IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA

[Before Shri M. Balaganesh, AM & Shri S. S. Viswanethra Ravi, JM]

I.T(SS).A No. 58 & 60/Kol/2012
Assessment Years: 2004-05 & 2005-06

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I.T(SS).A No. 59,61 & 62/Kol/2012
Assessment Years: 2006-07, 2007-08 & 2008-09

Tantia Constructions Limited (PAN:AABCT0811E) (Appellant)	Vs.	Deputy Commissioner of Income-tax, Central Circle-XIII, Kolkata. (Respondent)

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I.T.A No. 69 to 71/Kol/2013
Assessment Years: 2006-07 to 2008-09

Deputy Commissioner of Income-tax, Central Circle-XIII, Kolkata. (Appellant)	Vs.	Tantia Constructions Limited (Respondent)

Date of hearing: 23.08.2016
Date of pronouncement: 23.09.2016

For the Assessee: Shri Manish Tiwari, AR
For the Revenue : Shri G. Mallikarjuna, CIT, DR

ORDER

Per Shri M. Balaganesh, AM:

All these appeals of assessee are arising out of separate orders of CIT(A), Central-II, Kolkata vide appeal No. 129,131,130/CC-XIII/CIT(A)C-II/11-12 dated 08.10.2012 and 132&133/CC-XIII/CIT(A)C-II/11-12 dated 09.10.2012 and 10.10.2012. All these appeals of revenue are arising out of separate orders of CIT(A), Central0II, Kolkata vide appeal Nos. 131, 132 & 133/CC-XIII/CIT(A)C-II/11-12 dated 08.10.2012, 09.10.2012 and 10.10.2012. Assessments were framed by DCIT, C.C-XIII, Kolkata u/s. 153A/143(3) of the Income tax Act, 1961 (hereinafter referred to as the "Act") for AYs 2004-05 to 2008-09 vide his separate orders dated 16.08.2011. Both the appeals are taken up together for the sake of convenience

Assessee Appeals

2. The only issue to be decided in the appeals of the assessee is as to whether the retention money credited to profit and loss account is to be brought to tax on accrual basis or on receipt basis in the facts and circumstances of the case.

3. The brief facts of this issue is that the assessee is a public limited company engaged in the business of civil construction through the process of tender. The major projects where construction activities were carried on during the years under appeal were awarded by the following authorities :-

(a) Hooghly River Bridge Commissioner
(b) P.W.D., Mizoram
(c) P.W.D., Patna
(d) East Central Railway
(e) Central Public Works Deptt.

3.1. The facts for the Asst Year 2004-05 are stated herein and taken up for adjudication of the disputed issues and the same would apply with equal force for other asst years also in view of identical facts involved except variance in figures.

3.2. Consequent upon search and seizure operation u/s 132 of the Act conducted on 17.3.2010 at the office premises of the assessee company and its group concerns as well as survey operations at various places of the company, a notice u/s 153A of the Act dated 12.1.2011 was served on the assessee. The assessee filed its return in response to notice u/s 153A of the Act on 11.2.2011 declaring loss of Rs. 74,72,430/- and determining the taxable income u/s 115JB of the Act as declared earlier. In the return filed originally u/s 139(1) of the Act, the assessee declared income from construction business based on gross contract receivable from Principals / Clients as per bills raised on them. Since the Principals / Clients retain a part of such bill amount pending verification regarding satisfactory performance which normally takes time, the assessability of such retention money became the subject matter of

dispute. The assessee in its original return u/s 139(1) had offered the same on accrual basis on the basis of bills raised on the Principals / Clients. But in the return filed in response to notice u/s 153A of the Act, the assessee chose to offer the same on receipt basis (i.e. retention money offered in the year of receipt) by placing reliance on the following decisions :-

CIT vs Ignifluid Boilers (I) Ltd reported in (2006) 283 ITR 295 (Mad)
CIT vs P & C Constructions (P) Ltd reported in (2009) 2 taxmann.com 47 (Mad)
CIT vs Simplex Concrete Piles (India) Pvt Ltd reported in (1989) 179 ITR 8 (Cal)

3.3. The assessee tried to explain that since section 153A of the Act authorizes the ld AO to assess or reassess the total income in respect of each asst year falling within such six years, the said assessments have to be framed as per law and only such receipt which can be legally includible can be brought to taxation. Since the retention money is taxable only in the year of release by respective authorities as per judicial decisions referred earlier, the same should be taxed accordingly.

