IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD '' C " BENCH – AHMEDABAD

Before Shri R.P. Tolani, JM, & Shri Manish Borad, AM.

Sl. No.	ITA No.	Asst. Year	Appellant	Vs.	Respondent
1	811/Ahd/2010	2005-06	Acquafil Polymers Co.Pvt. Ltd. 202/203, Shymak Complex, B/h Kamdhenu Complex, Polytechnic, Ahmedabad.	.	ITO, Ward-1(3), Ahmedabad.
2	732/Ahd/2013	2005-06	DCIT, Cir-1, Ahmedabad.		Acquafil Polymers Co.Pvt. Ltd.
3	812/Ahd/2010	2006-07	Acquafil Polymers Co.Pvt. Ltd.		ITO, Ward-1(3), Ahmedabad.
4	2132/Ahd/2011	2006-07	DCIT, Circle-1, Ahmedabad		Acquafil Polymers Co.Pvt. Ltd.
5	250/Ahd/2011	2007-08	ITO, Ward-1(2), Ahmedabad.		Acquafil Polymers Co.Pvt. Ltd.
6	CO No.30/Ahd/2011 in ITA No.250/Ahd/11	`2007-08	Acquafil Polymers Co.Pvt. Ltd.		ITO, Ward-1(3), Ahmedabad.
7	487/Ahd/2013	2008-09	Acquafil Polymers Co.Pvt. Ltd.		Addl.CIT, Range-1, Ahmedabad.
8	733/Ahd/2013	2008-09	DCIT, Circle-1, Ahmedabad		Acquafil Polymers Co. Pvt. Ltd.
9	488/Ahd/2013	2009-10	Acquafil Polymers Co. Pvt. Ltd.		Addl.CIT, Range-1, Ahmedabad
10	935/Ahd/2013	2009-10	DCIT, Circle-1, Ahmedabad		Acquafil Polymers Co. Pvt. Ltd.
			Appellant	**Vs.**	**Respondent**
PAN AABCA7902R					

Appellant by	Shri S. N. Soparkar & Shri Parin Shah, ARs
Respondent by	Smt. Vibhas Bhalla, CIT, DR and Shri Prasoon Kabra, Sr.DR

Date of hearing: 19.7.2016
Date of pronouncement: 30/9/2016

O R D E R

PER Manish Borad, Accountant Member.

These 9 appeals and one Cross Objection out of which 4 appeals and one Cross Objection are at the instance of assessee and 5 appeals by Revenue for Asst. Year 2005-06 to Asst. Year 2009-10. Since the appeals and the Cross Objection relate to the same assessee and most of the issues raised therein are common, therefore, they were heard together and are being disposed of by this common order for the sake of convenience.

2. First we take up ITA No.811/Ahd/2010 & ITA No. 812/Ahd/2010, ITA No. 732/Ahd/2013 and ITA No.2132/Ahd/2011. Assessee is in appeal for Asst. Year 2005-06 and Asst. Year 2006-07 vide ITA Nos.811/Ahd/2010 and 812/Ahd/2010 against the order u/s 263 of the Act passed by CIT-1, Ahmedabad of even date 5.3.2010 whereas Revenue is in appeal vide appeal Nos.732/Ahd/2013 and 2132/Ahd/2011 for Asst. Years 2005-06 & 2006-07 respectively against the orders dated 24.12.2012 and 23.6.2011 by CIT(A)-VI, Ahmedabad passed against the order framed by Assessing Officer u/s 143(3) r.w.s. 263 of the Act.

3. We will first take up assessee's appeal against the order of CIT u/s 263 of the Act for Asst. Year 2005-06.

4. Briefly stated facts of the case are that assessee is a private limited company engaged in the manufacturing of waste, water and effluent treatment plant. Return of income was filed on 27.10.2005

declaring total income of Rs.5,17,644/- which was followed by revised return filed on 04.12.2006 showing income at Rs.NIL and claiming deduction u/s 80IA of the Act at Rs.33,10,007/-. The case was selected for scrutiny and notice u/s 143(2) of the Act was issued on 06/06/2006 followed by notice u/s 142(1) along with questionnaire calling for requisite details. Necessary details were furnished during the course of assessment proceedings and return of income was accepted including the allowability of deduction of Rs.33,10,007/- u/s 80IA of the Act. Thereafter records of the assessee were verified in the office of CIT and on the basis of details available prima facie it was observed that assessee is not a developer but has executed the work contract and Assessing Officer has wrongly allowed the deduction u/s 80IA of the Act without making proper enquiry/verification or analyzing the said issue. The assessee made necessary submissions with requisite details of the contract awarded, nature of work entrusted on the assessee and in these contracts in order to prove that scope of work included designing (process, hydraulic, structure, equipment and aesthetically) constructing and commissioning conventional water treatment plant consisting of all civil, mechanical and electrical components including necessary hydraulic testing, structural testing, equipment testing, trial run etc. The assessee also submitted that all these details were put forth before the Assessing Officer also. However, ld. CIT was not convinced and was of the view that assessment u/s 143(3) of the Act dated 20.12.2007 passed by the Assessing Officer was erroneous and prejudicial to the interest of revenue to the extent of allowance of deduction claimed by the assessee u/s 80IA of the Act at

Rs.33,10,007/- and ordered for setting aside the impugned assessment order u/s 143(3) of the Act to the extent that Assessing Officer will adjudicate on the issues of allowance of claim of deduction u/s 80IA of the Act afresh in accordance with law.

5. Aggrieved, assessee is now in appeal before the Tribunal.

6. Ld. AR submitted that profits from the projects awarded by Gujarat Water Supply and Sewerage Board (GSSB) relating to Asian Development Bank Project (ADB), GWSSB (Gondal/Kotharia), Special Area Development Authority (SADA), Gwalior, M.P. & GWSSB (Madhuka) have been claimed as deduction u/s 80IA of the Act. In all these projects the assessee company has carried out work of planning, designing, testing, commissioning of water treatment plant & marketing and in view of various legal decisions these joint operations are under the categorized developer and the ld. Assessing Officer has rightly allowed the deduction u/s 80IA of the Act. Further ld. AR referred to the agreement and work orders placed on record making it evidently clear that assessee company has designed, constructed, commissioned, tested, operated, manufactured, water treatment plant and has trained the personnel of GWSSB which are enough to satisfy that works were carried out on time basis as developer and not as contractor.

7. Ld. AR also submitted that during the course of assessment proceedings all necessary details were placed before the assessing authority which are evidenced in the assessment order itself and ld.

Assessing Officer has applied his mind within the four corners of law. On the basis of details available on record, the discretionary power was with the assessing authority to treat the assessee as a developer or a works contractor which in this case tilted in favour of assessee as it was treated as a developer. There are series of judgments and decisions wherein it has been held that if the assessing authority at some juncture has two possible legal views and he opts for one then it cannot be said to be prejudicial to the interest of Revenue nor it can be termed as erroneous order. Ld. AR relied on the judgment of Hon. Jurisdictional High Court in the case of Principal CIT vs. Shri Prakash Bhagchand Khatri in Tax Appeal No.177 & 178 of 2016, judgment of Hon. Delhi High Court in the case of CIT vs. Ansal Housing & Construction Ltd. (2014) 45 taxmann.com 223 (Delhi), decision of the Co-ordinate Bench, Pune in the case of Kirloskar Brothers Ltd. vs. ACIT in ITA No.636 & 637/PN/2008.

