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

[Before Hon'ble Shri Aby. T. Varkey, JM & Shri M.Balaganesh, AM]

I.T.A No. 692/Kol/2016

Assessment Year : 2010-11

ACIT, Circle-33, Kolkata	-vs-	M/s Ho Hup Simplex JV [PAN: AAAAH 0653 B]
(Appellant)		(Respondent)

For the Appellant : Shri Arindam Bhattacharjee, Addl. CIT

For the Respondent : Shri Ravi Tulsiyan, FCA

Date of Hearing : 14.03.2018

Date of Pronouncement : 21.03.2018

ORDER

Per M.Balaganesh, AM

1. This appeal by the Revenue arises out of the order of the Learned Commissioner of Income Tax(Appeals)-9, Kolkata [in short the ld CIT(A)] in Appeal No.19/CIT(A)-9/Cir-33/2014-15/Kol dated 29.01.2016 against the order passed by the ACIT, Range-33, Kolkata [in short the ld AO] under section 143(3) of the Income Tax Act, 1961 (in short "the Act") dated 26.03.2013 for the Assessment Year 2010-11.

2. The only issue to be decided in this appeal is as to whether the assessee is a developer or contractor and consequentially whether it is entitled for deduction u/s 80IA of the Act in the facts and circumstances of the case.

3. The brief facts of this case are that the assessee is a joint venture between M/s Simplex Infrastructure Ltd and M/s Ho Hup Construction Company (India) Pvt Ltd. The said members entered into an agreement as per which they were to act in collaboration with each other for the purpose of participation and submission of Tender Bid to the National Highway Authority of India for construction of road. The assessee being a consortium of companies engaged in the business of development of infrastructure facility claimed deduction u/s 80IA of the Act. The assessee filed its return of income for the Asst Year 2010-11 disclosing total income of Rs 43,80,800/- after claiming the deduction u/s 80IA of the Act of Rs 1,11,75,715/-. The ld AO observed that the assessee had been awarded a contract for 'Rehabilitation and Upgradation of existing 2 lane road to 4/6 lane divided carriageway configuration of Kavali to Ongole, km 222 to km 291 of National Highway No. 5 in Andhra Pradesh vide letter of acceptance dated 6.7.2001. The assessee JV has been following the completed contract method of accounting as per erstwhile Accounting Standard (AS) – 7 issued by the Institute of Chartered Accountants of India (ICAI in short) . As per completed contract method, the total revenue and costs are required to be recognized only after completion of the contract and all expenses on the project incurred during the course of contract are required to be carried forward as Work in Progress (WIP) to be claimed in the year. In accordance with erstwhile AS-7 , the assessee recognized a sum of Rs 298,69,41,081/- as WIP . As the contract has been completed during the year, the JV recognized its revenue and accordingly prepared its profit and loss account. The total revenue of Rs 287,86,15,699/- since inception of the contract has been recognized in the year of completion i.e Asst Year 2010-11.

3.1. The ld AO observed that the assessee during the Asst Year 2010-11, had shown contractual receipts of Rs 287,86,15,699/- and had shown net profit of Rs 3,58,31,288/- before tax. In the audit report and in the return of income, the assessee

claimed deduction u/s 80IA of the Act to the tune of Rs 1,11,75,715/- for the development of infrastructure facility. The ld AO invoked the provisions of Explanation to section 80IA with retrospective effect from 1.4.2000 and observed that the assessee JV is merely executing the civil construction work in the nature of works contracts and receiving payment from the National Highway Authority of India. The assessee was show caused as to why the deduction claimed u/s 80IA of the Act should be denied to it. The assessee filed a reply in response to the same. The ld AO without adducing any reason observed that the submission of the assessee is not found satisfactory and denied the deduction u/s 80IA of the Act and disallowed the same in the assessment.

4. The ld CITA appreciated the contentions of the assessee and deleted the disallowance u/s 80IA of the Act by holding that the assessee in the instant case is a developer and hence explanation to section 80IA(13) of the Act does not apply to it. The ld CITA also placed reliance on the co-ordinate bench decisions of this tribunal in the case of M/s Simplex Subhash JV, Simplex Somdatt Builders JV and Simplex Projects Ltd for Asst Year 2007-08 in this regard. Aggrieved, the revenue is in appeal before us on the following grounds:-

1. In the facts and circumstances of the case the Ld. CIT(A)-9, Kolkata has erred in allowing the deduction of Rs. 1,11,75,715/- u/s 80IA.