3.4. The ld AO rejected the claim , inter alia, on the ground that the assessee had accounted the 'retention money' in the profit and loss account following mercantile system from year to year and such claim was not made in its original return filed u/s 139(1) of the Act. Moreover, the assessee has been following consistently the method of accounting in respect of retention money by offering the same on mercantile basis and accepted by the revenue in the earlier years. Hence the said method should not be changed in section 153A proceedings by the assessee. The observations of the ld AO in his order are as under:-

> *The assessee neither reduced the retention money in the profit and loss account nor it did reduce from the computation of income while filing the return of income filed u/s 139(1) of the Act. The assessee had taken the opportunity to revise the return u/s 153A of the Act filed in consequence to search dated 17.03.2010.* ***Importantly , not a single document emanates from the search and seizure operation*** *which could prompt the assessee to reduce its income by revising its return of income already accounted for in the regular books of accounts.*

3.5. The taxability of retention money under dispute on mercantile basis is as under:-

Asst year 2004-05	-	1,35,96,919/-
Asst year 2005-06	-	46,90,919/-
Asst year 2006-07	-	1,52,69,653/-
Asst year 2007-08	-	3,42,11,947/-
Asst year 2008-09	-	7,01,40,322/-
Asst year 2009-10	-	9,77,65,108/-
Asst year 2010-11	-	10,65,10,578/-

4. The ld CITA upheld the treatment of retention money given by the ld AO by observing as under:-

"5. I have considered the submission of the appellant and perused the assessment order. The facts of the case have already been discussed above. It is apparent that the appellant company is following the mercantile system of accounting and, therefore, in its books of account the company had accounted for receipt of retention money on accrual basis. In its financial statements also the retention money had been accounted for on accrual basis and hence the amount of retention money is credited to the P&L A/C. Accordingly, the return of income was filed u/s 139(1) of the Act and the assessment was completed. However, in the return filed u/s 153A, the appellant shifted from its original stand and claimed that the retention money is to be accounted for on receipt basis for the purpose of taxation. Therefore, in the return filed u/s 153A, the appellant reduced the amount of retention money directly in the computation of income. On careful consideration of facts and in law, I am of the opinion that the appellant company is not entitled to change its stand in the return filed u/s 153A of the Act. The appellant company is not entitled for change in the method of accounting or method of valuation in the proceedings initiated u/s 153A of the Act. The proceedings u/s 153A of the Act is for the benefit of the Revenue and not for the benefit of assessee. Hence, I am of the considered opinion that the AO has rightly disallowed the claim of the appellant for reduction of amount of retention money of Rs. l,35,96,919/- from the gross contract receipt."

5. Aggrieved, the assessee is in appeal before us on the following grounds:-

"1. A). That the observations / findings of Ld. CIT (A) that "retention money" 'having been credited in P&L A/ c. on accrual basis, the appellant cannot shift and claim reduction for retention money from its income are opposed to the following decisions: -

a) CIT - Vs. - Ignifluid Boilers (I) Ltd. 283 ITR 295 (Mad)
b) CIT - Vs. - P & C Constructions (P) Ltd. 2 Taxman. Corn 47 (Mad)
c) CIT - Vs. - Simplex Concrete Piles (India) Pvt. Ltd. 179 ITR 8 (Cal)

B.) That the Ld. CIT(A) has erred in not holding that A.O. has failed to consider that if in law certain receipt is not taxable the mere fact that such receipt was accounted in the books of account or offered in the return of income cannot make the receipt as taxable.

2. That the finding of Ld. CIT (A) that the appellant is not entitled to change its stand to claim reduction of income for retention money as taxable on receipt basis in course of proceeding u/s 153A of I. T. Act is not maintainable in law.

3. That on the facts and in the circumstances of the case, Ld. CIT (A) is wrong and unjustified in upholding the action of Assessing Officer who denied the claim for reduction of retention money and thereby enhancing the return income filed u/s. 153A of the Act by Rs.1,35,96,919/-.

4. That on the facts and in the circumstances of the case, Ld. CIT(A) has erred in not holding that A.O. has traveled beyond jurisdictional limit as envisaged in Section 153A of Income Tax Act, 1961 while rejecting the claim of taxability of Retention Money on receipt basis."

6. The ld AR argued that the assessee had to change its stand in offering the retention money on receipt basis based on the decision of the Hon'ble Calcutta High Court in the case of CIT vs Simplex Concrete Piles (India) Pvt Ltd reported in (1989) 179 ITR 8 (Cal) which came to the knowledge of the assessee only after the search . Accordingly, he reiterated the submissions made by him before the lower authorities. He further argued that the provisions of section 153A of the Act which is stated by the ld CITA as meant for the benefit of the revenue and accordingly the assessed income u/s 143(3) of the Act earlier cannot be reduced in a search assessment. He argued that these observations do not draw any support from the provisions of the Act and moreover, the decision relied upon by the ld CITA on the *Hon'ble Apex Court in the case of CIT vs Sun Engg. Works (P) Ltd reported in 198 ITR 297 (SC)* was rendered in the context of section 147 proceedings and not for search proceedings. He further argued that the claim made by the assessee were allowed by the ld CITA and on further appeal to this tribunal by the revenue, the same were dismissed vide ITA Nos. 346 & 347/Kol/2015 dated 17.6.2015.