8. On the other hand, ld. DR relied on the order of CIT u/s 263 of the Act.

9. We have heard the rival contentions and perused the material on record. Solitary grievance of the assessee is against the order u/s 263 of the Act framed by ld. CIT holding that the assessment order passed u/s 143(3) of the Act is erroneous and prejudicial to the interest of Revenue to the extent of allowance of deduction u/s 80IA of the Act without appreciating the fact that the impugned assessment order was passed under proper enquiry and verification. We observe that assessee has claimed deduction u/s 80IA of the Act of

Rs.33,10,007/- towards profit earned from the projects awarded by GWSSB and SADA, Gwalior, M.P. towards designing, constructing, commissioning, testing, operating and maintenance of water treatment plants and training the personnel of GWSSB. Necessary agreements and contracts are placed on record. Relevant portion of the provision relating to deduction u/s 80IA sub-section (4) of the Act applicable in the case of assessee reads as follows :-

Sec.80IA:

(4) This section applies to—

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

(*a*) it is owned by a company registered in India or by a consortium of such companies [or by an authority or a board or a corpora-tion or any other body established or constituted under any Central or State Act;]

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

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

Provided that where an infrastructure facility is transferred on or after the 1st day of April, 1999 by an enterprise which developed such infrastructure facility (hereafter referred to in this section as the transferor enterprise) to another enterprise (hereafter in this section referred to as the transferee enterprise) for the purpose of operating and maintaining the infrastructure facility on its behalf in accordance with the agreement with the Central Government, State Government, local authority or statutory body, the provisions of this section shall apply to the transferee enterprise as if it were the enterprise to which this clause applies and the deduction from profits and gains would be available to such transferee enterprise for the unexpired period during which the transferor enterprise would have been entitled to the deduction, if the transfer had not taken place.

[*Explanation*.—For the purposes of this clause, "infrastructure facility" means—

(*a*) a road including toll road, a bridge or a rail system;

(*b*) a highway project including housing or other activities being an integral part of the highway project;

(*c*) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;

(*d*) a port, airport, inland waterway [, inland port or navigational channel in the sea];]

[(ii) any undertaking which has started or starts providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services on or after the 1st day of April, 1995, but on or before the 31st day of March, [34][2005].]

Explanation.—For the purposes of this clause, "domestic satellite" means a satellite owned and operated by an Indian company for providing telecommunication service;

10. From going through the above provisions and applying the facts available on record, we observe that assessee also is engaged in operating maintenance of the projects entered into agreement with the Government/Local authorities. We further observe that explanation to section 80IA of the Act was inserted by Finance (No.2) Act, 2009 with retrospective effect from 1.4.2000 which reads as under :-

Sec.80IA

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

The above was substituted at the place of following explanation which reads as under :-

"For the removal of doubts it is hereby declared that nothing contained in this section was applied to a person to execute works contract entered into with the undertaking or enterprise as the case may be."

Above amendment which came into effect with the Finance (No.2) Act 2009 whereas the assessment order was framed u/s 143(3) of the Act on 20.12.2007 which is much before the amendment and certainly Assessing Officer has applied his mind on the basis of existing provisions as on the date of passing the order.

11. We further observe that Hon. Jurisdictional High Court in the case of Principal CIT vs. Shri Prakash Bhagchand Khatri (supra) dealing with similar issue u/s 263 of the Act has observed as under :-

5) Having heard learned counsel for the parties and having perused documents on record, we notice that though in the order of assessment, the Assessing Officer has not discussed the claim of the assessee of long term capital gain and deduction under section 54F of the Act out of such capital gain, he had raised multiple queries about said aspects. In the order sheet, the Assessment Officer had called upon the assessee to furnish various details including "the details of fixed assets and details of sale of land". Thus, details the assessee had provided under a communication made in October, 2012 in which he had provided details of fixed assets and details of sale of land. On 28.2.2012, the assessee had written to the Assessing Officer as under:

> "This is with reference to the date of Construction of new Asset for the purpose section 54/54F within a period of three years we would like to mention as follows:
>
> 1. Section 54F of the Income-tax Act provides for exemption from tax on long term capital gains arising from transfer of a capital asset other than a residential house property, provided the net consideration is invested in a new asset being a residential house property. For availing of the exemption, the assessee is required to do following acts in addition to satisfying other conditions:
>
> *Purchase the residential house property within a period of one year before or two years after
>
> *Construct the residential house property within a period of three years after the date of transfer of the asset.

2. Section 54 of the Income Tax Act dealing with exemption from tax for long term gains on transfer of a long term capital asset other than a residential house provides as under (relevant extracts only):

"Capital gain on transfer of certain capital assets not to be charged in case of investment in residential house. . . - :

54F. (1) [Subject to the provisions of sub-section (4), where, in the case of an assessee being an individual or a Hindu undivided family], the capital gain arises from the transfer of any long-term capital asset, not being a residential house (hereafter in this section referred to as the original asset), and the assessee has, within a period of one year before or [two years] after the date on which the transfer took place purchased, or has within a period of three years after that date *[constructed, a residential house]* (hereafter in this section referred to as the new asset), the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say,—

(a) if the cost of the new asset is not less than the net consideration in respect of the original asset, the whole of such capital gain shall not be charged under section 45 ;

(b) if the cost of the new asset is less than the net consideration in respect of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of the new asset bears to the net consideration, shall not be charged under section 45:

3. The major points to be noted on the issue are as under:

*Section 54F of the Income Tax Act is a beneficial provision which is to be interpreted liberally for achieving the purpose for which it was inserted. The purpose of the section is to encourage construction of the houses.

*For the purpose of interpretation of the word "purchased" or "constructed" what is essential is the investment of the capital gain in the residential house. The capital gain should be parted with by the assessee and invested in either purchasing or constructing the house.

4. One of the conditions for getting benefit of section 54/54Fis that on sale or transfer of the old house, the assessee should either purchase a new house within one year before sale or within 2 years after sale or should construct a new house within 3 years of the sale of old house by investing therein the nest amount of capital gain arising from the sale or transfer of the old house."

6) It can thus be seen that though final order of assessment was silent on this aspect, the Assessing Officer had carried out inquiries about the nature of sale of land and about the validity of the assessee's claim of deduction under section 54F of the Act. Learned counsel for the Revenue however submitted that these inquiries were confined to the claim of deduction under section 54F of the Act in the context of fulfilling conditions contained therein and may possibly have no relevance to the question whether the sale of land gave rise to a long term capital gain. Looking to the tenor of queries by the Assessing Office and details supplied by the assessee, we are unable to accept such a condition. In that view of the matter, the observation of the Tribunal that the Assessing Officer having made inquiries and when two views are possible, revisional powers could not be exercised, called for no interference. Since with respect to computation and assertions of other aspects of deduction under section 54F of the Act, the Tribunal has remanded the proceedings, nothing stated in this order would affect either side in considerations of such claim.

12. Similar issue relating to deduction u/s 80IB r.w.s. 263 of the Act came up before Hon. Delhi High Court in the case of CIT vs. Ansal Housing & Construction Ltd. [2014] 45 taxmann.com 223 (Delhi) wherein following facts were dealt :-

- The Commissioner initiated revision proceedings on the ground that the Assessing Officer had allowed deduction under section 80-IB(10) without examining whether all the conditions prescribed by the section were satisfied and, hence assessment was erroneous and prejudicial to the interest of revenue.