2. In the facts and circumstances of the case the Ld. CIT(A)-9, Kolkata has erred in treating the assessee as developer not contractor.

3. The Ld. CIT(A)-9, Kolkata has erred in not adhering to the explanation to Section 80IA (introduced by the Finance Act, 2007).

4. The department craves leave to add, alter or amend any ground of grounds before or at the time of hearing.

5. The ld DR vehemently relied on the order of the ld AO. In response to this, the ld AR vehemently relied on the orders of the co-ordinate bench decision of this tribunal in the case of DCIT vs SPML Infra Ltd in ITA Nos. 1291-1292/Kol/2013 for Asst Years 2006-07 & 2009-10 dated 24.8.2016 on the similar issue, which has been rightly relied upon by the ld CITA.

6. We have heard the rival submissions. From the reading of provisions of section 80IA of the Act, we find that in order to avail deduction u/s 80IA of the Act, the following conditions should be satisfied by the assessee :-

a) The assessee should be a company or consortium of companies.
b) There should exist an agreement with the Central Government, State Government, Local Authority or any other Statutory Body and
c) Pursuant to the said agreement, the company engages itself in any of the following activities :-

(i) Development of Infrastructure facility
(ii) Operation and Maintenance of Infrastructure facility
(iii) Development, Operation and Maintenance of Infrastructure facility

6.1. The assessee in the instant case is a consortium of companies which, pursuant to agreements with Government, engaged itself in development of infrastructure. The main dispute to be resolved in this appeal is as to whether the assessee is to be treated as a developer or contractor. In this regard the provisions of Explanation in section 80IA of the Act inserted vide Finance Act, 2009 with retrospective effect from 1.4.2000 is relevant which is reproduced below for the sake of convenience :-

"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)."*

6.2. From a plain reading of the above it is clear that deduction U/S 80-IA does not apply to works contract. Now the relevant question that arises here is that does the term "work contract" include all contracts entered into by the assessee, i.e. can section 80-IA be interpreted in a manner that if an assessee develops infrastructure under a contract, he is not eligible for deduction U/S 80-IA (as interpreted by the ld. AO).

6.3. At this juncture, it would be appropriate to first discuss the legislative intent behind the extension of tax holiday to the infrastructure industry U/S 80-IA. In the 80's and in early 90's, infrastructure like roads, bridges, water works etc were being done by the Government departments like PWD, Irrigation Department etc departmentally. The experience had been that the infrastructure developed departmentally had poor quality, used to take much more time than as originally scheduled which in turn would result in cost escalation i.e. the government would end up spending much more than originally planned for the poor quality infrastructure being done departmentally. In the early 90's, the government wanted to involve the private sector for development of infrastructure projects but very few assessees in the private sector were forthcoming to take on such projects as there were serious issues of delay in land acquisition, public interest litigations and problems in getting environmental clearances. **Therefore, in order to encourage private sector participation, tax holiday u/s 80-IA was extended to infrastructure industry** and consequently sub-section (4A) was introduced and inserted by the Finance Act of 1995 with effect April 1, 1996. Since then the legislative scheme has been liberalised progressively, in the interests of aiding the growth of infrastructure.

6.4 The above discussed legislative intent may be confirmed from the judgment of the Bombay High court in case of **Commissioner of Income-tax v. ABG Heavy Industries Limited [322 ITR 323].**

6.5 In the background of the legislative intent behind insertion of sub-section (4) as discussed above, if we interpret the Explanation in a way that income from infrastructure development work undertaken under any contract with any person including the Central or State Government is not eligible for deduction U/S 80-IA, then the basic intention behind extension of said benefit will be defeated and Section 80IA(4) shall become redundant. The same will negate the grant of benefit to infrastructure industries under sub-section (4) pursuant to which an existence of agreement with Government authorities is essential for availing the tax holiday. On one hand the main enactment mandates existence of an agreement with government and on the other hand the Explanation (as interpreted by the Ld. AO) denies the benefit to the assessee if he undertakes infrastructure work under a contract/agreement. Thus, the interpretation of the Explanation adopted by the ld. AO is clearly contradictory to and has the effect of negating the main enactment.

6.6. It would be relevant now to ascertain as to what is meant by the term 'works contract' as used in the Explanation inserted vide Finance Act 2009, w.r.e.f. 1.4.2000. Section 80IA of the Act nowhere defines the term 'works contract', hence the natural meaning of the word shall apply. As per the Oxford dictionary, the term 'work' means application of effort to a purpose or use of energy. Thus going by the dictionary meaning we may say that a works contract is a contract which involves effort or in other words labour of the contractor. Further as per the Black's Law

Dictionary, the term 'work' means labour or in other words physical and mental exertion to attain an end especially as controlled by and for the benefit of the employer. Thus as per Black's Law also, a works contract is a labour contract under which the contractor merely employs his labour as per the directions of the contractee.