7. In response to this, the ld DR fairly agreed that no incriminating materials were found during the course of search to disturb the treatment of retention money so as to take a different stand from the section 143(3) proceedings. He reiterated the findings of the ld AO and argued that there is no good reason for the assessee to shift its stand by not offering the retention money on mercantile basis in the return filed in response to notice issued u/s 153A of the Act.

8. We have heard the rival submissions and perused the materials available on record. The facts stated hereinabove remain undisputed and hence the same are not reiterated for the sake of brevity. We find that though the Hon'ble Calcutta High Court in the case referred to supra had held that the retention money would be taxable in the year of receipt due to contingencies involved therein for releasing the payment by the Contractees to the assessee, but it cannot be

ignored that the assessee had offered the retention money year after year on mercantile basis and assessments framed accordingly. Without the existence of any incriminating materials found during the course of search with regard to the issue of retention money, we are of the considered opinion that the assessments framed already should not be disturbed in section 153A proceedings. Our understanding on this issue is further sanctified and approved by the recent decision of *Hon'ble Calcutta High Court in the case of CIT vs Veerprabhu Marketing Ltd in ITA 661/2008 dated 4.8.2016* and also by the decision of the Hon'ble Bombay High Court in the case of *CIT vs Continental Warehousing Corporation (Nhava Sheva) Ltd and All Cargo Global Logistics Ltd reported in (2015) 374 ITR 645 (Bom) vide order dated 21.4.2015.*

8.1. With regard to the decision relied upon by the ld AR on the Co-ordinate bench of this tribunal in assessee's own case supra, we find that the assessments for the first time in those years were made u/s 143(3) of the Act vide orders dated 31.12.2010 and 30.12.2011. Hence in the case of regular assessment, the change in stand could be taken by the assessee and the same was also duly appreciated by the ld CITA and further by this tribunal vide abovementioned order. Hence we hold that the decision relied upon by the ld AR does not support the case of the assessee.

8.2. In view of these judicial precedents, we find no infirmity in the order of the ld CITA on the impugned issue. Accordingly, the grounds raised by the assessee in its appeals are dismissed.

Revenue Appeals

9. The only issue to be decided in the appeals of the revenue is as to whether the assessee is entitled for deduction u/s 80IA (4) of the Act in the facts and circumstances of the case.

10. The brief facts of this issue is that the assessee is a public limited company engaged in the business of civil construction through the process of tender. The major projects where

construction activities were carried on during the years under appeal were awarded by the following authorities :-

(a) Hooghly River Bridge Commissioner

(b) KSHIP, Bangalore

(c) The Kolkata Municipal Corporation

(d) Indian Oil Corporation Ltd

(e) Central Public Works Deptt.

10.1. The facts for the Asst Year 2006-07 are stated herein and taken up for adjudication of the disputed issues and the same would apply with equal force for other asst years also in view of identical facts involved except variance in figures.

10.2. The assessee filed its return originally on 30.11.2006 declaring total income at Rs. Nil after claiming deduction u/s 80IA of the Act in the sum of Rs. 7,68,59,145/-, but paid tax on the basis of book profits u/s 115JB of the act. The assessment was completed u/s 143(3) of the Act by allowing the claim of deduction u/s 80IA of the Act amounting to Rs. 5,93,37,353/-. Consequent upon search and seizure operation u/s 132 of the Act conducted on 17.3.2010 at the office premises of the assessee company and its group concerns as well as survey operations at various places of the company, a notice u/s 153A of the Act dated 12.1.2011 was served on the assessee. The assessee filed its return in response to notice u/s 153A of the Act on 11.2.2011 declaring total income of Rs. 27,71,510/- but showed its liability to tax at the book profit u/s 115JB of the Act as declared earlier. The ld AO sought to deny the claim of deduction u/s 80IA of the Act in the search assessment proceedings u/s 153A of the Act. The assessee explained that the assessee originally claimed deduction u/s 80IA of the Act for Rs. 10,64,04,988/- in respect of 16 construction projects. Later on, the claim was confined to 13 projects for Rs. 9,34,19,846/-. The then ld AO after examination allowed claim to the extent of Rs. 5,92,22,478/- in respect of 9 projects on the basis of detailed findings recorded in the order. The dispute was contested in appeal but the ld CITA on the basis of findings recorded in his order confirmed the action of the ld AO. Therefore this issue had reached finality and should be considered as allowable in the course of assessment u/s 153A of the Act in as much as no

incriminating materials were found in the course of search warranting any disturbance to the claim of deduction u/s 80IA of the Act. It was also explained that so far as the Explanation inserted at the end of section 80IA by Finance Act, 2007 and substitution by Finance (No.2) Act, 2009 with retrospective effect from 1.4.2000 to deny the benefit to a person who executes works contract, the Explanatory Memorandum to Union Budget 2007-08 explained that those contractors who have taken the contract directly from the Governments or Statutory Bodies should not get affected because they still comply with the conditions specified in the section. The explanation would only change the position of sub-contractors.

10.3. The ld AO examined the claim of deduction u/s 80IA of the Act with reference to various agreements entered into by the company with the Central / State Governments and Local Authorities etc. The deduction u/s 80IA of the Act was originally allowed u/s 143(3) proceedings to the tune of Rs. 5,93,37,353/- as against Rs. 10,64,04,988/- in respect of profits derived from 9 development projects. In the search proceedings u/s 153A of the Act also, the ld AO again called for the copies of all the agreements / contracts to examine the eligibility and allowability of deduction u/s 80IA of the Act. The ld AO was of the opinion, that in respect of 5 projects, the conditions of section 80IA were satisfied and the profit from such 5 projects to the extent of Rs. 4,12,88,960/- was eligible for deduction u/s 80IA of the Act. In the assessment order, the ld AO had listed particulars of these 5 projects in Table – A. In case of rest of the 4 projects from which profit of Rs. 1,79,33,518/- was derived, the ld AO was of the opinion that these projects did not satisfy the conditions of Section 80IA of the Act because there was no new development of infrastructure facilities and in these contracts, the company had only executed the work of renovation of existing facilities. The details of these 4 projects have been given by the ld AO in Table B of the order. Thus after verification and examination of the agreements, the ld AO was of the opinion that the assessee was eligible for deduction u/s 80IA to the extent of profit derived from the business of development of infrastructure facilities. But the ld AO observed that the said deduction u/s 80IA of the Act is not eligible for the assessee because of the Explanation in Section 80IA inserted by Finance Act 2007 w.r.e.f 1.4.2000 and further substituted by Finance (No. 2) Act, 2009 w.r.e.f. 1.4.2000 , though, the primary conditions for allowability of deduction are satisfied. The ld AO observed that in view

of the substituted Explanation, the assessee had executed only the works contract awarded by the Central / State Government and Local Authorities, therefore, not eligible for deduction u/s 80IA. In order to arrive at this conclusion, the ld AO referred to the definition of work contract as per the Government of Puducherry, payment of sales tax and work contract tax by the assessee, reference of the assessee company as contractor in the agreements / contracts. The ld AO also got lead from the fact that no claim of deduction u/s 80IA of the Act was made by the assessee for the Asst Years 2009-10 and 2010-11 pursuant to the Explanation in Section 80IA supra.

11. The ld CITA went to the history of provisions of section 80IA of the Act and observed that prior to 1.4.2002, the agreements/contacts awarded to an enterprise for development of a new infrastructure facility are to be executed under the BOLT scheme i.e. Build, Own, Lease and Transfer, because as per the provisions, all the three activities of development, maintenance and operation had been carried on by the same enterprise. However, from assessment year 2002-03 onwards there was no such condition and to make itself being eligible for deduction u/s 80IA, the enterprise could carry on anyone of the three or all the three activities. Thus, in a sense, the provisions were liberalized for being eligible for deduction. This was perhaps a practical realization of the fact that 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. Thus, in a case where the enterprise has entered in to an agreement with the Central/State Government or a local authority, only for the development of new infrastructure facility, it has to recoup its investment from someone because it has not entered in to a contract to simultaneously maintain and operate such developed new infrastructure facility. In such cases, the developer receives the money from the person with whom agreement for development of facility is made. Such payment also include profit element of the enterprise eligible for deduction u/s 80IA subject to fulfillment of other conditions. If, an enterprise which only develops the infrastructure facility, would not receive the money from the Central Government or a State Government or local authority, its entire investment in development would be a loss because it could not transfer the facility developed by it to any other enterprise

for maintenance and operation to recover its investment. Therefore, in the cases where an enterprise has only developed the infrastructure facility as per contract and receive the money in one go or in phases from the government for executing the work, it cannot be said that such an enterprise was only a contractor who has executed the works contract in lieu of money from the government or local authority etc.

11.1. The ld CITA observed that the ld AO relied on the meaning of 'works contract' as per the Government of Puducherry, according to which, 'any agreement for execution of works relating to civil works, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property for cash / deferred payment or other valuable consideration is a works contract.' It further says that when a contract fulfilling the above conditions is executed by a dealer, he is liable to pay tax on sale value of goods involved in the execution of works contract at the rates provided in the schedule. In view of above, the ld AO held that all the works executed by the assessee during the year falls under works contract and assessee have also paid the works contract tax and sales tax. Further in the contracts / agreements, the company has been denoted as a contractor. The ld CITA observed that this understanding and conclusion of the ld AO and consequentially disallowing the claim of deduction u/s 80IA of the Act is unjustified in as much as , if this view of the ld AO is accepted, then in that situation no enterprise which entered into an agreement with the Government for only development of new infrastructure facility would be eligible for deduction u/s 80IA because in all such agreements, the enterprise is referred to as 'contractor' and in almost all the infrastructure development activities, the civil work, construction , fabrication, erection, installation, repair and commissioning ,etc. are involved. The enterprise has to receive the payment from the Government for the work of development because with such an enterprise there is no other source to recover its investment made in executing the work of development of infrastructure project awarded to it. Such an enterprise also has to pay the state tax as per the provisions of law existing in the state where infrastructure facility is developed. It means that all sort of works executed by an enterprise by virtue of an agreement / contract awarded by the Government, only for development of infrastructure facility, would have to be treated as works contract and such an enterprise would

not be entitled for deduction u/s 80IA of the Act. However, on going through the provisions of section 80IA of the Act w.e.f. 1.4.2002, it does not appear to be the intention of the legislation because the legislation intends to provide the benefit of the incentive to such enterprises also who only develop the new infrastructure facility. If the view taken by the ld AO is to be accepted, then the very purpose of legislature to extend incentive for development of infrastructure would be frustrated. Accordingly, the ld CITA held that it will not be correct to say that the assessee company was not a developer of infrastructure facility , but only a contractor and it has merely executed the works contract. The ld CITA further observed that on going through the agreements / contracts , the assessee had carried out set of activities to develop the infrastructure project using its technical expertise, technical and other skilled and non-skilled manpower and it plant and machineries to execute the projects which were sourced out of own and borrowed funds by the assessee. Hence on this count itself, it cannot be said that the assessee is merely a works contractor. The ld CITA further held that every contractor may not be a developer but every developer developing infrastructure facility on behalf of the Government is a contractor.

11.2. The ld CITA observed that from the decision of the *Co-ordinate Bench of Hyderabad Tribunal in the case of KMC Constructions Ltd vs ACIT reported in (2012) 21 taxmann.com 138 (Hyd.)* , it is clear that in the case of an agreement entered into by an enterprise with the Government, such an enterprise is denoted by the word ‘contractor;, but it does not mean that such enterprise is a work contractor and not a developer. The nature of all the agreements entered into have to be looked into and if the enterprise has entered into contract with the Government / Government Bodies for development of infrastructure facility and such development has been carried out by the enterprise itself by doing composite work by deploying its technical manpower, labour, technical knowhow, its expertise and finance and plant and machinery, etc., such development agreement cannot be treated as simple work contract and on such contracts the assessee will be eligible for deduction u/s 80IA of the Act.

11.3. The ld CITA ultimately held that the assessee is only a developer and accordingly eligible for deduction u/s 80IA of the Act by observing as under:-

"8.8 In the case of appellant company, the facts are similar to the facts involved in the case of KMC Constructions Ltd. (supra). As mentioned earlier in this order, in the course of assessment proceedings, the AO called for and examined all the agreements entered into by the appellant company with Government/ Government bodies. After examining the agreements, he made two tables i.e. 'Table - A' containing the agreements which according to him fulfills the conditions laid down in section 801A(4) and, therefore, eligible for deduction u/s 80lA otherwise than Explanation below sub-section (13) of section 80lA, and 'Table - B', having projects which in ,his opinion did not qualify for the deduction u/s 80lA being in the nature of only repair and renovation of existing facilities. The AO did not allow the deduction u/s. 80IA on the projects listed in Table - A for the reason that he was of the opinion that the appellant was a work contractor who executed the work contracts. He made this opinion on the basis of appellant company was denoted as a contractor in the agreements, paid work contract tax and also paid performance guarantee etc to the Government. The agreements produced before the AO were also produced by the appellant during the appellate proceedings and same were examined and verified with reference to the decision of ITAT, Hyderabad in the case of KMC Constructions Ltd. (supra).

*On going through the agreements entered into by the appellant company with the Government/ Government Bodies, it is observed that by virtue of these agreements, the appellant company is required to develop the new infrastructure facility and, therefore, the appellant has acted as a developer of infrastructure facility and it is not mere a works contractor within the meaning of Explanation below sub-section (13) of section 801A inserted by the Finance Act, 2007 and substituted by the Finance (No.2) Act, 2009, as held by the AO. It is observed that the appellant company had carried out composite activities to develop the infrastructure facility once the possession of the land/site is handed over to the appellant. On completion of work, the developed infrastructure facility is handed over back to the Government/Government Body. Even after handing over the facility to the Government, the appellant company has to maintain the facility for 12 to 48 months free of cost for any defect or damages etc. The appellant company designs the new infrastructure facility as per the requirement of the Government, deploy its technical experts, technical know-how, labour, expertise, plant and machinery, purchases the materials required for the project and also deploy substantial fund of its own and borrowed funds. Therefore, it cannot be said that the appellant company was only works contactor with reference to all the agreements and not the developer. For example, the appellant company entered into an agreement with East Central Railway, for construction of new Bridge No.26 (4*76.2m + 2*30.5m through girder & well foundation) at Km. 16.848, Bridge No.27(5*30.Sm under slung girder & bored cast in situ piles) at Km.17.140 & Bridge No.28(5*18.30m composite girder and bored cast in situ piles) at Km.18.240 over Tilaiya Reservoir between Koderma & Hazaribagh in connection with new BG Rail line between Koderma & Ranchi to the Railway Administration. As per agreement the company was required to acquaint itself, at its own responsibility, risk and expense, with all information of the site of work and their neighborhoods, actual working and other prevalent conditions, laws/regulations, availability and suitability of local laborers, materials, surface and sub-soil condition, accessibility of site of work sources and availability of water, electricity, camp site, market, banking facilities etc. The company was also required to submit specific details of technical personnel and plant and machinery to be used, to submit the samples of the materials procured by the company to execute the work. It was the responsibility of the enterprise to bear loss or damage to its materials, equipments, tools and plant and machinery etc. The work to be carried out under this agreement/contract shall include all labour, materials, construction plant, equipments and transport which may be required in preparation of and for the full and entire execution and successful completion of the works. The possession of the site will be handed over by the Engineer concerned and its area of occupation will be defined. The contractor shall make his own arrangement at his own cost for any addition; requirement by him for the purpose of executing the work. As per clause 29.2, the contractor shall*

on his own cost provide, if necessary, or if required on the site, all temporary access thereto and shall alter, adopt and maintain the same as required from time to time and shall take up and clear them away as and when no longer required and make good all damages done to the site. These accesses will also be permitted to be used by other agencies. The clause 32.1 says that the contractor shall at his own expense, provide all materials required for the was and shall maintain a minimum stock of at least 3 months consumption of all materials required for the work. As per clause 32.3, for stocking cement, the contractor shall at his own cost build suitable damp proof godowns at the site of work and make all satisfactory arrangements to see that the strength of cement is not deteriorated. The contractor has to make arrangements on its own for electric power. As per clause 41.4.2. before the work is started, the site shall be cleared of all obstructions like trees and bushes along with their roots, heavy grass and shrubs by the contractor at his own cost. The clause 41. 9 says that if in the opinion of engineer, any of the works had been executed with improper materials or defective workman-ship, the contractor shall re-execute the same and substitute proper materials and workman-ship forthwith at his own cost. As per clause 42, on completion of the work, it will be taken over by the Engineer. From the date of taking over, the contractor shall be responsible for maintenance of the work for a further period of 12 months. The contractor shall make good and remedy at his own expense, any defect which may develop or may be noticed before the expiry of period of 12 months. Thus, the appellant company, in this contract, was involved in the development of new infrastructure facility in the form of construction of foundations, sub-structure and super structure for the Rail Bridge over Tiliaya Reservoir between Koderma and Hazaribagh in connection with new B.G. Railway line between Koderma and Ranchi. It cannot be said that by developing a new Bridge, the appellant company had executed only a works contract as held by the AO. In view of decision of ITAT, Hyderabad, in the case of KMC Constructions Ltd. (supra), the appellant company has executed the development contract and not the works contract and, therefore, eligible for deduction u/s 80lA of the Act. Similar is the situation with other four contracts entered Into by the company with the government/government bodies and listed in Table-A of the assessment order."

12. Aggrieved, the revenue is in appeal before us on the following grounds:-

"1. That on the facts and in the circumstances of the case and in law, the Ld CIT (Appeals) erred in allowing the deduction u/s 80lA claimed by the assessee.

2. That the order of the learned CIT(A) is bad on facts and in law.

3. That the Ld CIT (Appeals) failed to appreciate the fact that the i assessee was a mere contractor who merely executed works contract and hence not entitled to get deduction u/s 801A.

4. That the order of the learned CIT(A) in allowing deduction to the assessee u/s 80lA is in error of law and in error of facts.

5. That the learned CIT(A) has failed to understand the meaning of "Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development" referred to in section 801A.

6. That the learned CIT(A) has failed to understand the meaning of the terms, '(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business)' in section 80IA(1).

7. That the learned CIT(A) failed to understand the meaning of section 80IA(2), " .... the year in which the undertaking or enterprise develops and begins to operate any infrastructure facility or ....."

8. That the Learned CIT(A) failed to understand the meaning of an eligible project in proviso below section 80IA(2) for an eligible project....." where the assessee develops or operates and maintains, or develops, operates, and maintenance any infrastructure facility referred to in ....."

9. That the learned CIT(A) failed to understand the meaning of an eligible project and profits from an eligible project for the purpose of section 80IA(4).

10. That the Ld. CIT(A) failed to understand that first a project has to be completed, and be in operation, and result in profits before the said profits can be considered to be eligible for deduction u/s 801A. Before the project is completed, and comes into operation by being put to business use, it cannot be said to yield any profits. (For example, when an infrastructure project, say an airport or a highway, is completed and in operation and yields in eligible profits or income u/s 80IA(1).

11. That the Ld. CIT(A) failed to understand in respect of an eligible project, the meaning of "(1) developing or (ii) operating and maintaining or (iii) developing operating and maintaining any infrastructure of (iii) developing operating and maintaining any infrastructure facility....." in section 80IA(4).

12. That the learned CIT(A) failed understand the provisions of section 80IA(5) that first the eligible business or the project has to yield profits after it is completed, and then only the question of deduction of such profits of the project (revenue receipts from operations of the completed project less eligible deductions) arises u/s 801A.

13. That the learned CIT(A) failed to understand the provisions of s.80IA(7) which clearly indicates that where incidental income arises from a project, such income can be adjusted against the income of the project when it is completed, further clarifying that it is the income from completed project (after completion, revenue receipts from operations less deductible expenses) that would be eligible for deduction u/s 801A.

14. That the learned CIT(A) failed to understand the provisions of section 80IA(7) wherein it is clearly stated that accounts have to be prepared for each 'enterprise' of the assessee showing profits and gains derived from such an enterprise, and certificate obtained from an authorized accountant that such an enterprise has yielded such income. The learned CIT(A) further failed to appreciate that no income can arise from an eligible project of an enterprise even before it is completed, ready for operations and actually yields profits and gains.

15. That the learned CIT(A) failed to appreciate that Proviso below section 80IA(8) enables the Assessing Officer to compute the profits of the eligible business in an appropriate manner and the AO came to the conclusion that since the project had not yet been completed or yielded any profits after commencing operations, the eligible profits were nil.

16. That the learned CIT(A) has failed to understand the provisions of section 80IA(9) that only the profits from an 'enterprise' or an 'undertaking' can be considered for deduction in the hands of the assessee after such 'enterprise' or 'undertaking' starts yielding profits, which cannot arise unless the said activity is ready and fit to yield income, and actually yields income from operations as is commonly understood.

17. That the learned CIT(A) failed to understand the provisions of Explanation below section 801A(13) which is only clarificatory, and not amendatory.

18. That the learned CIT(A) also failed to understand the simple meaning of income from an eligible project can commence only after the project is completed and starts earning income."

13. The revenue had also raised the following additional ground for all the years :-

"That on the Hon'ble Gujrat High Court in Special Civil Application No.11781 of 2009 order dated 28.02.2013/04.03.2013 in the case of 'Katira Construction Ltd. Vs. Union of India' have upheld that deduction u/s.80IA is to be given only to a developer and not to a contractor, and that the Explanation below section 80lA of the Act inserted by Finance (No.2) Act, 2009 w.r.e.f. 01.04.2000 or by Finance Act 2007 w.r.e.f. 01.04.2000 was only c1arificatory and not amendatory in nature."

14. We have heard the rival submissions and perused the materials available on record. The ld DR vehemently supported the order of the ld AO. He further stated that the reliance placed by the ld CITA on the certain decisions are not relevant as in those cases, the issue was only remanded back to ld AO for verification. Accordingly he prayed for setting aside of the issue to the file of the ld AO. In response to this, the ld AR vehemently supported the orders of the ld CITA. He stated that the decisions relied upon by the ld CITA are squarely applicable to the facts of the instant case , in as much as, in those cases, the relevant clauses of the agreements / contracts were not looked into by the lower authorities and hence the tribunal had in the interest of justice had remanded the matter back to the file of the ld AO to go through the agreements / contracts. Whereas , in the instant case, the entire agreements / contracts were very much produced before the ld AO both in the original scrutiny assessment proceedings u/s 143(3) and also in section 153A proceedings which only enabled the ld AO to prepare a tabulation in Table A and Table B in his assessment order. The ld AR further argued that absolutely no incriminating materials were found during the course of search which would enable the department to change its stand about the status of the assessee , being a developer or contractor. Accordingly he prayed that the status of the assessee being a developer and claim of deduction u/s 80IA cannot be disturbed in section 153A proceedings. He placed reliance in this regard on the *Co-ordinate Bench of this Tribunal in the case of ACIT vs Kanchan Oil Industries Ltd in ITA No. 725/Kol/2011 , ITA Nos. 1390,1391 & 1553/Kol/2010 dated 9.12.2015*.

14.1. We find lot of force in the arguments of the ld AR that all the agreements / contracts were filed before the lower authorities and the ld CITA had gone into the relevant clauses of the agreements / contracts , analysed the same in his elaborate order and then arrived at a conclusion that the assessee is only a developer and not merely a works contractor and accordingly eligible for deduction u/s 80 IA of the Act. We also find that the *Co-ordinate Bench of Chennai Tribunal in the case of ACIT vs R.R.Constructions in ITA No. 2061/Mds/2010 dated 3.10.2011* had an occasion to consider similar issue wherein it was held as under :-

> *"The assessee has also produced all six agreements regarding six projects undertaken before the AO, whose copies are available before us also. It is a fact that even after taking a contract from Government, if the assessee develops infrastructure facilities, it would be regarded as a 'developer: and not as a 'works contractor'. The assessee has carried on entire construction/development of the infrastructure facilities and satisfy all the conditions of section 80IA(4)(i)(a). It is undeniable fact that the assessee has taken development of infrastructure facility agreement from the State Government/ local authority. A contractor who develops the infrastructure facility becomes a developer to claim deduction u/s 80IA(4). The Hon'ble Bombay Bench of ITAT while deciding the case of Patel Engineering Ltd. v. DCIT in ITA No. 1221/Mum/2004 has gone the extent of holding that the assessee, a civil contractor, having executed a part of contracts of irrigation and water supply on 'build and transfer' basis and handed over them to contractee Governments, was eligible for deduction u/s 80IA(4). The similar view was taken by us in the case of East Coast Constructions & Industries Ltd. v. DCIT, ITA No. 554/Mds/2010 dated 13.09.2011. Therefore, we confirm the findings of the CIT(A) and do not find any valid merit in Revenue's appeal"*

14.2. We find that the ld CITA had granted relief for claim of deduction u/s 80IA of the Act in respect of profits mentioned in the projects in Table A of the assessment order. The ld CITA observed that profit to the tune of Rs. 1,79,33,518/- mentioned in the projects in Table B of the assessment order, the assessee failed to substantiate its claim of deduction u/s 80IA of the Act and accordingly confirmed the disallowance made thereon. We find that against this, the assessee had not preferred any appeal before us. Hence we refrain to give our comments on the same.

14.3. We also find that the ld CITA had duly met one of the observations of the ld AO that the assessee suo moto refrained from making any claim of deduction u/s 80IA of the Act for Asst Years 2009-10 and 2010-11 in the return pursuant to the Explanation brought out in

Finance (No.2) Act, 2009 w.r.e.f. 1.4.2000. We find that the ld CITA in this regard had stated that each assessment year is a separate unit and the decision has to be taken on the basis of facts in that particular year. We find that the revenue cannot take undue advantage of the ignorance of an assessee by collecting undue taxes which would admittedly be against Article 265 of the Constitution.

14.4. We find that , in any case, the revenue had conceded to the fact that there was absolutely no incriminating materials found during the course of search which would enable the ld AO to take a different stand with regard to the status of the assessee (whether a developer or contractor). Admittedly, the assessment framed in the impugned appeal is pursuant to search conducted u/s 132 of the Act wherein no incriminating materials were found, which fact is not disputed before us. Moreover, it is not in dispute that the claim of deduction u/s 80IA of the Act has been accepted by the revenue in section 143(3) proceedings and there is no reason to disturb the same in section 153A proceedings without there being any incriminating materials to the contrary. In this regard, we find that the issue is squarely covered by the co-ordinate bench decision of this tribunal in the case of Kanchan Oil Industries Ltd supra.

14.5. With regard to the additional ground raised by the assessee, in view of our aforesaid findings, we do not deem it fit to go into the additional ground raised by the assessee as the same would only be superfluous in nature.

15. In view of our aforesaid findings and respectfully following the various judicial precedents relied upon hereinabove, we hold that the assessee has to be treated only as a developer in the facts and circumstances of the case and not merely as a works contractor , thereby eligible for deduction u/s 80IA of the Act in respect of profits derived from projects mentioned in Table A of the assessment order to the tune of Rs. 4,12,88,960/- which has been rightly allowed by the ld CITA. In any case, we hold that the said claim cannot be disturbed by the ld AO in section 153A proceedings in the absence of any incriminating materials to the contrary found in the course of search . Hence we do not find any infirmity in the order of the ld CITA in this regard. Accordingly, the grounds raised by the revenue are dismissed.

16. The decision rendered in assessee's appeal for Asst Year 2004-05 would apply with equal force for other assessment years in the appeals of the assessee. Similarly the decision rendered here in for revenue's appeal for Asst Year 2006-07 would apply with equal force for other assessment years in the appeals of the revenue.

17. In the result, both the appeals of the assessee as well as the revenue are dismissed.

Order pronounced in the open court on 23.09.2016

Sd/-	Sd/-
(S.S. Viswanethra Ravi)	(M. Balaganesh)
Judicial Member	Accountant Member

Dated : 23rd September, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT – DCIT, Central Circle-XIII, Kolkata.
2. Respondent – M/s. Tantia construction Ltd.,25-27, Netaji Subhas Road, Kolkata-700 001.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Asstt. Registrar.