- The Tribunal in its order held that as regards the interpretation placed on section 80-IB(10). there was no dispute that the project was approved by local authorities and was developed on land exceeding 1 acre, as required by the section. It further held that even if some flats exceeded 1000 sq. ft. of the built-up area, that did not disentitle the assessee to the deduction rather a proportionate deduction on flats which exceed the statutory limit of 1000 sq. ft. alone could be disallowed.

- On an appeal :

Hon. Court adjudicated the issue by upholding the order of the Tribunal by observing as under :-

12**.** The Tribunal was of opinion that merely because there was a honest and bona fide difference of opinion between the assessee and the Assessing Officer on the one hand and the

CIT on the other with regard to the interpretation to be placed on a provision of law or there was a possibility of more than one reasonable view of the statutory provision, it cannot be said that the assessment was erroneous or prejudicial to the interest of the Revenue. In this view of the matter, the Tribunal vacated the orders of the CIT passed under Section 263 of the Act for both the years. It may be added that the Tribunal placed reliance on the following judgments of the Supreme Court:—

(1) *Malabar Industries Co. Ltd.* v. *CIT* [20001 243 ITR 83/109 Taxman 66
(SO. C/Tv. *G.M. Mittal* [20031 253 ITR 255/130 Taxman 67 (SO.
(2) C/Tv. *Max India Ltd.* 120071 295 ITR 282/166 Taxman 188 (SO

13**.** The Tribunal however, observed that since no submissions were made by the assessee as regard the disallowance under Section* 14A, the orders of the CIT on that issue had to be affirmed.

14. We are not persuaded to take a view different from the view taken by the Tribunal. A clear finding was recorded by the Tribunal that the assessee had filed the details and calculations about the built-up area of the residential units. It would be unreasonable to hold'that the Assessing Officer ignored those details. Moreover the statutory auditors had clearly mentioned the dates of approval of the lay out plan of the residential colonies. The Assessing Officer was thus made aware of the dates on which the approvals were granted in respect of each of the four housing projects. The more important aspect was the applicability of clause (a) of Section SOIB(IO). On this aspect the Tribunal held that any construction carried out before the receipt of necessary approvals would be unauthorized arid could not be recognized. It was found by the Tribunal that in any case there was only site development by filling of pits, leveling of land, construction of roads, wells, laying of sewerage and electricity lines etc. Further there was no dispute regarding the date of commencement of construction with respect to the projects, namely, Golf Link-II and East End Loni. The Tribunal has found that both these projects commenced after 1st October, 1998. With regard to the other two projects, namely, Golf Link-I and Avantika Akruti, the Tribunal held that the date of commencement of construction had to be reckoned from the date when the construction of the building plan of each project was approved by the concerned authority. On examination of the details of the chronological events furnished by the assessee, it was held by the Tribunal that the building plans of each house submitted by the assessee were not sanctioned as such by the competent authority before 1st October, 1998. They were rejected and time and again modifications were proposed by the authority; finally the approvals of the building plans were issued after 1st October, 1998, except for 26 houses in Avantika Akruti Project. The Tribunal has also referred to certain orders of the Pune and Bombay Benches of the Tribunal where the date of approval by the competent authority was considered crucial to determine the date of commencement of development or construction. This discussion of the Tribunal shows that the determination of the question as to when the undertaking commenced development and construction, in the absence of any statutory prescription, has to be decided in a pragmatic and reasonable way. It would have been an entirely different issue had there been a statutory prescription of what would be the date of commencement of construction or development. It is certainly a debatable issue on which more than one plausible view is reasonably possible and merely because the Assessing Officer has taken one plausible view, it cannot be said that the assessment is erroneous or prejudicial to the interest of the Revenue. This position stands well settled by the judgments of the Supreme Court cited supra. The Tribunal applied the tests laid down in these judgments to the case.

15. For the above reasons, we are of the view that no substantial question of law arises for our consideration in ITA Nos.485/2010 & 480/2010. The orders of the Tribunal are accordingly upheld and appeals filed by the Revenue are dismissed.

13. Further we also observe that similar issue also came up before the Co-ordinate Bench, Pune in the case of Kirloskar Brothers Ltd. vs. ACIT in ITA No.636 & 637/PN/2008, Asst. Years 2003-04 & 2004-05 wherein vide its order dated 28th February, 2011 decided the issue by observing as under :-

15. After going through rival submissions and material on record, we find that Hon'ble Supreme Court in the case of Max India Ltd. (supra) has held that in case at the Kirloskar Brothers A.Y. 2003-04 & 2004-05 time of passing an order u/s 143(3) two views were inherently possible on the word "profits" occurring in the proviso to section 80-HHC(3) and therefore, subsequent amendment of section 80-HHC made in the year 2005, though retrospective, did not render the order of the Assessing Officer erroneous and prejudicial to the interest of the Revenue, the CIT could not exercise powers u/s 263 of the Act. Following the same analogy, we find that at the relevant point of time, two views were possible before retrospective amendment to section 80-IAwhereby Explanation was inserted by the Finance (No. 2) Act, 2009 with retrospective effect from 1-4-2000 which reads as under:

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

It was substituted by the Finance (No. 2) Act 2009 with retrospective effect from 1-4-2000. Prior to its substitution, Explanation, as inserted by the Finance Act, 2007 with retrospective effect from 1-4-2000, read as under:

> "Explanation - For the removal of doubts, it is hereby declared that nothing contained in this section shall apply to a person who executes a works contract entered into with the undertaking or enterprise as the case may be"

16. Thus, the above amendment to the Explanation to section 80-IA was made by the Finance (No. 2) Act 2009 while the assessment order passed on 28-3-2006 and the order of the CIT was passed on 13-3-2008. In this situation, the

retrospective insertion of the Explanation to section 80-IA and amendment thereof with retrospective effect does not render the assessment order erroneous in so far as prejudicial to the interests of revenue so as to invoke provisions of section 263 of the Act, as held by Hon'ble Supreme Court in the case of Max India Ltd. (supra). Here we are confined to the limited issue of invoking the provisions of section 263. According to us, the Assessing Officer has taken one of the possible views available at the relevant point of time. In view of this, we are not inclined to agree with the finding of the CIT. We accordingly set aside the order of the CIT passed u/s 263 for A.Y. 2003-04. Similar is the issue raised by the assessee in its appeal in ITA No. 637/PN/2008 for A.Y. 2004-05. Facts being similar, so following the reasoning given while dealing with the appeal for A.Y. 2003-04, the order passed by the CIT invoking the provisions of section 263 for A.Y. 2004-05 is also set aside.

14. Respectfully following the judgments and decision as referred above, we are of the view that in the given facts and circumstances of the case, Assessing Officer was having two legal possible views of either treating the assessee as a developer or a works contractor and on the basis of details available, ld. Assessing Officer treated the assessee as a developer eligible for deduction u/s 80IA of the Act.

15. In view of this, it can be said that the assessment u/s 143(3) of the Act is neither erroneous nor prejudicial to the interest of Revenue. Accordingly, we disagree with the finding of ld. CIT and set aside his order u/s 263 of the Act and restored the assessment order u/s 143(3) of the Act. Therefore issue raised in this appeal is decided in favour of assessee. Accordingly, the appeal of assessee is allowed.

16. In appeal of assessee in ITA No.812/Ahd/2010 for Asst. Year 2006-07, the issue raised is similar to that of appeal in ITA No.811/Ahd/2010 for Asst. Year 2005-06. We therefore, apply our decision taken in ITA No.811/Ahd/2010 and set aside the order of ld.

CIT u/s 263 of the Act and restore the order of Assessing Officer u/s 143(3) of the Act dated 28.3.2008 allowing deduction u/s 80IA of Rs.38,35,761/-. This appeal of the assessee is also allowed.

17. Now we take up ITA No.732/Ahd/2013 for Asst. Year 2005-06 and appeal in ITA No.2132/Ahd/2011 for Asst. Year 2006-07 (Revenue's appeals). Revenue is in appeals against the orders passed u/s 143(3) r.w.s. 263 allowing the deduction u/s 80IA of the Act to the assessee.

18. As we have already decided the appeal in favour of assessee in ITA No.811/Ahd/2010 & ITA No.812/Ahd/2010 for Asst. Year 2005-06 & Asst. Year 2006-07, quashing the order u/s 263 of the Act passed by ld. CIT, it will be academic to deal with these two appeals of Revenue against the order of ld. CIT(A) passed u/s 143(3) r.w.s. 263 for Asst. Year 2005-06 & Asst. Year 2006-07. Therefore, we dismiss both these appeals.

19. In the result, ITA No.732/Ahd/2013 for asst. year 2005-06 and ITA No. 2132/Ahd/2011 for Asst. Year 2006-07 are dismissed.

20. Now we take Revenue's appeals in ITA No.250/Ahd/2011 for asst. year 2007-08, in ITA No.733/Ahd/2013 for Asst. Year 2008-09 & ITA No.935/Ahd/2013 for Asst. Year 2009-10, Revenue has challenged the orders of ld. CIT(A) dated 29.12.2010, dated 26.12.2012 and dated 2.1.2013 raising common ground against these orders allowing claim u/s 80IA of the Act at Rs.42,19,807/-,

Rs.35,26,005/- and Rs.52,26,225/- respectively for asst. years 2007-08, 2008-09 and 2009-10.

21. We take up the facts for Asst. Year 2007-08 for adjudicating the issue. Briefly stated facts are that the return of income was filed on 29.10.2007 declaring total income at Rs.49,19,090/- followed by revised return dated 22.02.2009 declaring the same income. Case was selected for scrutiny assessment. Necessary details as required by Assessing Officer were filed by the assessee. Assessment was completed at an assessed income of Rs.1,22,70,657/- after making addition towards disallowance of deduction u/s 80IA of the Act at Rs.49,47,687/-, disallowance of claim of bad debt/business loss at Rs.17,77,540/- and disallowance of bad debt at Rs.6,26,340/-. Appeal of the assessee was partly allowed by ld. CIT(A).

22. Now Revenue is in appeal before the Tribunal against the allowability of claim of deduction of Rs.49,19,807/- u/s 80IA of the Act on account of three projects namely –GWSSB-ADB, Gondal, GWSSB-Gondal & MPAKVN.

23. Ld. DR supported the order of ld. Assessing Officer.

24. On the other hand, ld. AR supported the order of ld. CIT(A) and at the outset submitted that facts and activities undertaken by the assessee company in completion of the projects are similar to those adjudicated by the Co-ordinate Bench, Hyderabad in the case of Sushee Hi Tech Constructions (P) Ltd. vs. DCIT (2013) wherein it has

been held that the profits from such contracts which involve development, operating, maintenance, financial involvement and defect correction then such contract cannot be called a simple works contract and the assessee in such circumstances shall be eligible for deduction u/s 80IA of the Act.

25. We have heard the rival contentions and perused the material on the record and also gone through the decision relied on by the ld. AR. Solitary grievance of the Revenue is against the order of ld. CIT(A) allowing the claim of Rs. 42,19,807/- u/s 80IA of the Act. We observe that ld. CIT(A) has allowed the claim under section 80IA of the Act towards profit earned from three projects namely –GWSSB-ADB, Gondal, GWSSB-Gondal & MPAKVN by observing as below :-

2.3 I have considered the facts of the case, assessment order and appellant's submission. Appellant claimed deduction u/s 80IA(4) of IT Act on five infrastructure development projects before assessing officer as under :-

1. GWSSB –Asian Development Bank (ADB) Project
2. GWSSB –Gondal/Katharia
3. Ahmedabad Municipal Corporation
4. GWSSB –Nadiad
5. MP Audyogik Kendra Vikas Nigam Ltd. (IMPAKVN)

However in appeal submission dated 27.10.2010 appellant did not pursue its claim in respect of two projects namely –Ahmedabad municipal corporation and GWSSB Nadiad, it was submitted that these projects relates to maintenance and other services and not infrastructure development therefore 80IA claim in respect of these projects were not pursued. In view of this appellant's claim in respect of these two projects is rejected.

Coming to the other three projects appellant submitted detailed submission in respect of each project and demonstrated that as per the bid document and terms of the agreement the work included designing, construction, commissioning, testing, trial run etc. This also included training of the personnel.

All three agreements were produced and were examined in detail. Appellant's claim that it was not a mere contractor was evidenced from these documents. Appellant was found to be a designer of the infrastructure facilities with its technical team. It also constructed infrastructure facilities with its risk and also commissioned the same and carried out trial run. Appellant also operated and maintained the infrastructure facilities created by it for some time and also trained the personnel when required. Considering these facts it cannot be said that appellant was a mere contractor and not a developer. All the decisions referred by the assessing officer and appellant were analysed and in the light of facts of the appellant, it is quite clear that in respect of these three projects, appellant was developer. Appellant relied upon a recent decision of ITAT, Rajkot dated 23.9.10 in ITA No.1111/RJT/2010 in the case of M/s Tarmet Bel (JV) KCL, Rajkot vs. ITO Wd 1(4), Rajkot. All relevant decision of the issue were discussed in this decision. The relevant extract of this order is as under :-

"*In the* present case, we hove *already held that although the appellant entered into a contract with the Govt., the contract is* part of *the primary condition of Sec.* 80IA(4) and *further the nature of work carried out shows that the appellant not only directly (and not indirectly) carried out work as per the contract but it employed various resources of its own by way of machineries, technical knowledge, technical and other manpower, materials etc. and also funded the* same *out of its own capital and borrowings. The appellant was required to furnish guarantees including free maintenance of the infrastructure facilities. All these factors combined clearly go to show that the appellant also assumed considerable risk in the capacity of a businessman and the such tasks as undertaken, although under a contract as mandated by the Section, would require skills of planning of work, employing technical know-how to execute the work and to face the consequences of attendant risks.* We *find that the risks ore upon the* assessee and *not upon the Govt, These elements are generally missing in the* case of a sub-contractor. Here, *the appellant is directly engaged in performing its functions Further, in the case of Om Metals Infraprojects Ltd.(*supra), *it is held that if it is the assessee mobilizing people, plants, technical* expertise etc., the assessee can be *said to be a developer and that the assessee cannot* be denied deduct/on from the *profits of developing the infrastructure facility though it may not operate or maintain the same, particularly in view of the insertion of the word "or" in Sec. 80IA{4)."*

Honorable 1TAT held that if assessee assumes the risk of project, plan the project work, employ technical skills, mobilize people, funds and resources then assessee cannot be denied the deduction from the profit of developing infrastructure. Appellant's case is identical since in respect of these three projects appellant designed the infrastructure projects, took risk of the project, commissioned the project and conducted trial run, deployed its own resources. In the light of these facts appellant cannot be termed as mere contractor. Since appellant perform all those tasks which

is performed by a developer, appellant cannot be denied the benefit available to the developer. All the arguments of the assessing officer have been met by the appellant in detailed submissions quoted earlier. Respectfully following the recent decision of 1TAT Rajkot bench which squarely applies to the facts of the appellant's case, assessing officer is directed to allow deduction u/s 80IA of IT act in respect of the three projects namely GWSSB-ADB project, GWSSB-Gondal and MPAKVN project.