6.7. Further, attention is invited to relevant extracts of section 194C of the IT Act:

> *"(iv) "work" shall include-*
> *(a) advertising ,-*
> *(b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;*
> *(c) carriage of goods or passengers by any mode of transport other than by railways; '*
> *(d) catering ;*
> *(e) manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer,*
> ***but does not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, other than such customer. "***

Thus as per section 194C also, "works contract" does not include a contract wherein the contractor in addition to employing labour, procures material from a third party. Thus, contracts involving mere labour of the contractor are included in the purview of "works contract".

6.8. It would be pertinent at this juncture to look into the observations of the Hon'ble Supreme Court in the case of Associated Cement Co. Ltd. vs. CIT [201 ITR 435], wherein the Hon'ble Court while interpreting the term 'work' u/s 194C held that:

> *"We see no reason to curtail or to cut down the meaning of the plain words used in the section. "Any work" means any work and not a "works contract ", which has a special connotation in the tax law.* ***Indeed in the sub-section, the "work " referred to therein expressly includes supply of labour to carry out a work. It is a clear indication of the Legislature that the "work" in the sub-section is not intended to be confined to or restricted to " works contract " .. "***

The issue before the Supreme Court in the aforesaid case was whether the term "work" used in section 194C needs to be restricted to "works contract". The Apex Court laid out that the term "work" used in section 194C need not be restricted to "works contracts" (i.e. labour contracts) because the sub-section expressly includes supply of labour to carry out work. In other words, it implied that works contract means supply of labour to carry out work.

6.9. Thus from the above, it could be safely concluded that a works contract constitutes a contract under which the contractor is merely employing his efforts or labour. Under such a contract, the contractee provides the material and other requisites (a complete infrastructure) needed to carry out the desired work to the contractor who by applying his labour to the said material turns the material into a desired product.

6.10. It would be relevant to go to the Memorandum explaining the provisions in the Finance Bill 2007 reported in (2007) 289 ITR (St.) 292 at page 312, which reads as under:-

> *"Section 80-IA, inter alia, provides for a ten-year tax benefit to an enterprise or an undertaking engaged in development of infrastructure facilities, industrial parks and special economic zones. The tax benefit was introduced for the reason that industrial modernization requires a passive expansion of, and qualitative improvement in, infrastructure (viz., expressways, highways, airports, ports and rapid urban rail transport systems) which was lacking in our country.* ***The purpose of the tax benefit has all along been for encouraging private sector participation by way of investment in development of the infrastructure sector and not (or the persons who merely execute the civil construction work or any other works contract.***
>
> *Accordingly, it is proposed to clarify that the provisions of section 80- IA shall not apply to a person who executes a works contract entered into with the undertaking or enterprise referred to in the said section. Thus, in a case where a person makes the*

investment and himself 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, a person who enters into a contract with another person (i.e., undertaking or enterprise referred to in section 80-IA) for executing works contract, will not be eligible for tax benefit under section 80- IA.

This amendment will take retrospective effect from April 1, 2000 and will accordingly apply in relation to the assessment year 2000· -01 and subsequent years."

6.11. The Explanatory Memorandum clearly lays out that purpose of extending tax benefit U/S 80-IA was to encourage investments from the private sector and hence work contracts, i.e. contracts involving merely labour (or mere execution of construction without making investments) are outside the purview of the provisions of section 80- IA.

6.12. Thus, the term "works contract" used in Explanation to section 80-IA(13) means a contract of developing infrastructure by merely employing labour and making no investments. Reliance in this regard is placed on the following judgements :-

a) Co-ordinate Bench decision of *Hyderabad Tribunal in the case of M/s GVPR Engineers Ltd vs ACIT reported in (2012) 51 SOT 0207 (Hyd) (URO)* , wherein it was held that :-

"The next question to be answered is whether the assessee is a developer or mere works contractor. Whether the assessee is a developer or works contractor is purely depends on the nature of the work undertaken by the assessee. Each 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. 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; may be 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 Govt. 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 un- developed 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 80IA (4) of the Act. 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 department is not correct in holding that the assessee is a mere contractor of the work and not a developer."

The Hyderabad Tribunal had observed that 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 u/s 80IA of the act is available to developers who undertakes entrepreneurial and investment risk and not for the contractors, who undertakes only business risk.

