आयकर अपील य अ धकरण, अहमदाबाद ायपीठ

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

आयकर अपील सं./**ITA No. 627/Rjt/2014**
नधारण वष/Asstt. Year: 2010-2011

M/s Patel Infrastructure Pvt. Ltd., PaTCON House, 2nd Floor, Kotecha Chowk, Rajkot. **PAN: AADCP2670D**	Vs.	D.C.I.T. Circle-1, Rajkot.

(Applicant)		**(Respondent)**

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

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 appeal has been filed by the Assessee against the order of the Ld. Commissioner of Income-Tax (Appeals)-1, Rajkot (in short "Ld. CIT(A)") dated 12/09/2014 arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 11/03/2013 relevant to Assessment Year (A.Y) 2010-11.

2. The assessee has raised the following grounds of appeal:

"1.0 The grounds of appeal mentioned hereunder are without prejudice to one another.
2.0 The learned Commissioner of Income-tax (Appeal)-1, 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"] off Rs. 1,95,05,203/- 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 the disallowance of claim of deduction u/s.80IA(4) may kindly be directed to be allowed as per claim.

3.0 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."

3. The only issue raised by the assessee is that Ld. CIT(A) erred in confirming the disallowance made by the AO for Rs. 1,95,05,203/- on account of the deduction claimed by the assessee u/s 80IA(4) of the Act.

4. Briefly stated facts are that the assessee is a private limited company and engaged in the business of civil construction. The assessee is a Government approved "AA" class contractor. As such, it carries out the projects like construction of hospitals, roads, bridges, etc. for Government, semi-government and other institutions, etc. The assessee in the year under consideration was awarded an infrastructure housing project by the Gujarat Industrial Development Corporation (GIDC), Ankleshwar. The assessee in respect of such contract claimed a deduction of Rs. 67,73,762/- under the section 80IA(4) of the Act.

5. However, the AO during the proceedings found that the impugned project carried out by the assessee was in the nature of the work contract. Accordingly, the AO was of the view that the assessee is not eligible for deduction u/s 80 IA(4) of the Act in pursuance to the provisions of explanation attached below section 80IA-(13) of the Act. Accordingly, the assessee was show-caused vide notice dated 24.01.2013 to justify the claim made for the deduction u/s 80IA(4) of the Act. The assessee in compliance to it vide letter dated 21.02.2013 submitted that the contract was awarded to it by GIDC for development of infrastructure housing project on a BOT basis. As per the contract with GIDC, the assessee was to undertake every kind of activity for the development of the housing project beginning right from the excavation of earth to constructing streetlight poles on the developed road.

5.1 The assessee has used its machines, funds, technical and administrative staff to carry out all the activities concerning the development of the infrastructure housing project. As such, the assessee claimed that it is not acting as a subcontractor. The work was given by GIDC on principal to principal basis and not on principal to agent basis.

5.2 However, the AO was of the view that GIDC is the developer of the project and as such the assessee is acting as a mere contractor for completing the work assigned to it by GIDC.

5.3 The AO also observed that even in the case of works contract the party has to use its machines, own funds, technical expertise, and other administrative staff and therefore the same cannot be the criteria to hold that the assessee is acting as the developer. Even the certificate issued by GIDC dated 31.12.2009 reflects that the assessee was acting as a works contractor.

5.4 In view of the above, the AO held that the assessee is ineligible for deduction u/s 80IA(4) in terms of the explanation attached after sub-section 13 of section 80IA of the Act. Because of the above, the AO disallowed the deduction claimed by the assessee for Rs. 1,95,05,203/- and added to the total income of the assessee.

6. Aggrieved, assessee preferred an appeal to the Ld. CIT(A). The assessee before the Ld. CIT(A) submitted that it has complied all the conditions provided under section 80-IA of the Act for claiming the deduction. It was responsible for all set of the activities involved in the project right from the excavation of earth to the construction of street light poles on the developed road. The GIDC handed over the possession of the construction site to the assessee which was under the complete control of it till the delivery/ completion of the infrastructure facility.

6.1 Even after handing over the constructed infrastructure facility to GIDC, the assessee was responsible for defects which may arise subsequently after the completion of the work.

6.2 The assessee further claimed that it had supplied the materials used in the construction of the project. It was also liable to compensate the losses which might have occurred during the processing of construction activity. The assessee in support of its claim relied on the judgment of Hon'ble Bombay High Court in the case of CIT vs. Glenmark Pharmaceuticals Ltd. reported in 324 ITR 199.

6.3 Merely the term contractor has been used in the agreement with the GIDC does not debar the assessee from being called a developer. The assessee in support of his claim relied on the order of ITAT in the case of Om Metals Infra-projects Ltd. vs. CIT reported in 26 DTR 359. As per the assessee, all the conditions as specified under section 80IA(4) of the Act have duly complied. Therefore it cannot be denied the benefit of deduction u/s 80IA(4) of the Act.

6.4 The assessee was liable to complete the infrastructure facility after assuming the risk involved in the process. As such, it was liable to reimburse the losses to be suffered by anyone including the Government and the people during the construction process.

6.5 The assessee also claimed to have used its funds, technical staff, and administrative personnel in the construction of infrastructure facilities.

6.6 However, the Ld. CIT(A) rejected the contentions of the assessee and confirmed the disallowance made by the AO by observing as under:

> *6.5 I have carefully considered the appellant's submission and arguments. In the present case, it is an undisputed fact that the appellant has been awarded works contract by the State Government. The appellant's contention that because of the investment made and the cumulative nature of work carried out by him, he is a developer and hence entitled for*

deduction u/s.80IA(4), has no force in light of the principles laid down by the Hon'ble Gujarat High Court in the case of Katira Construction (supra). From careful reading of the decision of the Hon'ble High Court it would be difficult to assume that the Hon'ble High Court has not taken into consideration the difference between a works contract and the developer. The Hon'ble High Court has given a categorical finding that the explanation below s.80IA(13) was amended to clarify that nothing contained in this section shall apply in relation to/a business which is in the nature of a works contract. In para-27, the Hon'ble -"""High Court has categorically stated that there is an intrinsic difference between developing and infrastructure facility and executing the works contract. It was further stated in para-35 that the explanatory memorandum recorded that profit linked deductions were prone to considerable misuse and hence to prevent such use of tax holiday u/s.80IA it was proposed to amend the explanation to clarify that nothing contained in this section shall apply in relation to a business which is in the nature of works contract executed by the undertaking. In view of the findings of the Hon'ble Jurisdictional High Court, it is held that the appellant is not entitled for deduction u/s.80IA(4). It is also necessary to mention that this decision was subsequent to the decision of the Hon'ble IT AT, Rajkot Bench or the decision of the CIT(A)-I, Rajkot relied upon by the appellant. If this decision was prior to the above decisions perhaps the outcome could have been different. It is therefore held that the position stands clarified by the decision of the Hon'ble High Court and there is no ambiguity about it. The main contention of the appellant that it had made a lot of investments by way of men, machinery and money making it a developer, also in my opinion, does not hold fort. A person executing a works contract would also have to invest in men, material and money as done by the developer. It would be difficult to assume that the Hon'ble High Court has not taken any cognizance of this particular factor. However, in its own wisdom, the Hon'ble High Court has not considered it necessary to make a differentiation between a developer and a works contractor. It is categorically held that any person executing a works contract will not be eligible for deduction u/s.80IA(4). This impliedly means that it is not necessary to dwell on the question as to whether a person executing a works contract can still be considered as a developer or not, thus being eligible for deduction u/s.80IA(4). In light of this above decision of the Jurisdictional High Court, it is, held that the appellant is not eligible for deduction u/s.80IA(4) as it was executing a works contract. This ground of appeal is thus dismissed.

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

7. Ld. AR before us filed a paper book running from pages 1 to 135 and submitted that the assessee had fulfilled all the conditions as specified u/s 80IA(4)

of the Act. Therefore the assessee cannot be denied the benefit of deduction as specified u/s 80IA(4) of the Act.

8. On the other hand, the Ld. DR before us submitted that the assessee is acting in pursuance to a work contract and accordingly it is not eligible for deduction u/s 80IA(4) of the Act. The Ld. DR also filed the written submission which is reproduced as under:

> *1. In the above appeal 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]*
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> *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 Guiarat (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 lose 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 con tractor 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 t 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 us conclusive although such matters may be taken into consideration in determining i 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.(l) 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 he 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 appellant 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.(l) 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 wofk 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 connec- tion, 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 execu- tion 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 confi- dence 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 liabil- ity to sales-tax would arise in respect thereof. The High Court was, therefore, fight 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 drive 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).

9. The Ld. DR vehemently supported the order of the authorities below.

10. 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 by holding that the assessee is acting as a work contractor in the projects of housing development as per explanation 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). "*

10.1 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.

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

10.3 To summarize, the developer acts as a principal whereas the contractor acts as an agent in performing the functions as required by the developer. The developers, in true sense, are the persons who are carrying out the business of developing or operating and maintaining or developing, operating and maintaining the infrastructure facility the infrastructure facility whereas the contractors are those persons who merely execute part of these functions on behalf of developer and do not own any risks and responsibilities of the work. In such cases, the contractors may not be eligible for the deduction under section 80-IA of the Act, as they are not developing any infrastructure facility but only providing assistance to the actual developer.

10.4 In view of the above, we note that it is possible to ascertain whether a civil construction work is assigned on development basis or contract basis only on the basis of the terms and conditions of the agreement. Only on the basis of the terms and conditions it can be ascertained about the nature of the contract assigned that whether it is a "work contract" or a "development contract. *In the backdrop of the*

above discussion, we proceed to analyse the facts of the present case to find out whether the assessee is acting as a developer or contractor.

10.5 At this juncture, we find it important to refer the letter issued by GIDC for awarding the contract to the assessee which is placed on page 10 of the paper book and reproduced as under:

> *"By R.P.A.D.*
> *To,*
> *M/s. Patel Infrastructure Pvt. Ltd.,*
> *Corporate office*
> *Patcon House, 80 Ft Road,*
> *Near Indira Gandhi Statue*
> *Anand – 388001*
>
> ***Sub: Tender for the work of providing infrastructure in Housing Phase –IV at GIDC Ankleshwar***
>
> *Dear Sir,*
>
> *Your tender for the above mentioned work at **Rs.40,38,38,599.40 i.e. 3.252% Above against** the estimated cost at Rs.39,11,16,000.00 is approved by competent Authority subject to the following conditions:*
>
> *A) No extension will be granted on account of non-availability of materials required for the work and the contractor shall have to bring the total quantum of material on site of works for timely completion of the works as stipulated in the tender.*
>
> *B) You are, therefore, requested to pay 2.5% Security Deposit of **Rs.97,77,900.00** & 5% Performance Bond amounting to Rs.1,95,55,800.00 either in form of FDR or in form of NSS or Narmada Bond authority duly pledged in the name of Executive Engineer, GIDC, Ankleshwar and attend this office for executing tender documents within 10 (Ten) days otherwise the EMD paid by you, will be forfeited by GIDC.*
>
> *C) Please affix the stamp (Adhesive stamp) of **Rs.100/= (Hundred)** on enclosed Agreement form and submit with S.D. Amount.*
>
> *D) You are also requested to bring the partnership deed and power of attorney if any at the time of completing the tender documents."*

10.6 From the above, it is clear that the assessee was responsible for providing the materials required in the execution of the works contract. Thus there remains no doubt that the contract was not limited to the supply of labor.

10.7 The assessee was also liable to provide a security deposit as a measure of providing satisfactory completion of the work. Thus the assessee has furnished 2.5% as security deposit and 5% performance bond amounting to ₹ 97,77,900.00

and 1,95,55,800.00 respectively which implies that the has made initial investment in the project by way of furnishing security and performance guarantee.

10.8 Besides the above, we note certain clauses from the tender document which are reproduced as under:

1. *As per clause 1 the assessee was liable to deposit the security with GIDC.*
2. *As per clause 2 the assessee was liable to pay liquidated damages on account of delay in the execution of the work.*
3. *As per clause 3 the GIDC shall forfeit the security deposit, shall have the lien on all the plants and machinery including material in the event of any default by the assessee.*
4. *As per clause 8 the payment to the assessee shall be released only upon the completion of the work which will be approved by the engineer in charge.*
5. *As per clause 17A and 17B, in case of any defect in the work, the assessee is liable to rectify the same. The assessee also agreed to provide free maintenance guarantee for the period as agreed.*

10.9 There were many more clauses in the tender document which is placed on pages 24 to 119 of the paper book.

10.10 On perusal of the financial statement, we note that the assessee has claimed material expenses in the year under consideration. The copy of the financial statements is placed on record.

10.11 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.

10.12 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.

10.13 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 :

"83

*** ** ***

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."

10.14 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.

10.15 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) of the Act. 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.

10.16 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 versus CIT reported in 196 ITR 188 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).*

10.17 It is also pertinent to note that the Hon'ble Gujarat High Court in the case of Katira Construction Ltd. Vs. Union Bank of India reported in 31 taxmann.com 250 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.

10.18 The case laws quoted by the ld. 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.

10.19 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.

11. In the result, the appeal of the assessee is **allowed.**

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

-Sd-	**-Sd-**
(Ms MADHUMITA ROY)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 30/07/2020

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