26. We further observe that from the agreement entered into by the assessee with GWSSB & MPAKVN with regard to their scope of work wherein assessee is required to designing (process, hydraulic, structure, equipment and aesthetically) providing, constructing and commissioning conventional water treatment plant consisting of all civil, mechanical and electrical components including necessary hydraulic testing, structural testing, equipment testing, trial run etc. The assessee is also required to arrange cement, sand steel and equipments etc. and undertake soil investigation and other exploration work. In all the assessee company has to design, construct, commission, test/operate and maintain water treatment plant. All these conditions akin to the contract awarded to the assessee duly come within the ambit of the conditions laid down u/s 80IA sub-section (4) of the Act.

27. We further observe that similar issue came up before the Co-ordinate Bench, Hyderabad in the case of GVPR Engineers Ltd. vs. ACIT (2012) taxmann.com 25 (Hyd) wherein it has been held as under :-

HELD-I

The provisions of section 80-IA(4), when introduced afresh by the Finance Act, 1999, the provisions under section 80-IA(4A) were deleted from the Act. The deduction available for any enterprise earlier under section 80-IA(4A) is also made available under section 80-JA(4) itself. Further, the very fact that the legislature mentioned the words (i) 'developing' or (ii) 'operating and maintaining' or (iii) 'developing, operating and maintaining' clearly indicates that any enterprise which carried on any of these three activities would become eligible for deduction. Therefore, there is no ambiguity in the Act. Where an assessee incurred expenditure for purchase of materials himself and executes the development work, i.e., *carries out the civil construction work, he will be eligible for tax benefit under section 80-1A. In contrast to this, an assesses, who enters into a contract with another person including Government or an undertaking or enterprise referred to in section 80-IA, for executing works contract, will not be eligible for the tax benefit under section 80-IA. The word 'owned' in sub-clause (a.) of clause (I) of sub-sec.(4) of section 80-IA refers to the enterprise. By reading of the section, it is clear that the enterprises carrying on development of infrastructure development should be owned by the company and not that the infrastructure facility should be owned by a company. The provisions are made applicable to the person to whom such enterprise belongs to is explained in sub-clause (a). Therefore, the word 'ownership' is attributable only to the enterprise carrying on the business which would mean that only companies are eligible for deduction under section 80-IA(4) and not any other person like individual, HUF, firm etc. [Para 26]*

According to sub-clause (a), clause ([) of sub-section (4) of section 80-IA, the word 'it' denotes the - enterprise carrying on the business. The word 'it' cannot be related to (he infrastructure facility, particularly in view of the fact that infrastructure facility includes Rail system, Highway project, Water treatment system, Irrigation project, a Port, an Airport or an Inland port which cannot be owned by any one. Even otherwise, the word 'it' is used to denote an enterprise. Therefore, there is no requirement that the assessee should have been the owner of the infrastructure facility. [Para 27]

The next question to he answered is whether the assessee is a developer or mere works contractor. The revenue relied on the amendments brought in by the Finance Act 2007 and 2009 to mention that the activity undertaken by the assessee is akin (o works contract and it is not eligible for deduction under section 80-IA(4). Whether the assessee is a developer or works contractor purely depends on the nature of the work undertaken by the assessee. Each of the work undertaken has to he analysed and a conclusion has to be drawn about the nature of the work undertaken by the assessee. The agreement entered into with the Government or the Government body may be a mere works contract or for development of infrastructure. It is to be seen from the agreements entered into by the assessee with the Government. The Government handed over the possession of the premises of projects to the assessee for the development of infrastructure facility. It is the assessee's responsibility to do all acts till the possession of property is handed over to the Government. The first phase is to lake 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. Any loss to the public caused in the process would be the responsibility of the assessee. The assessee has to develop the infrastructure facility. In the process, all the works arc to be executed by the assessee. It may be laying of a drainage system: may be construction of a project: provision of way for cattle and bullock carts in the village; provision for traffic without any hindrance, the assessee's duty is to develop infrastructure whether it involves construction of a particular Hem as agreed to in the agreement or not. The agreement is not for a specific work, it is for development of facility as a whole. The assessee is not entrusted with any specific work to

he done by the assessee. The material required is to be brought in by the assessee by sticking to the quality and quantity irrespective of the cost of the such material. The Government does not provide any material to the assessee. It provides the works in packages and not as a works contract. The assessee utilizes its funds, its expertise, its employees and takes the responsibility of developing the infrastructure facility. The losses suffered either by the Government or the people in the process of such development would be that of the assessee. The assessee hands over the developed infrastructure facility to the Government on completion of the development. Thereafter, the assessee has to undertake maintenance of the said infrastructure for a period of 12 to 24 months. During this period, if any damages are occurred, it shall be the responsibility of the assessee. Further, during this period, the entire infrastructure shall have to be maintained by the assessee alone without hindrance to the regular traffic. Therefore, it is clear that from an undeveloped area, infrastructure is developed and handed over to the Government and as explained by the CBDT vide its Circular, dated 18-5-2010, such activity is eligible for deduction under section 80-IA (4). This cannot be considered as a mere works contract but has to be considered as a development of infrastructure facility. Therefore, the assessee is a developer and not a works contractor as presumed by the revenue. The circular issued by the Board clearly indicate that the assessee is eligible for deduction under section 8()-IA(4). The department is not correct in holding that the assessee is a mere contractor ij the work and not a developer. [Para 28]

As per the provisions of section 80-IA, a person being a company has to enter into an agreement with the Government or Government undertakings. Such an agreement is a contract and for the purpose of the agreement a person may be called as a contractor as he entered into a contract. But the word 'contractor' is used to denote a person entering into an agreement for undertaking the development of infrastructure facility. Every agreement entered into is a contract. The word 'contractor' is used to denote the person who enters into such contract. Even a person who enters into a contract for development of infrastructure facility is a contractor. Therefore, the contractor and the developer cannot he viewed differently. Every contractor may not be a developer hut every developer developing infrastructure facility on behalf of the Government is a contractor. {Para 29]

Section 80-IA intends to cover the entities carrying out developing, operating and maintaining the infrastructure facility keeping in mind the present business models and intend to grant the incentives to such entities. The CBDT, on several occasions, clarified that pure developer should also be eligible to claim deduction under section 80-1A which ultimately culminated into amendment under section 80-IA in the Finance Act, 2001, to give effect to the aforesaid circulars issued by the CBDT. To avoid misuse of the aforesaid amendment, an Explanation *was inserted in section 80-IA, in the Finance Act, 2007 to 2009. to clarify that mere works contract would not he eligible for deductions under section 80-IA. But, certainly, the* Explanation *cannot be read to do away with the eligibility of the developer; otherwise, the Parliament would have simply reversed {he amendment made in the Finance Act, 2001. Thus, the aforesaid* Explanation *was inserted, certainly, to deny the lax holiday to the entities who do mere works contract or sub-contract as distinct from the developer. This is clear from the express intention of the Parliament while introducing the* Explanation. *The explanatory memorandum to Finance Act, 2007 states that the purpose of the tax benefit has all along been to encourage investment in development of infrastructure sector and not for the persons who merely execute the civil construction work. It categorically states that the deduction under section 80-IA is available to developers who undertakes entrepreneurial and investment risk and no! to the contractors, who undertake only business risk. Without any doubt, the assessee clearly demonstrated that it has undertaken huge risks in terms of deployment of technical personnel, plant and machinery, technical know-how, expertise and financial resources. After the amendment section 80-IA(4) is read as (\) developing*

or (\\) operating and maintaining or (\\\) developing, operating and maintaining any infrastructure facility. While prior to amendment the 'or' between three activities was not there, after the amendment 'or' has been inserted with effect from 1-4-2002 by Finance Act, 2001. Therefore, if the contracts involve design, development, operating and maintenance, financial involvement, and defect correction and liability period, then such contracts cannot be called as simple works contract to deny the deduction under .section 80-IA. The contracts which contain above features to be segregated, this deduction under section 80-IA have to be granted and the other agreements which are pure works contracts hit by the Explanation *to section 80-JA(13), those work are not entitled for deduction under section 80-IA. The profit from the contracts which involve Resign, development, operating and maintenance, financial involvement, and defect correction and liability period is to be computed by the Assessing Officer on* pro rata *basis of turnover. The Assessing Officer is directed to examine the records accordingly and grant deduction on eligible turnover as directed above. [Para 30]*

28. Further similar issue also came up before the Tribunal, Hyderabad Bench in the case of Sushee Hi Tech Constructions (P) Ltd. vs. DCIT (2013) 33 taxmann.com 236 (Hyderabad-Trib), wherein dealing with the issue has decided the same by observing as below :-

FACTS -1

- The assessee had undertaken the development of irrigation canals and railway tracks including conversion of gauge. The project premises was handed over by the Government to the assessee for developing into an infrastructure and the scope of work involved taking over of the site and developing the site, re-handing over of the site after due development. Thereafter, the assessee would have to maintain the developed infrastructure facility for a certain period as provided in the agreement. The risk involved during the period from the date of taking over till the date of handing over of the infrastructure would be that of the assessee. Any loss suffered in the process of development would be that of the assessee. Assessee claimed that activities undertaken by it were development of infrastructure facility and, therefore, it was entitled to deduction under section 80-IA(4).

- The lower revenue authorities disallowed the deduction on the ground that assessee was a mere works contractor and not a developer. The authorities took the view that unless operation of the infrastructure facility was also undertaken, the assessee would not be eligible for deduction.

On appeal

Held –I

Ownership of infrastructure facility not required for deduction under section 80-IA

- The provisions of section 80-1 A(4) when introduced afresh by the Finance Act, 1999, the provisions under section 80-IA(4A) were deleted from the Act. The deductions available for any enterprise earlier under section 80-1A(4A) are also made available under section 80-IA(4) itself. Further, the very fact that the Legislature mentioned the words (/') 'developing' or (//) 'operating and maintaining[1] or (/;'/') 'developing, operating and maintaining[1] clearly indicated that any enterprise which carried on any of these three activities would become eligible for deduction. Therefore, there is no ambiguity in the Income-tax Act. Where an assessee incurres expenditure for purchase of materials himself and executes the development work, *i.e.,* carries out the civil construction work, he will be eligible for tax benefit under section 80-IA. In contrast to this, an assessee, who enters into a contract with another person including the Government or an undertaking or enterprise referred to in section '80-IA for executing works contract, will not be eligible for the tax benefit under section 80-IA. The word 'owned' in sub-clause *(a]* of clause (1) of sub-section (4) of section 80-IA refers to the enterprise. By reading of the section, it is clear that the enterprises carrying on development of infrastructure development should be owned by the company and not that the infrastructure facility should be owned by a company. Thai the provisions are made applicable to the person to whom such enterprise belongs to is explained in sub-clause *(a).* Therefore, the word 'ownership' is attributable only to the enterprise carrying on the business which would mean that only companies are eligible for deduction under section 80-1 A(4) and not any other person like individual. HUF, firm. etc. [Para 31]

- According to sub-clause *(a),* clause (/) of sub-section (4) of section 80-IA. the word 'it' denotes the enterprise carrying on (he business. The word 'it' cannot be related to the infrastructure facility, particularly in view of the fact that infrastructure facility includes Rail system. Highway project, Water treatment system, Irrigation project, a Port, an Airport or an Inland port which cannot be owned by any one. Even otherwise, the word 'it' is used to denote an enterprise. Therefore, there is no requirement that the assessee should have been the owner of the infrastructure facility. [Para 32]

Assessee is a developer and not a works contractor

- Whether the assessee is a developer or works contractor is purely depends on the nature of the work undertaken by the assessee. Bach of the work undertaken has to be analyzed and a conclusion has to be drawn about the nature of the work undertaken by the assessee. The agreement entered into with the Government or the Government body may be a mere works contract or for development of infrastructure. It is to be seen from the agreements entered into by the assessee with the Government.

- In the instant case, the Government handed over the possession of the premises of projects to the assessee for the development of infrastructure facility. It is the assessee's responsibility to do all acts till the possession of property is handed over to the Government. The first phase 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. Any loss to the public caused in the process would be the responsibility of the assessee. The assessee has to develop the

infrastructure facility. In the process, all the works are to be executed by the assessee. It may be laying of a drainage system; construction of a project; provision of way for the cattle and bullock carts in the village; provision for traffic without any hindrance, the assessee's duty is to develop infrastructure whether it involves construction of a particular item as agreed to in the agreement or not. The agreement is not for a specific work; it is for development of facility as a whole. The assessee is not entrusted with any specific work to be done by the assessee. The material required is to be brought in by the assessee by sticking to the quality and quantity irrespective of the cost of such material. The Government does not provide any material to the assessee. It provides the works in packages and not as a works contract. The assessee utilizes its funds, its expertise, its employees and takes the responsibility of developing the infrastructure facility. The losses suffered either by the Govi. or the people in the process of such development would be that of the assessee. The assessee hands over the developed infrastructure facility to the Government on completion of the development. Thereafter, the assessee has to undertake maintenance of the said infrastructure for a period of I 2 (o 24 months. During this period, if any damages are occurred, it shall be the responsibility of the assessee. Further, during this period, the entire infrastructure shall have to be maintained by the assessee alone without hindrance to the regular traffic. Therefore, it is clear that from an undeveloped area, infrastructure is developed and handed over to the Government and as explained by the CBDT *vide* its Circular dated 18-05-2010. such activity is eligible for deduction under section 80-IA (4). This cannot be considered as a mere works contract but has to be considered as a development of infrastructure facility.

- Therefore, the assessee is a developer and not a works contractor as presumed by the revenue. The circular issued by the Board clearly indicates that the assessee is eligible for deduction under section 80-IA (4). The department is not correct in holding that the assessee is a mere contractor of the work and not a developer. [Para 33]

Assessee is entitled to deduction under section 80-IA

- As per the provisions of the section 80-IA, a person being a company has to enter into an agreement with the Government or Government undertakings. Such an agreement is a contract and for the purpose of the agreement a person may be called as a contractor as he entered into a contract. But the word 'contractor' is used to denote a person entering into an agreement for undertaking the development of infrastructure facility. Every agreement entered into is a contract. The word 'contractor' is used to denote the person who enters into such contract. Even a person who enters into a contract for development of infrastructure facility is a contractor. Therefore, the contractor and the developer cannot be viewed differently. Every contractor may not be a developer but every developer developing infrastructure facility on behalf of the Government is a contractor. [Para 34]

- Section 80-IA intended to cover the entities carrying out developing, operating and maintaining the infrastructure facility keeping in mind the present business models and intends to grant the incentives to such entities.