6.13. Similarly the Chennai Bench of Tribunal in case of R.R. Constructions, Chennai vs Department Of Income Tax 2013) 35 CCH 0547 Chen Trib (2015) 152 ITD 0625 (Chennai) held that "when the assessee makes investment and himself executes development work and carries out civil works he is eligible for tax benefit u/s 80IA of the Act. Accordingly, with the foregoing discussion, we hold that the assessee is

entitled to deduction u/s 80IA(4) of the Act, and therefore, we order to delete the addition made in this respect" Thus, the memorandum explaining the provisions in the Finance Bill, 2007, further strengthens the contention of the assessee that a works contract is a contract which involves mere labour of the contractor. However, if under a contract, the contractor employs his capital and enterprise in addition to labour, then the said contract does not constitute a works contract under the Explanation to section 80-IA(l3) and the contractor shall be eligible for deduction U/S 80-IA.

6.14. We find that the Co-ordinate Bench of this Tribunal in the case of *M/s SPML Infra Ltd in ITA Nos. 1291-1292/Kol/2013 for Asst Years 2006-07 & 2009-10 dated 24.8.2016* had held as under:-

> *"Now coming to the facts of the case, it is submitted that the assessee was not mere works contractor, who had merely employed its labour under the projects from the various government authorities. The assessee was a developer. In addition to employing labour it made investments, it developed an enterprise/infrastructure to support the work under the various projects. In addition to labour, it deployed its machinery, materials and did all the things necessary (i.e. provided an enterprise) to support the construction work undertaken under the various projects. The assessee was provided with the site alone and by putting its own inputs (not labour alone) he converted the site into an infrastructural facility.*
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> *8.4 Further, ITAT (Hyderabad) in case of Siva Swathi Constructions Pvt. Ltd. vs DCIT, Circle-3(2) in ITA No.1008-09/Hyd/2013 for AYs 2009-10 & 2010-11 dated 25.10.2013 held that "The next reason given by the CIT(A) is with regard to non-financial participation by the assessee, as the assessee has got mobilization advance. The mobilization advance has not been given freely. It has been given only after the assessee furnished a bank guarantee, and the bank guarantee has been given by the bank only after getting enough security from the assessee, to protect itself from any risk on account of any default on the part of the assessee. The assessee has taken financial assistance from bank and paid huge interest of Rs. 2,87,10,943.00 for assessment year 2009-10 and of Rs. 9,35,78,373.00 for assessment year 2010-11, as seen from the Profit and Loss Account of the assessee for the relevant years ending on 31.3.2009 and 31.3.2010 respectively, copies of which are furnished by the assessee at pages 20 and 65 of the paper-book. Similarly, assessee has invested its own fund of Rs.5,55,00,000.00 for assessment year 2009-10 and of Rs. 7,86,75,710.00 for the assessment year 2010-*

11, as seen from the Balance Sheet of the assessee as on 31.3.2009 and 31.3.2010 respectively, copies of which are furnished by the assessee at pages 21 and 66 of the paper-book. In this view of the matter, the reason given by the CIT(A) on this aspect for denying deduction to the assessee under S.80-IA is also not valid.

Thus in light of the aforesaid decision of the Tribunal Hyderabad Bench, the contention of the AO is not valid. Further, merely because the assessee was receiving payments from the Government in progress of work it cannot be said that the projects were financed by Government. In this regard it is pointed out that under sub-section 4 of section 80-IA, deduction is available to a developer, i.e. if, an assessee, merely develops the infrastructure facility without operating and maintaining the same, it is entitled to deduction. The Bombay High court in case of Commissioner of Income-tax v. ABG Heavy Industries Limited [322 ITR 323] observed that "Parliament amended the provisions of section 80-lA of the Act so as to clarify that in order to avail of a deduction, the assessee could (i) develop ; or (ii) operate and maintain ; or (iii) develop, operate and maintain the facility. The condition as regards development, operation and maintenance of an infrastructure facility was contemporaneously construed by the authorities at all material times, to cover within its purview the development of an infrastructure facility under a scheme by which an enterprise would build, own, lease and eventually transfer the facility. "

> *"This was perhaps a practical realisation of the fact a developer may not possess the wherewithal, expertise or resources to operate a facility, once constructed Parliament eventually stepped in to clarify that it was not invariably necessary for a developer to operate and maintain the facility. Parliament when it amended the law was obviously aware of the administrative practice resulting in the circulars of the Central Board of Direct Taxes. The fact that in such a scheme. An enterprise would not operate the facility itself was not regarded as being a statutory bar to the entitlement to a deduction under section 80-IA of the Act. "*

*8.5 From the above it is clear that even if an assessee is merely developing the infrastructural facility (without operating and maintaining the same), it is entitled to deduction u/s 80-1A. Further, condition (b) laid out in sub-section 4 of section 80-IA mandates the existence of an agreement with the Government. Moreover, if section 80-IA grants deduction on profits from the activity of development carried out in pursuance of an agreement with the Government it presupposes that assessee will earn some profits from mere development (without operating and maintaining) of the infrastructure facility. Now the relevant question that arises here is that how would an assessee engaged in mere developmental activity (and no operation) pursuant to an agreement with the Government earn profits? The obvious answer is that the assessee will recover its cost of development from the Government otherwise the entire cost of development will be a loss in its hands. Thus, if deduction u/s 80-IA is denied on the ground that the assessee had received payments from Government, then an assessee who is only a "**developer**" (and not an operator) will never be entitled to deduction u/s 80-IA, which is clearly not the intention of legislature as discussed by the Bombay High Court in case of ABG Heavy Industries Ltd. Thus, merely because the assessee was*

paid by the Government for development work it cannot be denied deduction under section 80-IA(4). The contention of the assessee finds strength from the following judgments:

The ITAT (Mumbai) in case of ACIT v. Bharat Udyog Ltd. (2009) 123 TTJ 0689 : (2009) 23 DTR 0433 : (2009) 118 ITD 0336 : (2008) 24 SOT 0412

> *"After the amendment effected by Finance Act, 1999 w.e.f. 1st April, 2000, the deduction under s. 80-IA(4) has become available to any enterprise carrying on the business of (i) developing, or (ii) maintaining and operating, or (iii) developing, maintaining and operating any infrastructure facility. Sub-cl. (c) of cl. (i) of s. 80-IA(4) is obviously applicable to an enterprise which is engaged in 'operating and maintaining' the infrastructure facility on or after 1st April, 1995. It is not applicable to the case of an enterprise which is engaged in mere 'development' of infrastructure facility and not its 'operation' and 'maintenance'. Therefore, the question of 'operating and maintaining' of infrastructure facility by such enterprise before or after any cut off date cannot arise. However, if the contention of the Departmental Representative is accepted, it would obviously/understandably lead to manifestly absurd results. When the Act provides for deduction undisputedly for an enterprise who is only 'developing' the infrastructure facility, unaccompanied by 'operating and maintaining' thereof by such person, there cannot be any question of providing a condition for such an enterprise to start operating and maintaining the infrastructure facility on or after 1st April, 1995. Since the assessee is only a developer of the infrastructure project and it is not maintaining and operating the infrastructure facility, sub-cl. (c) of cl. (i) of sub-s. (4) of s. 80-IA is not applicable. The interpretation of Revenue is absurd also in view of the rationale of the provisions of s. 80-IA(4)(i). From the asst. yr. 2000-01, deduction is available if the assessee carries on the business of any one of the three types of activities. When an assessee is only developing an infrastructure facility project and is not maintaining nor operating it, obviously such an assessee will be paid for the cost incurred by it; otherwise, how will the person who develops the infrastructure facility project, realise its cost ? If the infrastructure facility, just after its development, is transferred to the Government, naturally the cost would be paid by the Government. Therefore, merely because the transferee has paid for the development of infrastructure facility carried out by the assessee, it cannot be said that the assessee did not develop the infrastructure facility. If the interpretation canvassed by the Revenue authorities is accepted, no enterprise, carrying on the business of only developing the infrastructure facility, would be entitled to deduction under s. 80-IA(4), which is not the intention of the law. If a person who only develops the infrastructure facility is not paid by the Government, the entire cost of development would be a loss in the hands of the developer as he is not operating the infrastructure facility. When the legislature has provided that the income of the developer of the infrastructure project would be eligible for deduction, it presupposes that there can be income to developer, i.e., to the person who is carrying on the activity of only developing infrastructure facility. Obvious as it is, a developer would have income only if he is paid for development of infrastructure facility, for the simple reason that he is not having the right/authorisation to operate the infrastructure facility and to collect toll therefrom, and has no other source of recoupment of his cost of development. Considered as such, the business activity of the nature of build and transfer also falls within eligible construction activity, that is, activity eligible for deduction under s. 80-IA inasmuch as mere 'development' as such*

*and unassociated/ unaccompanied with 'operate' and 'maintenance' also falls within such business activity as is eligible for deduction under s. 80-IA. Therefore, merely because the present assessee was paid by the Government for development work, it cannot be denied deduction under s. 80-IA(4). A person who enters into a contract with another person will be a contractor no doubt; and the assessee having entered into an agreement with the Government agencies for development of the infrastructure projects, is obviously a contractor but that does not derogate the assessee from being a developer as well. The term "contractor" is not essentially contradictory to the term "**developer**". On the other hand, rather s. 80-IA(4) itself provides that assessee should develop the infrastructure facility as per agreement with the Central Government, State Government or a local authority. So, entering into a lawful agreement and thereby becoming a contractor should, in no way, be a bar to the one being a developer. Therefore, merely because in the agreement for development of infrastructure facility, assessee is referred to as contractor or because some basic specifications are laid down, it does not detract the assessee from the position of being a developer; nor will it debar the assessee from claiming deduction under s. 80-IA(4). Therefore, an assessee who is only engaged in the developing the infrastructural facility i.e., road and not engaged in the 'operating and maintaining' the said facility is entitled to the benefits of the deduction under s. 80-IA(4).—Patel Engineering Ltd. vs. Dy. CIT (2004) 84 TTJ (Mumbai) 646* ***followed.*** *Provisions of sub-cl. (c) of cl. (i) of s. 80-IA(4) are inapplicable to the assessee which is engaged in mere developing of the infrastructure facility and, therefore, an assessee who is only engaged in developing the infrastructure facility and not in 'operating and maintaining' the said facility is entitled to the benefit of deduction under s. 80-IA(4); merely because assessee is referred to as 'contractor' in the agreement for development of infrastructure facility or some basic specifications are laid down, would not debar the assessee from claiming deduction under s. 80-IA(4)."*

If a person who only develops the infrastructure facility was not paid by the Government, the entire cost of development would be a loss in the hands of the developer as he was not operating the infrastructure facility. Merely because the assessee was paid by the Government for development work it could not be denied deduction under section 80-IA(4). The Chennai Bench of Tribunal in case of R.R. Constructions, Chennai vs. Department of Income tax held that "When an assessee is only developing an infrastructure facility project and is not maintaining nor operating it, obviously such an assessee will be paid for the cost incurred by it; otherwise, how will the person, who develops the infrastructure facility project, realize its cost? If the infrastructure facility, just after its development, is transferred to the Government, naturally the cost would be paid by the Government. Therefore, merely because the transferee had paid for the development of infrastructure facility carried out by the assessee, it cannot be said that the assessee did not develop the infrastructure facility. If the interpretation done by the Assessing Officer is accepted, no enterprise carrying on the business of only developing he infrastructure facility would be entitled to deduction under section 80IA(4), which is not the intention of the law. An enterprise, which develops the infrastructure facility is not paid by the Government, the entire cost of development would be a loss in the hands of the developer as he is not operating the infrastructure facility. The legislature has provided that the income of the developer of the infrastructure project would be eligible for deduction. It presupposes that there can

be income to developer i.e. to the person who is carrying on the activity of only development infrastructure facility. Ostensibly, a developer would have income only if he is paid for the development of infrastructure facility, for the simple reason that he is not having the right/authorization to operate the infrastructure facility and to collect toll there from, has no other source of recoupment of his cost of development. The Indore Bench of the Tribunal in case of Sanee Infrastructure Pvt. Ltd. vs. ACIT [138 ITD 433] held that "As per our considered view, after amendment by the Finance Act, 2002 for claim of deduction u/s 80IA(4) infrastructure facility is only required to be developed and there is no condition that assessee should also operate the same. Thus, after amendment, when the assessee is not required to operate the facility, the payment for development of such infrastructure is required to be made by the Government only.

> *"After amendment, when assessee undertakes to develop the infrastructure facility only, it is the Government who will make payment to assessee in respect of infrastructure facility developed by it in terms of agreement so entered with Government. Thus, we do not find any infringement of conditions {or claim of deduction"*

*8.6 Thus from the above, it is clear that the fact that the assessee had received payments from the Government in progress of its work has no bearing on eligibility of deduction u/s 80- IA. Further, the Revenue in all the grounds has contended that the contracts entered into by the assessee were merely '**construction contracts**' since the assessee is not exposed to any entrepreneurial and investment risk. In this regard, the AO has observed that the assessee is executing the contract against predetermined revenue w.r.t the above, it is submitted that under the impugned contracts, the assessee was merely carrying out the civil construction work. It was responsible for overall development of the infrastructure facility. It was merely provided with the site which it had to develop into an infrastructural facility by deploying his resources i.e. material, plant & machinery, labour, supervisors etc. It was responsible for any damage/loss caused to any property or life in course of execution of the works. It was even responsible for remedying of the defects in the works at its cost. It was also required to operate and maintain the infrastructure facility. Hence, it cannot be said that the contract with the Government was to carry out mere civil construction. Attention in this regard is invited to the following:*

(i) *The ITAT (Ahmedabad) in case of Sugam Construction (P) Ltd. vs. ITO [56 SOT 45] held that "It is also gathered (a) That a developer is a person who undertakes the responsibility to develop a project. (b) That a developer is therefore not a civil contractor simplicitor. (c) That if we apply the commercial aspect, then a developer has to execute both managerial as well as financial responsibility. (d) That the role of a developer, according to us, is larger than that of a contractor. (e) That when a person is acting as a developer, then he is under obligation to design the project, it is another aspect that such design has to be approved by the owner of the project, i. e. the Government in the present case. (f) That he has not only to execute the construction work in the capacity of a contractor but also he is assigned with the duty to develop,*

*maintain and operate such project. (g) That to ascertain whether a civil construction work is assigned on development basis or contract basis can only be decided on the basis of the terms and conditions of the agreement. Only on the basis of the terms and conditions it can be ascertained about the nature of the contract assigned that whether it is a "**work contract**" or a "**development contract**". (h) That in a development contract" responsibility is fully assigned to the developer for execution and completion of work. (i) That although the ownership of the site or the ownership over the land remains with the owner but during the period of development agreement the developer exercise complete domain over the land or the project. That a developer is not expected to raise bills at every step of construction but he is expected to charge the cost of construction plus mark-up of his profit from the assignee of the contract. (k) That a developer is therefore expected to arrange finances and also to undertake risk. (I) That in contrast to the rights of a "**contractor**" a "**developer**" is authorized to raise funds either by private placement or by financial institutions on the basis of the project. These are few broad qualities of a developer through which the character of a developer can be defined. "*

(ii) *ITAT(Hyderabad) in case of Koya and Co. Construction (P) Ltd. vs ACIT [51 SOT 203] held that "The explanatory memorandum to Finance Act 2007 states that the purpose of the tax benefit has all long 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 80IA of the Act is available to developers who undertakes entrepreneurial and investment risk and not for the contractors, who undertakes only business risk. Without any doubt, the learned counsel for the assessee clearly demonstrated before the court that the assessee at present has undertaken huge risks in terms of deployment of technical personnel, plant and machinery, technical knowhow, expertise and financial resources. "*

Thus the fact that the assessee deploys its resources (material, machinery, labour etc.) in the construction work clearly exhibits the risks undertaken by the assessee. Further, the assessee vide the agreements has clearly demonstrated the various risks undertaken by it. The assessee was to furnish a security deposit to the Employer and indemnify the employer of any losses/damage caused to any property/life in course of execution of works. Further, it was responsible for the correction of defects arising in the works at it cost. Thus, it cannot be said that the assessee had not undertaken any risk.

8.7 From the above, it is clear that the contention of the AO that the assessee had not undertaken any entrepreneurial and investment risk is an incorrect interpretation of the facts. Lastly, with regard to the project O&M, Bangalore (on which a deduction of Rs. 35,16,941/- was claimed), it is submitted that it is an operation and maintenance

project, to which Explanation to section 80-IA(13) does not apply. Explanation to section 80-IA(13) merely distinguishes between a developer and works contractor. It clarifies that a works contractor shall not be included in the category of 'developer' u/s 80-1A. Thus, the Explanation clearly does not apply to O&M projects. Hence, deduction of Rs. 35,16,941/- claimed for the aforesaid project u/s 80-IA cannot be denied by invoking the explanation to section 80-1A.

9. From the perusal of the terms and conditions in the agreement, it is clear that the assessee was not a works contractor simplicitor and was a developer and hence Explanation to section 80- IA(13) does not apply to the assessee. Further, in addition to developing the infrastructure facility, the assessee was even operating and maintaining the same. Thus, clearly the assessee is eligible for deduction u/s 80-1A. In our considered view do not find any reason to interfere in the order of ld. CIT(A). Hence this ground of appeal of the Revenue is dismissed."

6.15. We find that like any other entrepreneur who employs his material, plant, machinery, labour etc in a project and undertakes risk, the assessee was also exposed to a substantial amount of risk by virtue of engaging his establishment in the infrastructure projects. In addition, the assessee was exposed to risk of non-completion of work within time, any damage caused to the works, site etc. increase in prices of materials, labour etc. beyond what the Government had agreed to compensate as per the agreement.

6.16. From the facts stated above, it is clear that the assessee was a developer and not a mere works contractor. Thus, it is clearly outside the purview of the Explanation to section 80-IA(13) of the Act.

6.17. To substantiate the above attention is invited to the terms and conditions of agreement entered into between the assessee and National Highway Authority of India, some of which have been listed below:

(i) **General obligations**: The assessee shall, with due care and diligence, design, execute and complete the work and remedy any defects therein in

accordance with the provision of the contract. The assessee shall provide all superintendence, labour, material, plant, require in for such design, execution, completion and remedying of any defects. (page 12, para 8.1)

(ii) **Material, Plant and workmanship**: Page - 21, para 36.1

(iii) **Equipment, Temporary works and materials**: Page - 31, para 54.1

(iv) **Labour**: The assessee was to make its own arrangement for the engagement of all staff and labour and for their payment, housing and feeding. (page 21, para 34.1)

(v) **Superintendence**: The assessee was to provide all the necessary superintendence required during the execution of the Works. Page 14, para 15.1

(vi) **Safety, security and protection of environment**: The assessee was responsible for safety of all person on the site. Provide and maintain at his own cost all lights, guards, fencing, warning signs, etc. Take all reasonable steps to protect the environment. (Page 15, para 19.1)

(vii) **Defect Liability Period**: Even after the completion of works the responsibility of the assessee did not end, it was correct defects arising therein at its own cost (page 28, para 49.3) The said period was 12 (Twelve) months and extension of defect liability period - 24 months (page 46).

(viii) **Performance Security**: The performance security will be in the form of an unconditional and irrevocable Bank Guarantee in the amount 10 (ten) percent of contract price (page 45). Further, such performance Security was to be valid till successful completion of works and remedying of defects therein. (page 13, para 10.2)

(ix) **Retention Money**: 10 (ten) percent of Interim payment certificate subject to 5 percent of total contract price. Upon issue of taking over certificate one half of retention money would be paid whereas the other half would be paid on expiration of the Defects Liability period. (Page 35, para 60.3)

(x) The assessee was to ideminify the Employer against all losses and claims in respect of death or injury to any person or damage to any property (other than works) which may arise in course of execution of works. (page 17, para 22.1)

The Employer would not be liable for any damage or compensation payable to any workman or other person in employment of the assessee. (para 24.1)

(xi) **Liquidated Damages**: The assessee was liable to liquidated damages as specified at page 45, if there was delay in completion of works (page 24, para 47.1)

6.18 The above conditions clearly exhibit that it is not a case where the assessee was provided with the establishment and materials required to execute the work, which happens in case of works contract where the contractor gets the material and other requisites from the client and all he has to do is employ labour. The assessee in the given case was to procure raw material, make arrangements for power, water, plant machinery etc., and conduct all the other activities needed for construction.

6.19. Now the aforesaid agreement with the NHAI was produced before the Ld. CIT(A) who after perusal of the same allowed the assessee's appeal.

6.20. We find that the agreement in the instant case is similar to that before the tribunal in the case of SPML Infra Ltd for Asst Years 2006-07 & 2009-10 supra . In the instant case too, the assessee was not merely providing labour but was providing a complete infrastructure required to support the development of infrastructure facility. It

deployed its various resources like material, manpower, machinery etc. In addition it exposed itself to various risks.

6.21. In view of the aforesaid findings in the facts and circumstances of the case and respectfully following the various judicial precedents relied upon including that of co-ordinate bench of this tribunal in SPML Infra Ltd supra , we hold that the assessee is a developer and not a mere works contractor and accordingly is eligible for deduction u/s 80IA of the Act, which has been rightly held by the ld CITA. Accordingly, we do not find any infirmity in the order of the ld CITA. Accordingly, the grounds raised by the revenue are dismissed.

7. In the result, the appeal of the revenue is dismissed.

Order pronounced in the Court on 21.03.2018

Sd/-	Sd/-
[A.T. Varkey]	[M.Balaganesh]
Judicial Member	Accountant Member

Dated : 21.03.2018
SB, Sr. PS

Copy of the order forwarded to:
1. ACIT, Circle-33, Kolkata, 10B, Middleton Row, 3rd Floor, Kolkata-700071.
2. M/s Ho Hup Simplex JV, 12/1, Nellie Sengupta Sarani, Kolkata-700087.
3. C.I.T(A)- , Kolkata
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches