd. Vilage Ambavane.*
- e) *Irrigation Department Maharashtra Govt. Maharashtra.*

12. He submitted that the deduction u/s 80IA(4) is available to any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining the specified infrastructure facilities and subject to the specified conditions. He submitted that the assessee in the instant case has satisfied all the specified conditions in as much as it is a limited company and had entered into contracts with government departments for development of infrastructure development. He submitted that the assessee is not a works contractor as alleged by the Assessing Officer. He submitted that the Assessing

Officer while doing so has relied upon certain decisions which are not at all applicable to the facts of the present case.

13. So far as the decision in the case of HAL Ltd. vs. State of Orissa (supra) is concerned, he submitted that the same is not applicable to the facts of the present case since, in that case, the Hon'ble Supreme Court was concerned in respect of a transaction to decide whether it was a contract for sale or a contract for work and labour.

14. Similarly, in the case of State of Tamilnadu vs. Anandam Vishwanathan (supra), he submitted that the assessee in this case had entered into contracts with universities and other educational institutions in the country for printing question papers for the said educational institutions. The controversy involved in this case was whether it was a case of sale or works contract. Therefore, this decision was also not applicable to the facts of the present case.

15. So far as the case of State of Gujarat vs. Variety Body Builders (supra) is concerned, he submitted that in that case, the Court was concerned with the provisions of the Bombay Sales Tax Act regarding three contracts for construction of coaches on the under-frames supplied by the Railway Administration on the issue of whether the contracts were contracts for sale of goods or works contracts.

16. Similarly in the case of State of Andhra Pradesh vs. M/s. Kone Elevators (India) Ltd. (supra), the question involved in this civil appeal filed by the department was whether contracts entered into and executed by the assessee were contracts for sale and not works contract. Further, in the case of CWT vs. Officer in charge (supra) the Hon'ble Apex Court was concerned with the question of fact as to whether the lands under consideration were "agricultural" or not for the purposes of wealth u/s 2(e)(i) of the Wealth Tax Act, 1957. He accordingly submitted that all these decisions relied on by the lower authorities are distinguishable and not applicable to the facts of the present case.

17. So far as the case of the Assessing Officer that in the preceding year, such disallowance was made is concerned, he submitted that the same was disallowed on the ground that the assessee had not claimed the same in the return of income and the same was claimed only during assessment proceedings. There was no discussion on merit. However, for the impugned assessment year, the assessee has claimed in the return of income. Therefore, the assessee is entitled to deduction u/s 80IA(4).

18. He submitted that the Assessing Officer in the instant case has proceeded on misconceived issue. The issue here is not that of whether the transaction is a contract of sale or contract of work. The issue here is whether the assessee has developed infrastructure facility as a developer or as a works contractor. He submitted that even though the term 'works contract' has not been defined under

the Act but in the Explanatory memorandum while introducing the amendment, the government has explained the connotation of the term 'works contract'. Referring to the CBDT Circular No.3/2008, dated 12.03.2008, he submitted that the department has issued a circular clarifying as to who is a works contractor for the purpose of section 80IA(4). Referring to the following decisions, he submitted that the issue stands decided in favour of the assessee:

- i) *CIT vs. ABG Heavy Industries Ltd. (2010) 322 ITR 323*
- ii) *B.T. Patil & Sons Belgaum Constructions (P.) Ltd. vs. ACIT (2013) 34 taxmann.com 97 (Pune-Trib.)*
- iii) *M/s. Adhunik Infrastructure Pvt. Ltd. vs. JCIT*
- iv) *Akash Infra Projects (P.) Ltd. vs. ITO (2022) 141 taxmann.com 516 (Ahmedabad – Trib.)*
- v) *ACIT vs. Ho Hup Simplex JV (2018) 92 taxmann.com 106 (Kolkata – Trib.)*
- vi) *ACIT vs. Pratibha Industries Ltd. (2012) 28 taxmann.com 246 (Mumbai-Trib.)*
- vii) *Patel Engineering vs. DCIT (2004) 84 TTJ (Mumbai) 646*

19. Referring to the above decisions, he submitted that in a development contract, responsibility is fully assigned to the developer to do all acts for the execution and completion of the work right from designing the project till handing over of the project to the government. As such, the agreement is not for a specific work, it is for development of facility as a whole. He submitted that 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 exercises complete realm over the land or the project. However, in some cases 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 a works contractor. He submitted that the assessee in the instant case has invested its own funds, given bank guarantee, engaged requisite qualified / skilled/semi-skilled staff and the labourers and brought plant & machineries to be utilized in the project, has adhered to the timelines for completing the project and the tasks comprised therein. He has also undertaken to bear the consequences for delay in completion of the project and the tasks comprised therein, there is defect liability period and there is retention money / security deposit for due compliances including of quality works. However, in the case of a works contractor, an assessee merely executes the civil construction work or any other work, does not make any investment and does not take risks relating to the funds. He does not take risks and responsibilities like that of a developer. He merely carries out the work as has been instructed to him by the contractee. Therefore, the assessee in the instant case is entitled to the benefit of deduction u/s 80IA(4) of the Act. However, the Assessing Officer in the instant case has neither gone through the individual contracts nor referred to the Circular issued by the CBDT with reference to section 80IA(4), which is binding on him. Therefore, the order of the CIT(A) upholding the order of the Assessing Officer denying the claim of deduction u/s 80IA(4) of the Act is not in accordance with law.

20. The Ld. DR on the other hand heavily relied on the orders of the Assessing Officer and the CIT(A). He submitted that the Ld. CIT(A) has given justifiable

reasons while upholding the action of the Assessing Officer in denying the claim of deduction u/s 80IA(4) of the Act. Referring to the decision of the Hyderabad Bench of the Tribunal in the case of M/s. NEC NCC MAYTAS-JV vs. DCIT vide ITA No.496/Hyd/2018 and batch of other appeals, order dated 12.05.2021, he submitted that an identical issue has been decided by the Hyderabad Bench of the Tribunal and the deduction claimed u/s 80IA(4) has been denied. Referring to the decision of the Ahmedabad Bench of the Tribunal in the case of M.S. Khurana Engineering Ltd. (2024) 162 taxmann.com 7 (Ahmedabad – Trib.), he drew the attention of the Bench to the following head note:

“Where Commissioner (Appeals) had made general and bald observations while granting deduction claimed by assessee under section 80IA without analyzing details of all specific work executed by assessee in which assessee had claimed that it acted as developer and claimed to be eligible for deduction under section 80IA, matter was to be restored back to Commissioner (Appeals) for fresh adjudication.”

21. Referring to various decisions which were relied on by the Assessing Officer as well as the CIT(A), he submitted that the assessee in the instant case is not entitled to claim the benefit of deduction u/s 80IA(4) of the Act since the assessee is merely a works contractor and not a developer. He accordingly submitted that the order of the CIT(A) be upheld and the grounds raised by the assessee should be dismissed.

22. We have heard the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the paper book filed by both the sides. We have also considered the various decisions cited before us. We find

the Assessing Officer in the instant case denied the claim of deduction u/s 80IA(4) of the Act on the ground that the assessee has claimed deduction u/s 80IA(4) of the Act in respect of 44 infrastructure facilities developed by it, out of which some infrastructure facilities do not fall within the definition of 'infrastructure facility' such as reconstruction of bus station with sub work at Karad in Satara Division, Clinic for Primary Health sub center at Gojubavi, Tal – Baramati, Pune and retaining wall from Khadakwasla Dam to NadedPhata. Similarly, in some cases the assessee has undertaken the projects which were received as sub-contract basis from independent private parties. So far as the remaining projects are concerned, the Assessing Officer held that the assessee is merely a works contractor and not a developer. The reasons of the Assessing Officer for the denial of such 80IA(4) deduction as claimed by the assessee have already been reproduced in the preceding paragraphs. We find the Ld. CIT(A) also upheld the action of the Assessing Officer in treating the assessee as merely a works contractor and not a developer and therefore, not entitled to the claim of deduction u/s 80IA(4) of the Act, the reasons of which have already been reproduced in the preceding paragraphs. It is the submission of the Ld. Counsel for the assessee that the assessee is not a works contractor and is a developer who undertakes the project, develops and construct the project on its own risk and responsibility like that of a developer. According to the Ld. Counsel for the assessee, the assessee has invested its own funds, has given bank guarantee, has engaged requisite qualified / skilled / semi-skilled staff and the labourers and brought plant & machineries to be utilized in the project. He has also adhered to the timelines for completing the

project and tasks comprised therein, has also undertaken to bear the consequences for delay in completion of the project and tasks comprised therein. Further, there is defect liability period and there is retention money / security deposit for due compliances including of quality works. It is also his submission that the various decisions relied on by the Assessing Officer as well as the CIT(A) are distinguishable and not applicable to the facts of the present case. Further, the Hon'ble jurisdictional High Court has also taken a view in favour of the assessee in the case of CIT vs. ABG Heavy Industries Ltd. (supra).

23. We find the Assessing Officer in the instant case has not gone through the terms and conditions of each and every project undertaken by the assessee during the year. He has not discussed anything about the clarification given by the CBDT vide Circular No.3/2008, dated 12.03.2008 which is binding on the Revenue. We find the Hon'ble Bombay High Court in the case of CIT vs. ABG Heavy Industries Ltd. (supra) while discussing an identical issue as to whether the assessee is a developer or merely a works contractor has observed as under:

“16. Now, it is in the background of the evolution of the law that the controversy in the present case would have to be considered. The contention of the Revenue is that the assessee was not engaged in developing the facility at all and that under the Contract that was entered into between the assessee and JNPT all that the assessee was required to carry out was to supply and install cranes at the Port. The submission cannot be accepted. The expression 'development' has not been artificially defined for the purposes of Section 80IA of the Act and must, therefore, receive its ordinary and natural meaning. Under the terms of the contract between the assessee and JNPT, the assessee undertook an obligation for supplying, installing, testing, commissioning and maintenance of Container Handling equipment namely, the cranes in question. JNPT has a dedicated Container Handling Terminal. The case of the assessee is that the only activity at the Terminal consists of the loading, unloading and storage of containers. Under the

contract, the assessee was obligated to provide the equipment in question in an operable condition. The contract envisaged two different options; the first being one under which the assessee would carry out operation and maintenance of the equipment while the second consisted of an option to JNPT to carry out operations. The terms of the contract however made it clear that it was the obligation of the assessee to make the equipment available for operation for a stipulated minimum number of days during the year and made the assessee liable to liquidated damages in the event that this was not possible. JNPT by its letter dated 27th March 2000 clarified that the difference between the two options that had been given to the assessee consisted of a payment of Rs.40,00,000/- which was to be retained by JNPT in the event that the operators were provided by the Port for operating the cranes. At the same time, JNPT clarified that it was the responsibility of the assessee to guarantee the availability of the equipment; to ensure that the equipment is in operation on a round the clock basis; to provide for repairs and to ensure the operation and availability of the equipment in accordance with the terms of the contract.

17. The obligations which have been assumed by the assessee under the terms of the contract are obligations involving the development of an infrastructure facility. Section 80IA of the Act essentially contemplated a deduction in a situation where an enterprise carried on the business of developing, maintaining and operating an infrastructure facility. A Port was defined to be included within the purview of the expression infrastructure facility. The obligations which the assessee assumed under the terms of the contract were not merely for supply and installation of the cranes, but involved a continuous obligation right from the supply of the cranes to the installation, testing, commissioning, operation and maintenance of the cranes for a term of ten years after which the cranes were to vest in JNPT free of cost. An assessee did not have to develop the entire port in order to qualify for a deduction under Section 80IA. Parliament did not legislate a condition impossible of compliance. A port is defined to be an infrastructure facility and the circular of the Board clarified that a structure for loading, unloading, storage etc. at a port would qualify for deduction under Section 80IA. The condition of a certificate from the Port Authority was fulfilled and JNPT certified that the facility provided by the assessee was an integral part of the port. The assessee developed the facility on a BOLT basis under the contract with JNPT. On the fulfillment of the lease of ten years, there was a vesting in the JNPT free of cost.

18. Before the Tribunal, material was placed on record by the assessee to indicate the nature and extent of the activities undertaken by it in ensuring that the equipment which was supplied was fully operational. The assessee had in its employment diverse employees, including a Senior Manager, a Manager, Assistant Manager and five Deputy Managers (Operations) in addition to Assistant Engineers, Technical Officers and Operators-cum-Technicians. On considering the material on record including letters of the Port Authority, the Tribunal came to the conclusion that as a matter of fact the assessee was also engaged in activities of operating the equipment. The finding that the assessee had developed the infrastructure facility and that it was engaged in operating the cranes is, therefore, based on the material on record. The fact that the assessee was also

maintaining the cranes is not disputed. There is also no merit in the submission that what the assessee constructed was not a structure for loading, unloading, storage etc. at the port. Plainly, the assessee did so.

19. On behalf of the Revenue it was sought to be urged that at the material time for A.Ys 1997-98 and 1998-99, it was necessary for the assessee to cumulatively fulfill the requirement of developing, operating and maintaining the infrastructure facility. It was urged that the assessee, even if it be held to have developed the facility, cannot be regarded as operating the facility. For the reasons already indicated, it is not possible to accept the submission. As we have already noted the assessee had as a matter of fact developed the facility. The Tribunal has also arrived at a finding of fact that the assessee was under the contract required to operate the facility. Merely because the operators of the cranes were provided by the Port Authority did not absolve the assessee of the overall responsibility of operating the cranes, under the terms of the contract.

20. Counsel appearing on behalf of the assessee urged that the requirement that the assessee ought to have developed, maintained and operated the facility is not a condition which is to be read in the cumulative. The learned counsel submitted that the scheme under Section 80IA of the Act was to provide a concession in order to attract private investment in infrastructure. It is in this background that the CBDT issued a clarificatory circular on 14th August 1995 stating that infrastructure facilities developed on a BOT, BOOT or other similar basis were within the contemplation of the provision. Reliance was placed on the circulars dated 23rd June 2000 and 16th December 2005 as being indicative of the fact that the requirement of developing, maintaining and operating an infrastructure facility were never regarded to be cumulative. The learned counsel urged that it was in line with the Board's understanding of the provisions of Section 80IA of the Act that the Parliament eventually stepped in by amending the provisions of Section 80IA of the Act so as to clarify that in order to avail of a deduction, the assessee could (i) develop; or (ii) operate and maintain; or (iii) develop, operate and maintain the facility.

21. While dealing with this submission, we note that neither in the memo of appeal nor in the submissions before us has any effort been made to suggest on the part of the Revenue that the circulars of the Board are not binding on the Revenue. Nor for that matter was it the submission of the Revenue that the circulars issued by the Board from time to time were in violation of or contrary to legal provisions. Plainly, right from 1996 CBDT was seized with the question, as to whether infrastructure facilities developed under a BOLT project would qualify for exemption under Section 80IA of the Act. The first circular in that regard that was issued on 23rd January 1996 specifically dealt with whether Section 80IA (4A) of the Act would be applicable to a BOLT Scheme involving an infrastructure facility for the Indian Railways. The circular clarified that an infrastructure facility set up on a BOLT basis for Railways would qualify for a deduction. That was followed by the two circulars of the Board dated 23rd June 2000 and 16th December 2005. The first of those circulars recognizes that structures for storage, loading and unloading etc. at a port built under a BOT and BOLT Scheme would qualify for a deduction. Now, there is no question of an enterprise operating a facility in a

*BOLT Scheme because such a Scheme contemplates that the enterprise would build, own, lease and eventually transfer the facility to the Authority for whom the facility is constructed. The subsequent circular dated 16th December 2005 once again clarified the position of CBDT that structures which have been built inter alia under a BOLT Scheme upto A.Y. 2001-2002 would qualify for a deduction under Section 80IA of the Act. In fact from A.Y. 2002-2003, the process was further liberalized, consistent with the basic purpose and object of granting the concession. In this background, particularly in the context of the objective sought to be achieved and in the absence of any challenge on the part of the Revenue on the applicability of the binding circulars of CBDT, we are of the view that the condition as regards development, operation and maintenance of an infrastructure facility was contemporaneously construed by the Authorities at all material times, to cover within its purview the development of an infrastructure facility under a Scheme by which an enterprise would build, own, lease and eventually transfer the facility. This was perhaps a practical realisation of the fact a developer may not possess the wherewithal, expertise or resources to operate a facility, once constructed. Parliament eventually stepped in to clarify that it was not invariably necessary for a developer to operate and maintain the facility. Parliament when it amended the law was obviously aware of the administrative practice resulting in the circulars of CBDT. The fact that in such a Scheme, an enterprise would not operate the facility itself was not regarded as being a statutory bar to the entitlement to a deduction under Section 80IA of the Act. The Court cannot be unmindful in the present case of the underlying objects and reasons for a grant of deduction to an enterprise engaged in the development of an infrastructure facility. The provision was intended to give an incentive to investment for infrastructural growth in the country. In *Bajaj Tempo V/s. Commissioner of Income Tax*,¹ the Supreme Court emphasized that a provision in a taxing statute granting incentives for promoting growth and development should be construed liberally. In the present case, the administrative circulars issued by the CBDT proceeded on that basis by adopting a liberal view of the scope and ambit of the provisions of Section 80IA of the Act. Parliamentary intervention endorsed the administrative practice. A provision inserted by the legislature to supply an obvious omission and to make a section workable has in certain circumstances been regarded as retrospective particularly when it was intended to remedy unintended consequences. *Allied Motors P. Limited 1 196 ITR 188 (S.C.) V/s. C.I.T. 2* and *C.I.T. V/s. Alom Extrusions Limited*.³ The Tribunal having only followed these provisions, we do not find any just reason to interfere in our appellate jurisdiction.*

22. Another submission which was urged on behalf of the Revenue is that under clause (iii) of sub-section (4A) of Section 80IA, one of the conditions imposed was that the enterprise must start operating and maintaining the infrastructure facility on or after 1st April 1995. The same requirement is embodied in sub-clause (c) of clause (i) of sub-section (4) of the amended provisions of Section 80IA. On this basis, it was urged that since the assessee was not operating and maintaining the facility, he did not fulfill the condition. This submission is fallacious both in fact and in law. As a matter of fact, the Tribunal has entered a finding that the assessee was operating the facility and this finding has been confirmed earlier in this judgment. That the assessee was maintaining the facility is not in dispute. The

facility was commenced after 1st April 1995. Therefore, the requirement was met in fact. Moreover, as a matter of law, what the condition essentially means is that the infrastructure facility should have been operational after 1st April 1995. After Section 80IA was amended by the Finance Act of 2001, the section applies to an enterprise carrying on the business of (i) developing; or (ii) operating and maintaining; or (iii) developing, operating and maintaining any infrastructure facility which fulfills certain conditions. Those conditions are : (i) Ownership of the enterprise by a Company registered in India or by a consortium; (ii) An agreement with the Central or State Government, local authority or statutory body; and (iii) 2 (1997) 224 ITR 677 (S.C.) 3 (2009) 319 ITR 306 (S.C.) The start of operation and maintenance of the infrastructure facility on or after 1st April 1995. The requirement that the operation and maintenance of the infrastructure facility should commence after 1st April 1995 has to be harmoniously construed with the main provision under which a deduction is available to an assessee who develops; or operates and maintains; or develops, operates and maintains an infrastructure facility. Unless both the provisions are harmoniously construed, the object and intent underlying the amendment of the provision by the Finance Act of 2001 would be defeated. A harmonious reading of the provision in its entirety would lead to the conclusion that the deduction is available to an enterprise which (i) develops; or (ii) operates and maintains; or (iii) develops, maintains and operates that infrastructure facility. However, the commencement of the operation and maintenance of the infrastructure facility should be after 1st April 1995. In the present case, the assessee clearly fulfilled this condition.

23. In the view which we have taken, all the assessment years in question to which this batch of appeals relates would be governed by the same principle. The subsequent amendment of Section 80IA (4A) of the Act to clarify that the provision would apply to an enterprise engaged in (i) developing; or (ii) operating and maintaining; or (iii) developing, operating and maintaining an infrastructure facility was reflective of a position which was always construed to hold the field. Before the amendment that was brought about by Parliament by Finance Act of 2001, we have already noted that the consistent line of circulars of the Board postulated the same position. The amendment made by Parliament to Section 80IA (4) of the Act set the matter beyond any controversy by stipulating that the three conditions for development, operation and maintenance were not intended to be cumulative in nature.

23. In view of the aforesaid observations, the question of law shall accordingly stand answered in favour of the assessee and against the Revenue.

24. For all these reasons, we are of the view that there is no merit in the appeals. The appeals shall accordingly stand dismissed.”

24. We find the Assessing Officer in the instant case without going through the terms and conditions of each of the project that has been undertaken by the

assessee during the year has come to the conclusion that the assessee is a works contractor and not a developer. Considering the totality of the facts of the case and in the interest of justice, we deem it proper to restore the issue to the file of the Assessing Officer with a direction to decide the issue afresh in light of the decision of the Hon'ble jurisdictional High Court in the case of CIT vs. ABG Heavy Industries Ltd. (supra), CBDT Circular No.3/2008, dated 12.03.2008 and the terms and conditions of each of the project that has been undertaken by the assessee to ascertain as to whether the assessee is a works contractor or a developer. Needless to say, the Assessing Officer shall give due opportunity of being heard to the assessee and decide the issue as per fact and law. We hold and direct accordingly. The grounds raised by the assessee are accordingly allowed for statistical purposes.

25. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 1st October, 2024.

Sd/-
(R. K. PANDA)
VICE PRESIDENT

Sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER

पुणे Pune; दिनांक Dated : 1st October, 2024
GCVSR

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent
3. The concerned Pr.CIT
4. DR, ITAT, 'B' Bench, Pune
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे
/ ITAT, Pune

S.No.	Details	Date	Initials	Designation
1	Draft dictated on	18.09.2024 & 30.09.2024		Sr. PS/PS
2	Draft placed before author	19.09.2024 & 01.10.2024		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement on			Sr. PS/PS
7	Date of uploading of Order			Sr. PS/PS
8	File sent to Bench Clerk			Sr. PS/PS
9	Date on which the file goes to the Head Clerk			
10	Date on which file goes to the A.R.			
11	Date of Dispatch of order			