- The CBDT, on several occasions, clarified that pure developer should also be eligible to claim deduction under section 80-IA, which ultimately culminated into amendment

under section 80-IA in the Finance Act, 2001. to give effect to the circulars issued by the CBDT. lo avoid misuse of the aforesaid amendment, an *Explanation* was inserted in section 80-IA in the Finance Act 2007 and 2009. to clarify that mere works contract would not be eligible for deductions under section 80-IA. But. certainly, the *Explanation* cannot be read to do away with the eligibility of the developer; otherwise, the Parliament would have simply reversed the amendment made in the Finance Act, 2001. Thus, the aforesaid *Explanation* was inserted, certainly, to deny the tax holiday to the entities who do mere works contact or sub-contract as distinct from the developer. This is clear from the express intension of the Parliament while introducing the *Explanation.* The explanatory memorandum to Finance Act, 2007, states that the purpose of the tax benefit has all along been to encourage investment in development of infrastructure sector and not for the persons who merely execute the civil construction work. It categorically states that the deduction under section 80-IA is available to developers who undertake entrepreneurial and investment risk and not for the contractors, who undertake only business risk. Without any doubt, the assessee clearly demonstrated that it has undertaken huge risks in terms of deployment of technical personnel, plain and machinery, technical know-how, expertise and financial resources.

- Further, after the amendment the section 80-IA(4) read as (/) developing or (//') operating and maintaining or (///') developing, operating and maintaining any infrastructure facility. Prior to amendment the 'or' between three activities was not there, after the- amendment 'or' has been inserted with effect from 1-4-2002 by Finance Act, 2001.

- Therefore, the assessee should not be denied the deduction under section 80-IA, as if the contracts involve development, operating, maintenance, financial involvement and defect correction and liability period, then such contracts cannot be called as simple works contract. The contracts which contain above features are to be segregated and on this deduction under section 80-IA has to be granted and the other agreements, which are pure works contracts hit by the *Explanation* to section 80-IA(13), are not entitled for deduction under section 80-IA. The profit from such contracts which involve development, operating, maintenance, financial involvement, and defect correction and liability period is to be computed by Assessing Officer on *pro-rata* basis of turnover. The Assessing Officer is directed to examine and grant deduction on eligible turnover as directed above. [Para 35]

- Further, where the assessee has carried out the development of infrastructure work in consortium and not as a sub-contractor, then also the assessee is entitled to deduction under section 80-IA. The same is also applicable in case of work allotted by Government corporation/Government bodies. [Para 37]

29. Respectfully following the decisions of the Co-ordinate Bench in the above referred cases and applying the facts to these facts as well as the provisions of sec.80IA sub-sec.(4) of the Act, we are of the

considered view that assessee is not merely a contractor but a developer looking to the scope of activities undertaken by it for the completion of the project and, therefore, eligible for deduction u/s 80IA of the Act. We therefore, find no reason to interfere with the order of ld. CIT(A) and uphold the same. The ground raised by the Revenue is dismissed. The appeal of Revenue is dismissed.

30. In appeal in ITA No.733/Ahd/2013 and ITA No. 935/Ahd/2013 for Asst. Years 2008-09 and 2009-10 Revenue has raised similar issue against the orders of ld. CIT(A) for allowing Rs. Rs.35,26,005/- and Rs.52,26,225/- respectively.

31. As the issue is similar to that which we have adjudicated for Asst. Year 2007-08. We apply the same decision to these appeals and we find no reason to interfere with the orders of ld. CIT(A), we uphold the same. Accordingly, the appeals filed by the Revenue are dismissed for Asst. Year 2008-09 and Asst. Year 2009-10.

32. For Asst. Year 2007-08 assessee has filed Cross Objection No.30/Ahd/2011 in ITA No.250/Ahd/2011 against the confirmation of disallowance of business loss of Rs.17,77,540/- holding as trading loss and the assessee company being unable to prove the loss. During the course of assessment proceedings, ld. Assessing Officer observed assessee placed bank guarantee of Rs.44,37,500/- which was given to Rajkamal Builders out of which part payment was received and after carrying out certain debits and credits for various transactions the balance of Rs.17,77,540/- was outstanding as on

31.03.2007 which was due to be received by the assessee. This amount of Rs.17,77,540/- was claimed as business loss by the Assessee. However, ld. Assessing Officer was of the view that the advance given to Rajkamal Builders was of capital nature and, therefore, this amount of Rs.17,77,540/- is merely a capital loss and not revenue loss and claim is treated as liability. Against this addition assessee went in appeal before ld. CIT(A) but ld. CIT(A) confirmed the addition of disallowance of business loss of Rs.17,77,540/- by observing as under :-

3,3. I have considered the facts of the case, assessment order and appellant's submission. I have gone through the decisions relied upon by the assessing officer as well as appellant. Claim of business loss under section 28 is possible if following conditions are fulfilled-

1-the loss should be incidental to the business.
2-the loss suffered should be proved.

In the case of appellant, facts have been elaborately discussed in assessment order as well as appellant's submission. It is not in dispute that appellant made deposit for the project jointly bid by it. Without such deposit/advance, appellant would not have been eligible for the project. Therefore the advance/deposit was given in the normal course of running the business. Such losses are allowable as business loss under section 28 in view of the various decisions relied upon by the appellant. The nature of loss can be capita! or revenue depending upon the purpose for which it was given. If the loss is suffered in the process of creation of capital asset, such loss will be capital. However if the losses suffered for running the business, it will be revenue in nature. Like stock is an asset but loss suffered in fire is allowable as revenue. Similarly cash embezzled by employee is revenue though Cash is an asset. In view of this the purpose for which the loss is suffered is important rather than the item on which loss is suffered. Accordingly the business advance given by the appellant for obtaining project is held to be in the normal course of business and such losses are revenue in nature.

However for allowing such loss, other condition is that it should be proved as loss. Appellant has not submitted evidence to prove that the loss is final and there is no scope of recovery. It is not a claim of bad debts where mere writing off is sufficient. For claiming loss under section 28, onus is on the appellant to prove

that it is final. Since appellant has not proved the loss, the same Is not allowable In this year.

However if appellant is able to prove the loss in any future year, the same will be allowable in that year as business loss under section 28.

33. Now Cross Objection has been filed by the assessee.

34. Ld. AR at the outset requested that ld. CIT(A) has sustained the disallowance for the very reason that assessee has been unable to prove the loss by not submitting any evidence. Ld. AR made a request that if the matter is set aside to the Assessing Officer for examining this issue necessary evidence will be placed for verification before ld. Assessing Officer towards justification of the claim that the impugned amount of Rs.17,77,540/- is merely a business loss.

35. Ld. DR relied on the orders of lower authorities and did not object to the submissions of ld. AR for setting aside the matter to the file of Assessing Officer.

36. We have heard the rival contentions and perused the material on record. The grievance of the assessee through this Cross Objection is against the sustaining of addition towards disallowance of Rs.17,77,540/-. From going through the observation of ld. CIT(A) we find that impugned transaction of giving bank guarantee to Rajkamal Builders was in the course of business for carrying out of the contract for construction of water treatment of GWSSB & ADB and amount of Rs.17,77,540/- was outstanding to be received has

been claimed as business loss as there was no possibility to recover the same. However, these facts could not be proved by the assessee with the support of necessary documents. Ld. AR has made a request for setting aside the issue for examination to which ld. DR did not object. Therefore, we set aside this issue to the file of Assessing Officer for the purpose of verification of necessary evidence/documents which will be submitted by assessee. Needless to mention that reasonable opportunity of being heard will be provided to the assessee. Accordingly, the C.O. of assessee is allowed for statistical purposes.

37. Now we take up appeals in ITA Nos.487/Ahd/2013 for Asst. Year 2008-09 and 488/Ahd/2013 for Asst. Year 2009-10 filed the Assessee. Following grounds have been raised in these appeals :-

ITA No.487/Ahd/2013 (Assessee's appeal) for Asst. Year 2008-09.

Grounds of appeal –

1. a) The ld. Commissioner of Income Tax (Appeals): VI, Ahmedabad [hereinafter referred to as C1T(A)] has grievously erred in law and on facts in excluding Rs. 2,05,556/-, being interest earned on bank FDRs, from the profits derived from projects eligible u/s. 80IA in total disregard of the fact that the said bank deposits were placed by the Appellant company according to the terms of the contracts awarded through tenders.

   b) The ld. CIT(A) should have restricted himself to the exclusion of only dividend income; interest on income tax refund from the profits derived from the projects eligible u/s. 80IA.

   The Appellant company craves leave to add to, alter, amend, modify, substitute any of the ground as and when the occasion may arise.

ITA No.488/Ahd/2013 (Assessee's appeal) for Asst. Year 2009-10

Grounds of appeal –

1. The ld. Commissioner of Income Tax (Appeals): VI, Ahmedabad [hereinafter referred to as CIT(A)] has grievously erred in law and on facts in issuing direction to exclude interest earned on bank FDR, which were placed in terms of contracts awarded through tenders, from the profits derived from projects eligible u/s. 80IA (para: 3.4 page: 11 of the appellate order).

2. The ld. CIT(A) has grievously erred in law and on facts in confirming the disallowance of Rs. 3,21,458/- (the correct amount is Rs. 3,19,458/-) u/s. 2(24)(x) r.w.s. 36(1)(va) although Rs. 2,02,010/- has been paid during the relevant previous year and Rs. 1,17,448/- has been paid before the due date of filing of return of income u/s. 139(1) of the Income Tax Act.

3. The Appellant company craves leave to add to, alter, amend, modify, substitute any of the ground as and when the occasion may arise.

38. Ground No.1 is common in these two appeals of assessee against the orders of ld. CIT(A) for not allowing deduction u/s 80IA of the Act towards interest earned on bank FDRs. Ld. AR did not press this common ground in both these appeals and therefore, the same is dismissed.

39. Now we take up ground no.2 of ITA No.488/Ahd/2013 against the order of ld. CIT(A) confirming the disallowance of Rs.3,21,458/- (correct amount is Rs.3,19,458/-) u/s 2(24)(x) r.w.s. 36(1)(va) of the Act towards non-payment of employees contribution to the Government.

40. Ld. DR submitted that this issue has now been settled in favour of Revenue by the judgment of Hon. Jurisdictional High Court in the case of CIT vs. Gujarat State Road Transport Corporation 366

ITR 170 (Guj). Ld. AR accepted that this issue is decided against the assessee in the light of above referred decision.

41. We observe that this ground relates to disallowance of Rs. 3,21,458/- (correct amount is Rs.3,19,458/-) u/s 2(24)(x) r.w.s. 36(1)(va) of the Act towards delayed payment of employees contribution to PF in the Government Account. Such delayed payment has been disallowed for claiming as an expenditure as per the judgment of Hon. Jurisdictional High Court in the case of CIT vs. Gujarat State Road Transport Corporation wherein it has decided the issue by observing as under :-

7.00. Heard the learned advocates appearing on behalf of the respective parties at length.

8.00. In view of the above and for the reasons stated above, and considering section 36(1)(va) of the Income Tax Act, 1961 read with sub-clause (x) of clause 24 of section 2, it is held that with respect to the sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section (2) applies, the assessee shall be entitled to deduction in computing the income referred to in section 28 with respect to such sum credited by the assessee to the employees' account in the relevant fund or funds on or before the "due date" mentioned in explanation to section 36(1)(va). Consequently, it is held that the learned tribunal has erred in deleting respective disallowances being employees' contribution to PF Account / ESI Account made by the AO as, as such, such sums were not credited by the respective assessee to the employees' accounts in the relevant fund or funds (in the present case Provident Fund and/or ESI Fund on or before the due date as per the explanation to section 36(1)(va) of the Act i.e.

date by which the concerned assessee was required as an employer to credit employees' contribution to the employees' account in the Provident Fund under the Provident Fund Act and/or in the ESI Fund under the ESI Act.

Consequently, all these appeals are allowed and the impugned judgement and orders passed by the tribunal in deleting the disallowances made by the AO are hereby quashed and set aside and the disallowances of the respective sums with respect to the Provident Fund / ESI Fund made by the AO is hereby restored. The questions raised in present appeal are answered in favour of the revenue. With this, all these appeals are allowed.

42. Respectfully following the above judgment of Hon. Jurisdictional High Court, we are of the view that ld. CIT(A) has rightly disallowed the expenditure of employees contribution to P.F. deposited after the due date. We dismiss this ground of assessee.

43. ITA No.487/Ahd/2013 and 488/Ahd/2013 of the assessee are dismissed.

44. Other grounds of the appeals are of general nature, which need no adjudication.

45. In the result ITA No.811/Ahd/2010 and 812/Ahd/2010 of assessee are allowed, ITA No.732/Ahd/2013, ITA No.2132/Ahd/2011, ITA No.250/Ahd/11, ITA No.733/Ahd/2013 & ITA No.935/Ahd/2013 of Revenue are dismissed, CO No.30/Ahd/2011 by assessee is allowed

for statistical purposes and ITA Nos.487 & 488/Ahd/2013 by assessee are dismissed.

Order pronounced in the open Court on 30th September, 2016

Sd/-	sd/-
(R.P. Tolani)	(Manish Borad)
Judicial Member	Accountant Member

Dated 30/9/2016

Mahata/-

Copy of the order forwarded to:

1.	The Appellant
2.	The Respondent
3.	The CIT concerned
4.	The CIT(A) concerned
5.	The DR, ITAT, Ahmedabad
6.	Guard File

BY ORDER

Asst. Registrar, ITAT, Ahmedabad

1. Date of dictation: 22-23-26/09/2016
2. Date on which the typed draft is placed before the Dictating Member: 28/09/2016 other Member:
3. Date on which approved draft comes to the Sr. P. S./P.S.:
4. Date on which the fair order is placed before the Dictating Member for pronouncement: _____
5. Date on which the fair order comes back to the Sr. P.S./P.S.:
6. Date on which the file goes to the Bench Clerk: 30/9/2016
7. Date on which the file goes to the Head Clerk:
8. The date on which the file goes to the Assistant Registrar for signature on the order:
9. Date of Despatch of the Order: