

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI, LARGER BENCH, MUMBAI**

Before S/Shri G.C.Gupta, JM, R.S.Syal & Pramod Kumar, AMs

ITA Nos.1408 & 1409/PN/2003: Asst.Years 2000-2001 & 2001-2002

M/s.B.T.Patil & Sons Belgaum Construction Private Limited 4112, "Patson House" P.B.Road Belgaum – 590 003 Karnataka State PA No.AAACB7343N.	Vs.	The Asstt.Commissioner of Income-tax Circle 2 Kolhapur.
(Appellant)		(Respondent)

Appellant by : S/Shri S.N.Inamdar & Satish Mody

Respondent by : S/Shri S.S.Rana, CIT-DR & Pitambar Das, Sr.AR

--- INTERVENERS ---

Sr. No.	ITA No.	Name of the Assessee	Name of the Counsel for Intervener
1.	7155/Mum/2008	Patel KNR JV	Shri Vijay Mehta & Shri Mayur Kishadwala
2.	7156/Mum/2008	KNR Patel JV	-do-
3.	7282/Mum/2007	Patel Engineering Limited	-do-
4.	7283/Mum/2007	Patel Engineering Limited	-do-

ORDER

Per R.S.Syal (AM) :

On account of difference of opinion between the learned Members who originally heard these appeals, the Hon'ble President has constituted this Larger Bench of Three Members u/s. 255(4) of the Income-tax Act, 1961 (hereinafter called the Act) by referring the following questions for our consideration and opinion:-

- “1. Whether on facts and circumstances of the case, the appellant assessee is entitled for claiming of deduction under the provisions of section 80-IA(4) in respect of the projects undertaken?
2. Whether the Tribunal has to decide an issue on the basis of the law as it stands on the day of the passing of the order?”

2. Though the facts of the case have been adverted to at great length in the separate orders passed by the learned Members of the Division Bench yet for the purpose of disposing off the present reference we are making a brief reference to such facts.

3. The assessee is a civil contractor and during the previous years relevant to the assessment years under consideration it was engaged in the construction of various projects of Government of Maharashtra, Government of Karnataka and various local authorities. It furnished its returns declaring total income of 10,41,09,480 for assessment year 2000-2001 on 30.11.2000 and Rs.2,59,55,460 on 29.10.2000 after claiming deduction u/s. 80-IA to the tune of Rs.9,55,57,028 and Rs.7,94,48,125 in relation to A.Ys. 2000-01 and 2001-02 respectively. These amounts were computed after showing the net profit from the business of “infrastructure project” claimed to have been carried on by the assessee during the relevant years. The project-wise claim of deduction has been reproduced in the assessment orders as well as the order proposed by the learned Judicial Member. To sum up, the assessee claimed deduction in respect of five and seven projects in the years in question respectively. It was claimed that the assessee’s gross total income included profit and gains derived from business referred to in sub-section (4) of section 80-IA and hence it was entitled to deduction. The Assessing Officer did not allow the deduction as in his opinion the assessee had not fulfilled conditions stipulated in sub-section (4) inasmuch as the infrastructure was not owned by the assessee-company; there was no agreement between the assessee-company and the Central Government or a State Government or a local authority or any other statutory body for developing or operating and maintaining or developing, operating and maintaining any infrastructure facility which fulfills the conditions as set out in clause (i) of sub-section (4); the assessee did not carry any business in infrastructure facility; the assessee did not do any business of infrastructure facility as it had just constructed the properties belonging to Government / Statutory bodies and parted with them after getting the contract amount fixed for this purpose; the construction was done by the assessee as per the requirements of the Governments / Statutory Bodies and this work was done for and on behalf of the Governments and Statutory Bodies and not for operating any infrastructure facility. For the above reasons the A.O. came to the conclusion that the assessee was not entitled to deduction u/s. 80-IA in both the years. The learned CIT(A) echoed the action of the Assessing Officer by considering the provisions of this section along with relevant Circulars. He considered individual projects undertaken by the assessee during these years. It was noted by him that the project Bhima Sina Link Canal Tunnel & approaches was the joint venture between the assessee-company and a proprietorship concern with the name of Swapnali Construction owned by one Shri A.N.Bhosale. Since it was a joint venture of the assessee-company with a proprietorship concern which was

awarded the contract, the learned CIT(A) held that it did not satisfy the condition of “consortium of the companies” as envisaged u/s. 80-IA(4). About the other project for construction of Kadabgatti Tunnel, the learned CIT(A) noted that such contract related to financial year 1987-88 i.e. much before 1.4.1995, being the date stipulated u/s. 80-IA. Still for another project namely Koyna Hydro Electric Project the nature of work undertaken by the assessee was found to be not an infrastructure facility because it involved development of tunnel for supply of water from Koyna river to power station. Further this work was executed by the assessee as a sub-contractor even though the tripartite agreement was made between the assessee, M/s Patel Engineering Company and Government of Maharashtra. This agreement was also dated October 1992, that is the period anterior to 1.4.1995, being the date from which the deduction u/s. 80-IA was available. One project i.e. Jihe Kathapur Lift Irrigation Project was again found to be a joint venture between the assessee-company and two other non-corporate entities. That was also found to be hit by the provisions of section 80-IA(4)(i)(a) of the Act. The learned CIT(A) came to hold that the assessee could not be called as a Developer in the sense of section 80-IA because no agreement was signed by it with the Central Government or State Government or local authorities for development of projects under BOT or BOOT scheme. The assessee was held to be a mere Contractor for executing the projects of various Government authorities. Since in the opinion of the learned CIT(A) the benefit u/s. 80-IA was available to those enterprises who were engaged in the business of developing, operating or maintaining or developing, operating and maintaining the infrastructure projects, the assessee was held to be not entitled to the same benefit as it did not fall in any of the eligible categories for deduction.

4. Aggrieved by the order passed by the learned first appellate authority, the assessee came up in appeal to the Tribunal. The learned Judicial Member, vide his order dated 20.2.2007, accepted the assessee’s contention and granted the deduction on the reasoning that Circular No.733 dt. 30.01.1996 clarified that after construction, the project was to be transferred to the Central Government and hence due to this reason the assessee cannot be denied deduction only on the ground that the projects in question were owned by the Central Government. He further held that it was not a condition precedent for allowing the deduction, that the project must be owned by an enterprise. In his opinion even the consortium of such enterprises or companies could enter into agreement with State Government so as to operate, develop and maintain the infrastructure facility. He further held that the term ‘contractor’ did not contradict with the term ‘developer’. Finally the assessee was held to be developer of an infrastructure facility and hence its income from the business of construction activity was made eligible for deduction u/s. 80-IA.

5. The learned Accountant Member did not concur with the view expressed by the learned Judicial Member in granting deduction u/s. 80-IA(4) in respect of all the projects undertaken by the assessee. On illustrative basis he explained the facts of Koyna project in which the assessee was a sub-contractor. Then he took note of the amendment made in section 80-IA by the Finance Bill, 2007 by which an *Explanation* has been introduced with retrospective effect from 1.4.2000. In the opinion of the learned Accountant Member even if there was some lack of clarity in the main provision, the new *Explanation* clarified the position that no deduction could be allowed. Therefore, vide his separate order dated 21.5.2007 he disagreed with the learned Judicial Member on the granting of deduction u/s. 80-IA of the Act. The above referred two questions were formulated by the learned Members of the Division Bench and the matter was sent to the Hon'ble President of the Tribunal for making a reference to the Third Member u/s. 255(4) of the Act.

6. The Hon'ble President fixed the case for hearing at Pune Bench on 12.03.2008 acting himself as the Third Member. It was argued before him that the learned Accountant Member had referred to *Explanation* below section 80-IA(13) which was inserted by the Finance Act, 2007 with retrospective effect from 1.4.2000. It was claimed that the learned Accountant Member unilaterally took Finance Bill, 2007 into consideration and decided the matter against the assessee. This fact was not disputed even by the learned Departmental Representative. Under these circumstances the Hon'ble President, in his capacity of the Third Member in this case, observed that the entire case was decided by the learned Accountant Member on a point not raised by the parties during the course of hearing. He further noted that if the matter was decided by him after hearing the arguments on the applicability of the *Explanation* it would amount to decision for the first time and the view so expressed by him might be viewed as solitary expression of opinion on the issue, which would create complications rather than resolving them. Vide para 9 of his order dated 14th March, 2008 he referred the matter in dispute to a Larger Bench comprising of three Members in exercise of his powers u/s. 255(3) and 255(4) so that there may be no problem of majority. That is how this matter is before the instant Larger Bench.

WHETHER IT IS REFERENCE UNDER SUB-SECTION (3) OR (4) OF SECTION 255

7. Sh. S.N. Inamdar, the learned Counsel for the assessee, at the very outset, raised a preliminary objection by contending that before dealing with the points of difference on merits it needed to be clarified as to whether the Reference was proposed to be decided as the one made

u/s. 255(4) or 255(3) as in his opinion it could not be under both the sub-sections since the scope and limitations in both the situations were vastly different. Vide his written note dated 1st September, 2009 he submitted that u/s. 255(4) of the Act, the Third Member, whether one or more, will have to confine only to the point of difference and express opinion on such point alone. Elaborating his argument further he stated that in such a situation the Bench will have no power to adjudicate upon the points on which there was no difference of opinion. It was stated that there were five projects in the A.Y. 2000-01 and seven in A.Y. 2001-02 and the Id. AM had expressed his dissenting opinion only on one of such projects. In his view, since there was no difference of opinion between the Members on the remaining projects, the same could not be a subject matter of reference to the Third Member. Relying on the judgment of the Hon'ble Madras High Court in the case of *Dynavision Ltd. Vs. ITAT & Ors. [(2008) 304 ITR 350 (Mad.)]* the learned Counsel contended that the controversy raised before the Third Member could not be enlarged and as such there was no inherent right to Third Member going beyond the reference. It was further contended that in case the reference was decided u/s. 255(4) then there could not be allowed any interveners unless the point of difference on a law point stated was identical with the issue involved in the intervener's case. On the other hand Shri S.S.Rana, the learned Senior Departmental Representative, supported the view canvassed by the learned A.R. to the extent that this reference should be construed as having been made u/s. 255(4). He also relied on the case of *Dynavision Ltd. (supra)* to contend that the intervener cannot be allowed on the point of difference u/s. 255(4).

8. We have heard the preliminary objections raised on behalf of the parties before us. Ahead of delving upon to decide the questions referred to us for decision on merits, it is imperative to deal with the preliminary objection taken before us so as to dispel any doubt about the nature of the constitution of this Larger Bench and the sub-section under which it is constituted. It will be imperative to go through the relevant provisions in this regard, which are as under:-

“255(3) The President or any other member of the Appellate Tribunal, and the President may, for the disposal of any particular case, constitute a Special Bench consisting of three or more members, one of whom shall necessarily be a judicial member and one an accountant member.

255(4) If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President of the Appellate Tribunal for hearing on such point or points by one or more of the other members of the

Appellate Tribunal, and such point or points shall be decided according to the opinion of the majority of the members of the Appellate Tribunal who have heard the case, including those who first heard it.”

9. A bare perusal of sub-section (3) of section 255 indicates that the President may for the disposal of any particular case constitute a Special Bench consisting of three or more members. In contrast to that, sub-section (4) is applicable only when there is difference between the members of the division bench in opinion on the point(s) before them and in order to bring the majority rule to the fore, the President of the Tribunal refers the point or points of dispute to one or more other members of the Tribunal. Whereas in sub-section (3) the Special Bench is constituted for disposal of any particular case which must consist of three or more members, sub-section (4) talks of “one or more of the other members”. The latter sub-section clearly empowers the President to nominate one or more other members “distinct from” those who had earlier heard the matter. Such number of members appointed to act under sub-section (4) may be three or five etc. The number of members so appointed usually remains odd so that any problem regarding majority of opinion is ruled out. Therefore, in both the sub-sections there cannot be any bar on nominating three or more members.

10. The circumstances under which the Special Bench is constituted under sub-section (3) are materially different from those under sub-section (4). The President is empowered to constitute a Special Bench u/s. 255(3) on his own volition if he considers any issue of a greater significance affecting large number of tax payers or due to the importance of the issue even if it does not affect several assesseees or otherwise. The power of the President in constituting the Special Bench at his own will are plenary, unfettered and unlimited. Apart from constituting Special Bench on the President’s own choice, such a Bench can also be constituted by the President on a representation made either by the assessee or by the Revenue. Further if a single member bench of the tribunal or a Division bench hearing a particular case considers it expedient to have opinion of the Larger Bench on the issue because of its vital implications or they feel themselves unable to agree with the view expressed by another Bench on similar point, they can request the President for the constitution of a Special Bench on such issue. Besides that there may be certain other circumstances also in which the President can constitute Special Bench u/s. 255(3) consisting of three or more members for the disposal of any particular case. As against this, sub-section (4) applies only where a Division bench has heard the matter and there is difference in the opinion on any point or points between the members. It is only under these circumstances that they state the point or points on which they differ and thereafter the President of the Tribunal appoints one or more of the other members so that there may be opinion of the majority of the

members. One noteworthy difference between sub-sections (3) and (4) of section 255 is that whereas one or more members are appointed under sub-section (4) only when there is difference between the members who heard the appeal and had stated the point or points of difference, the Special Bench under sub-section (3) is always constituted in the absence of differing opinion expressed by the members in that particular case through their separate orders. There may be a possibility that a particular appeal is heard by a Bench but the members consider it useful for making a reference to the President for constitution of this Special Bench. In such a situation the President may constitute Special Bench under sub-section (3) but the only condition is that the members of the Division Bench must not have passed the dissenting orders. Once both the members pass their respective orders differing with each other on a point or points, then the subsequent hearing of the matter for resolving of the difference by way of a majority opinion either by one or more other members can only fall within the domain of sub-section (4) notwithstanding the fact that a Larger Bench of three members has been constituted for the decision on the point(s) on which the earlier members of the Division Bench differed.

11. It is discernible that sub-section (4) is a special provision dealing only with a particular situation in which the members who earlier heard the case differ on a point or points, as against the language of the relevant part of sub-section (3) which refers to constituting a Special Bench consisting of three or more members couched in a general manner. We are reminded of the legal maxim 'Generalia specialibus non derogant' which means that the general things do not derogate from special. In other words, it implies that the special provision overrides the general provision. If there are two conflicting provisions in the same section or clause, the special provision will prevail as the same is excluded from the general provision. To put it simple words, if a specific provision is made on a certain subject, that matter is excluded from the general provision. The Hon'ble jurisdictional High Court in the case of Forbes Forbes Campbell And Co. Ltd. Vs. CIT [(1994) 206 ITR 495 (Bom.)] has quoted the above maxim with approval. It has also been applied by the Hon'ble Madras High Court in the case of CIT Vs. Copes Vulcen Inc. [(1987) 167 ITR 884 (Mad.)], in which case it was held that section 9(1)(i) is general in nature and section 9(1)(vii) refers to a particular type of income and is a special provision dealing with provision for technical services rendered by the foreign company. After considering the arguments from both sides it was held that section 9(1)(vii) would apply. Recently the Hon'ble Supreme Court in the case of Britania Industries Ltd. Vs. CIT [(2005) 278 ITR 546 (SC)] has held that the expenditure towards rent, repairs, maintenance of guest house used in connection with the business is to be disallowed u/s. 37(4) because this is a special provision overriding the general provision. It therefore, follows that if a specific provision is made then that matter is excluded from the

general provision. From the above discussion it can be seen that a specific provision is made under sub-section (4) to appoint one or more members (may be three or more) for dealing with a situation in which the members, who heard the appeal have passed the dissenting orders. On the other hand the sub-section (3) contains a general provision for appointing three or more members for disposal of any particular case. It boils down that no Special Bench can be constituted under sub-section (3) of section 255 in a particular case where dissenting orders have already been passed by the members constituting the Division Bench.

12. Adverting to the facts of the instant case it is observed that the hearing by the Division Bench was concluded in this case on 12.12.2006. The learned Judicial Member who passed the leading order on 20.2.2007 allowed the assessee's appeals, but the learned Accountant Member vide his separate and dissenting order dated 21.5.2007 held the assessee to be ineligible for deduction. Both the members made reference to the Hon'ble President for appointment of Third Member u/s. 255(4) on two questions mutually framed by them with consensus. The Hon'ble President initially heard the case as a third member and noted that the learned Accountant Member had unilaterally relied on *Explanation* below section 80-IA(13) inserted by the Finance Act, 2007 which was introduced by the Finance Bill, 2007 i.e. after the conclusion of hearing, without giving any opportunity to the parties to address on it. This position was also conceded by the learned Departmental Representative that the learned Accountant Member had decided on a point not raised by the parties during the course of hearing. It was under these peculiar circumstances that the Hon'ble President thought it prudent that if he proceeds to express his opinion on the *Explanation* to section 80-IA it might be considered as solitary expression of views on that issue there by creating complications rather than resolving them. In this background of facts he, while exercising his power u/ss.255(3) and 255(4), referred the matter in dispute to a Larger Bench comprising of three members so that there is no problem of majority. As the reference stood already made by the members of the Division Bench u/s. 255(4) when they shortlisted their difference of opinion by formulating the questions, the constitution of Larger Bench by the Hon'ble President under such compelling circumstances was only u/s. 255(4) and not u/s. 255(3). The reference to sub-section (3) by the Hon'ble President in this reference appears to be only with a view to nominate a Larger Bench of three members so that there may not be any problem of majority opinion on the applicability or otherwise of *Explanation* below section 80-IA(13) inserted by the Finance Act, 2007. We therefore clarify that for all practical purposes it is a reference to the Larger Bench comprising of three members u/s. 255(4) of the Act.

PERMISSION TO INTERVENE AND EXTENT OF INTERVENTION IN PROCEEDINGS U/S. 255(4)

13. When the learned A.R. raised preliminary objection to make clear, before hearing the case on merits, as to whether it was reference under sub-section (3) or sub-section (4) of section 255, the Bench, after considering the arguments from both sides on this issue, pronounced in the open Court that it is a reference u/s. 255(4) and the matter may be argued accordingly. To this the learned Departmental Representative raised objection in allowing the interveners to participate in the proceedings.

14. There is no dispute on the fact that the proceedings u/s. 255(4) are confined to the point or points on which the members of the Division Bench differ. One or more of the other members appointed under sub-section (4) are supposed to confine himself / themselves only to the facts of the case before the Bench. When the point of difference is restricted only to the evaluation and examination of the factual position prevailing in that case and no substantial question of law is involved, it is not permissible to allow any intervener to jump in the proceedings. Because of the very nature of such proceedings under sub-section (4) confined to the facts of a particular case, ordinarily, the interveners cannot be allowed to participate. It is more so for the reason that each case is based on its own facts and a small variation in the facts of one case from another alters the entire character of the transaction. If the intervener is allowed to argue in the proceedings u/s. 255(4), it may cause some problem in the adjudication of the matter of the intervener, which are obviously distinct proceedings. Since the decision by the Bench u/s. 255(4) has to be based on the facts of that very case, no general proposition can be laid down which may also apply to other factual situations prevailing in other cases.

15. The foregoing general rule is not unexceptional. If a pure and substantial question of law is involved in the proceedings u/s. 255(4), the decision on which may have impact over the other cases involving similar substantial question, we are unable to see any reason for shutting the doors to the interveners. In such like situation requiring the decision to be rendered on the substantial question of law by the bench u/s 255(4), we do not find any logic in placing embargo on the interveners to put forth their legal arguments on the question. At this stage it will be useful to refer to the order passed by the Special Bench of the Tribunal in *DCIT Vs. DCIT Vs. Oman International Bank SAOG [(2006) 100 ITD 285 (Mum.) (SB)]*, which has emphasized on the significance of the Third Member order passed u/s. 255(4). In this case it was held that the Third Member decision is *de facto* the decision of a Larger Bench and is as good as a Special

Bench decision within its territorial jurisdiction. It was further observed that it will be laying down a wrong precedent if the Third Member decision is slighted by any other Division bench as not being bound. The same position was clarified further by a subsequent Special Bench of the Tribunal in *DCIT Vs. Padam Prakash HUF [(2006) 104 TTJ (Del.) (SB) 989]* by holding that majority decision in Third Member case of the Tribunal is entitled to as much weight and respect as of the decision of a Special Bench. A word of caution was added in the later case by holding that in case of any conflict between the Special Bench and Third Member order, the regular Bench should follow and prefer to the decision of the Special Bench. In view of above referred two Special Bench orders of the tribunal it is vivid that the importance of Third Member order u/s. 255(4) cannot be undermined. The Division Benches are bound to follow the same unless there is a contrary decision given by the Special Bench u/s. 255(3) of the Act. Under such circumstances we fail to see any reason as to why the interveners be not allowed to participate in the proceedings u/s. 255(4) provided their arguments are confined to the substantial legal question posed before the Bench u/s. 255(4). It is further so for the reason that such an order passed u/s. 255(4) will have bearing on their respective cases if the issue involved is identical. However it is pertinent to mention that such privilege given to the interveners is not unbridled. The interveners cannot be granted permission to enlarge the controversy before the Bench. The intervention can be allowed only to that aspect of the legal issue which is before the Bench in the proceedings u/s. 255(4). No other aspect even of the same legal issue which is *sub judice* before the Bench, can be allowed to be argued. As the decision of the Bench u/s. 255(4) has to be only on the point or points on which the members of the Division Bench differed, it cannot be called upon to express opinion, either generally or specifically, on any aspect of the matter other than that which is under consideration. We, therefore, permit the interveners to address the Bench only on the legal issue raised before us and not to transgress the boundaries inherently set up by the questions under consideration.

QUESTION NO.2

16. Question no.2 posted for our consideration is whether the Tribunal has to decide an issue on the basis of the law as it stands on the day of the passing of the order. The learned A.R. vehemently argued that the learned Accountant Member passed his order by taking cognizance of the provisions of Finance Bill, 2007 which were not enacted by that time. According to him the reliance by the learned Accountant Member on *Explanation* below section 80-IA(13) was bad in law for the reason that he took note of a provision in the Finance Bill at the time of passing his order. He referred to section 294 of the Act for seeking assistance in support of his submission that the *Explanation* ought not have been considered by the learned Accountant Member because

at the time of passing of his order it was not there on the statute and in the absence of such *Explanation*, only the provisions of section 80-IA, without *Explanation*, should have been taken note of. Per contra the learned Departmental Representative submitted that the learned Accountant Member committed no error in considering the *Explanation* to section 80-IA. In his opinion section 294 was not attracted in such situations.

17. After considering the rival submissions and perusing the relevant material on record we find that section 294 is not applicable in the present circumstances. This section provides that : “If on the 1st day of April in any assessment year provision has not yet been made by a Central Act for the charging of income-tax for that assessment year, this Act shall nevertheless have effect until such provision is so made as if the provision in force in the preceding assessment year or the provision proposed in the Bill then before Parliament, whichever is more favourable to the assessee, were actually in force.” On a bare perusal of this section it is observed that the same refers to ‘for the charging of income tax for that assessment year’. When we consider the language of section 4, which is charging section, it turns out that the same, *inter alia* refers to the rate or rates of income-tax which shall be charged for the assessment year in accordance with and subject to the provisions of this Act in respect of the total income of the previous year of every person. Though section 4 is a charging section, but the rates of tax are provided by the relevant Finance Act. Thus section 4 is a medium for giving effect to the provisions of the Finance Act. It is in this context that section 294 is relevant. *Ex consequenti* the net effect of section 294 read with section 4 on the one hand and the relevant Finance Bill/Act on the other hand is that if the Finance Bill providing rates of tax has been enacted, then the rates as per the Finance Act as on the 1st day of April in the assessment year shall be applicable, but if the relevant provisions in the Finance Bill have not been enacted then the rates so proposed or those already applicable, which ever are more beneficial to the assessee, shall be applicable.

18. When this position was put across to the learned A.R., he candidly accepted of not strictly relying on but only taking assistance from section 294 in support of his case. He emphasized that the Id. AM ought to have eschewed from considering the *Explanation* which was still a proposal at the time of his passing order. We find that even the assistance taken of this section by the learned A.R. to bolster his submission that *Explanation* should not have been considered by the learned Accountant Member, is misplaced. The crucial words used in this section are “until such provision is so made”. So no reference can be made to this section when the provision stands enacted. It is only during interregnum that the more beneficial provision to the assessee is made applicable as per the mandate of this section. If, however a proposal in the Finance Bill has

been enacted that will become binding. It is only till such time that the Finance Bill is converted into Act that this section can be said to have any significance, even going as per the argument of the Id. AR. Once a proposal in the Finance Bill is converted into provision in the Act, such provision becomes applicable. Lot of emphasis has been laid by the learned A.R. on the proposition that when the learned Accountant Member passed his order, the said *Explanation* to section 80-IA was merely a proposal in the Finance Bill and not enacted. It is observed that the Finance Bill, 2007 became Act on receiving the assent of the Hon'ble President of India on 11th May, 2007 [(2007) 291 ITR St. 1]. The learned Accountant Member passed his order on 21.5.2007 i.e. after the enactment of *Explanation* below section 80-IA(13). It is, therefore, clear that when the learned AM passed his order, the *Explanation* to section 80-IA had already come into force with retrospective effect from 1.4.2000. Thus it is evident that this issue has been needlessly dragged by the learned A.R., which otherwise has no legs to stand on.

19. Now we come to the question no.2 about the applicability of law standing on the day of the passing of the order. It is simple and plain that the law governing the issue, as standing on the day of passing of the order, has to be applied. Only the provisions of the Act governing the issue standing on the date of adjudication by any authority under the Act, are applicable. For example if on the day of passing the assessment order a particular provision is doubtful of application to the facts of a case and the A.O. rejects the claim of the assessee on the basis of his interpretation of such provision, the learned CIT(A) will be fully entitled to decide the issue in conformity with the clarification if issued by the Board or some amendment made to the Act, subsequent to the passing of the assessment order, which concerns with the dispute. In the same manner when issue is taken up by the either side before the Tribunal and in the meantime some amendment is carried out to the relevant provision with retrospective effect covering the period under consideration, the Tribunal will be duty bound to abide by such retrospective amendment.

20. At this stage it will be useful to refer to the order passed by the Special Bench of the Tribunal in the case of *Aquarius Travels (P.) Ltd. Vs. ITO [(2008) 111 ITD 53 (Delhi) (SB)]*. Facts of that case are that the assessee earned *inter alia* some exempt income. The Assessing Officer disallowed interest to the tune of Rs.12,94,978. The assessee remained unsuccessful before the first appellate authority. In the meantime section 14A was introduced with retrospective effect. It was claimed on behalf of the assessee that the Tribunal was not competent to take recourse to section 14A for the first time. Rejecting this contention it was held that section 14A has to be applied retrospectively by all the Courts before whom the proceedings are pending i.e. if the issue relates to the subject-matter pertaining to deduction of expenses in

relation to exempt income, then such issue has to be decided by taking cognizance of the amended law.

21. We are reminded of a celebrated judgment rendered by the Hon'ble Supreme Court in the case of *M.K.Venkatachalam, ITO & Anr. Vs. Bombay Dyeing and Manufacturing Co. Ltd. [(1958) 34 ITR 143 (SC)]*. In this case Income Tax Officer made assessment for assessment year 1952-53 by giving credit for Rs.50,063 being interest at the rate of 2% on the tax paid in advance u/s.18A(5). Section 13 of the Indian Income Tax (Amendment) Act, 1953, which was passed subsequently, inserted a provision to section 18A(5) with the effect that an assessee was entitled to interest not on the whole of the tax paid in advance but only on the difference between the tax so paid and the amount of tax determined on regular assessment. This amending section was deemed to have come into force on 1.4.1952. As per this amendment the assessee was entitled only to a sum of Rs.21,157 as interest. The ITO rectified the mistake in the order of assessment and demanded payment of sum of Rs.29,446. The Hon'ble High Court held that there was no mistake apparent from record as the order of assessment was valid in the light of law as it stood on the date of order. Reversing the judgment of the Hon'ble High Court, the Hon'ble Supreme Court held that the proviso added by section 13 of the Amendment Act must, by legal fiction, be deemed to have come into force on 1.4.1952 and hence the amendment to section 18A must be deemed to have been included in the principal Act as from 1.4.1952, for all purposes, and therefore the proviso must be deemed to be part of section 18A on the date of the passing of the assessment order. Consequently the assessment order, found to be inconsistent with the proviso to section 18A, was held to be suffering from mistake apparent from record and the action of the ITO in exercising his power of rectification u/s.35 was held to be justified.

22. At this moment it will be useful to refer to a judgment of the Hon'ble jurisdictional High Court in the case of *CIT Vs. May And Baker (India) Pvt. Ltd. [(1991) 192 ITR 239 (Bom.)]*. The facts of that case indicate that the payment of Gratuity Act, 1972 came into force sometime in October, 1972. As per that, the assessee became liable to pay gratuity to its employees. Provision was made for Rs.8,65,000 bifurcating it into two parts viz. a sum of Rs.3,31,000 as gratuity liability of the previous year and the remaining sum of Rs.5,34,000 as liability of the past years. The ITO allowed assessee's claim to the extent of Rs.3.31 lakhs and disallowed the claim for the balance amount of Rs.5.34 lakhs. The Tribunal allowed deduction of the entire amount. Section 40A(7) was introduced by the Finance Act, 1975 with retrospective effect from 1.4.1973. The order of assessment, the appellate order of the Appellate Assistant Commissioner and the order of the Tribunal were passed before the insertion of sub-section (7) to section 40A. As a result of

that, the new amendment could not be considered by any of the authorities. The Hon'ble High Court held that the entire liability accrued during the previous year. The Tribunal was directed to pass such orders as were necessary to dispose off the issue conformably to the judgment of the High Court as provided u/s.260(1) of the Act. When the matter came up before the Hon'ble jurisdictional High Court it was held that, if in the meantime, as had happened in the instant case, certain provisions had been enacted which were applicable to the year under reference, the Tribunal was liable to consider the assessee's claim in the light of such provisions while giving effect to the High Court's order u/s.260(1).

23. On going through the enunciation of law through the above discussed judgments of the Hon'ble Supreme Court, High Court and order passed by the Special Bench of the tribunal, it becomes palpable that when an amendment is carried out to a particular section with retrospective effect, the authorities before whom the matter is pending, are bound to apply the amended law even if it sees the light of the day after the passing of the order by the authorities below it. Thus any retrospective amendment made to a particular provision covering the year in dispute, needs to be given effect to on any matter pending before any authority, notwithstanding the fact that such amendment was carried out after the passing of the assessment order. Therefore, it is not permissible to argue that the Tribunal is incompetent to take cognizance of any provision which comes into existence with retrospective effect, on the issue pending before it. However it is of paramount importance that before applying such amended provision, aggrieved party must be given an opportunity of hearing.

24. Another vital question which looms large before us is to decide as to whether a Bench u/s. 255(4) can take note of a provision inserted with retrospective effect having bearing on the issue, coming into existence after the passing of separate orders by the dissenting members but during the pendency of dispute before the Bench under sub-section (4) of section 255. In other words can a bench constituted u/s 255(4) take recourse to a provision inserted with retrospective effect covering the year in question, which was not available at the time of passing the orders by the members of the division bench. In order to answer this question it is fundamental to understand the nature and ambit of proceedings under sub-section (4). On the passing of the order by the Division Bench, finality is attached to all the issues on which there is no difference between the members. However, the point on which the two members differ, obviously remains open for adjudication by the Third member. During the continuation of proceedings u/s. 255(4) or after the passing of such order but before giving effect to the order so passed with a majority view, no party is entitled to re-agitate any of the issues decided by the Division Bench in concurrence or

take up an additional ground on any other fresh issue. For all practical purposes the proceedings are closed, insofar as the Tribunal is concerned when the hearing is concluded by the Division Bench save and except the point or points on which there arose a difference of opinion. The Jodhpur Bench of the Tribunal in *Rameshwar Soni Vs. ACIT (Inv.) (2005) 97 ITD 127 (Jod.)*, (to which one of us is party), considered a situation in which the Third member passed the order and when the matter came up before the Division Bench for giving effect to the majority view, the assessee raised an additional ground of appeal. After hearing the parties at length it was held that there was difference in the scope of jurisdiction and powers in the passing of orders u/s. 254(1) and 255(4). It was observed that section 254(1) provides that the Tribunal may, after giving both the parties to the appeal opportunity of hearing, pass such order thereon to as it thinks appropriate since the powers and jurisdiction of the Tribunal in passing the order under this sub-section are stated in widest amplitude. There are no fetters on the powers of the Tribunal to entertain any additional ground which is raised for the first time before it. On the contrary scope of the proceedings u/s. 255(4), after passing of order by the third member, has been held to be confined only to giving effect to the majority view *qua* the items which were the subject matter of dispute between the members who originally heard the appeal. It was therefore, concluded that on all aspects other than such point(s) of difference, the original order passed by the Division Bench becomes conclusive and hence the jurisdiction u/s. 255(4) cannot be stretched so far as to include within its sweep the issues beyond the purview of point(s) of difference between the members who originally heard the appeal. Thus it can be seen that the proceedings *qua* the point of difference continue before the Bench constituted u/s. 255(4) and are deemed to continue till the passing of order under this sub-section. It is manifest from the language of section 255(4) itself that on nomination by the President, such one or more members 'shall hear' the point. These are judicial proceedings in nature inasmuch the opportunity of hearing to both the parties has been specifically provided for and as a result of that the parties are allowed to argue the same issue on which there emerged difference of opinion between the members of the Division Bench. Statutory prescription of granting hearing, as envisaged under sub-section (4) of section 255 on the point or points of difference by the member or members nominated under sub-section (4), is a clear indicator of the fact that such proceedings are continuation of proceedings from the Division Bench but only *qua* the point or points of difference.

25. In such proceedings u/s 255(4) the parties are not entitled to file any additional evidence for the first time which was not before the members who originally heard the appeal in the division Bench. It has been held so in *Subhash Gupta (Individual) Vs. DCIT [(2003) 85 ITD 167 (Jp.) (TM)]*, *DCIT Vs. B.P. Agarwalla & Sons Ltd. [(2003) 86 ITD 219 (Kol.) (TM)]* and

Ms.Aishwarya K.Rai Vs. DCIT [(2007) 104 ITD 166 (Mum.) (TM)]. However it is relevant to mention that the bar is imposed on furnishing of additional evidence in these proceedings. Such prohibition does not extend to making additional legal submissions having bearing on the point of difference which is open before the Third member. There is a basic difference between 'evidence' and 'submission'. The Law Lexicon by P.Ramanatha Aiyar gives the meaning of 'Evidence' as "the means from which an inference may logically be drawn as to the existence of facts." The meaning of 'Evidence' has further been explained here as : "all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact the truth of which is submitted to judicial investigation". Another meaning given is : "any matter of fact which is furnished to a legal tribunal.... otherwise than by reasoning or a reference to what is noticed without proof....as the basis of inference in ascertaining some other matter of fact". Here it will be relevant to note section 3 of the Evidence Act, 1872 which defines "evidence" to "mean and include – (1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence, (2) All documents produced for the inspection of the Court; such documents are called documentary evidence."

26. From the definition of the word "evidence" under the Indian Evidence Act and the meaning as given in the Law Lexicon, it transpires that the same is employed to prove the existence or non-existence of some facts. At the same time it is further clear that the word "evidence" excludes "argument". Whereas the evidence is confined to proving or disproving only a factual position, the argument, be it legal or otherwise, is a submission by the parties which is noticeably different from facts. The afore-noted orders passed by the Benches restrain the admission of an additional evidence by the Third member in the proceedings u/s. 255(4). It is nowhere laid down in these cases, and naturally it cannot be, that the parties are not empowered to make additional argument before the Bench on the point of difference. The very purpose of conducting judicial proceedings by Bench u/s. 255(4) "for hearing on such point or points" depicts that the parties are at liberty to advance any legal submission before the Bench on the question before it, even if such submission was not made at the time of hearing before the Division Bench. Making of additional legal submission by the parties in the proceedings u/s. 255(4) is poles apart from the proscription on the parties in filing additional evidence before the Bench which was not made available to the Division Bench. Thus it is clear that both the parties are at liberty to raise any legal submission in respect of the question before the Bench u/s. 255(4) notwithstanding the fact that such submission was not or could not have made earlier. Such a situation may arise due to variety of reasons which would also encompass a retrospective

amendment carried out to the relevant provision after the passing of orders by the members of the Division Bench but during the pendency of the proceedings before the Bench u/s. 255(4) which has significant bearing and is essential for the purposes of adjudicating the question on which difference of opinion arose. It, therefore, turns out that if a party relies on some retrospective amendment on the issue, which advents after the passing of orders by the members of the Division Bench, the same cannot be ignored by the Bench in the proceedings u/s. 255(4) provided the other party is given opportunity of hearing on such amendment. It is unrealistic to argue that the later amendment in the statutory provision or development of law on the question which is pending in dispute relating to the year, should be ignored. Not following such amendment would give absurd results and the order so passed will be rendered erroneous. The same is true for applying the judgment of the Hon'ble Supreme Court or the Hon'ble jurisdictional High Court coming into place after the passing of orders by the dissenting members. Brushing aside such amendment in the statutory provision or the pronouncement of law by the Hon'ble Supreme Court or the Hon'ble jurisdictional High Court, which is available at the time of passing order u/s 255(4), would make the order cryptic. It is trite law that even rectification of the order is permissible within the frame work of the provisions when there is retrospective amendment or adjudication by the Hon'ble Supreme Court or the Hon'ble jurisdictional High Court contrary to what was earlier decided by the concerned authority. In ACIT VS. Saurashtra Kutch Stock Exchange Ltd. (2008) 305 ITR 227 (SC) the Hon'ble Supreme Court has held that non-consideration of a judgment of the jurisdictional HC, rendered prior to or subsequent to the order, constitutes a mistake apparent from record. From the above discussion there remains no doubt whatsoever that the retrospective amendment is a good ground for the rectification of an order. When the retrospective amendment is a valid ground for rectification of the order, we fail to see as to why such amendment be not applied when the proceedings are continuing u/s. 255(4). We, therefore, hold that the Tribunal is not empowered but duty bound to apply such retrospective amendment made to the relevant section after allowing chance to the aggrieved party to address on such retrospective amendment concerning the dispute in question. We, therefore, answer this question in affirmative by holding that the tribunal has to decide an issue on the basis of the law as it stands on the day of the passing of the order.

QUESTION NO.1

27. Question no. 1 requires our answer as to whether on the facts and circumstances of the case, the assessee is entitled for claim of deduction under the provisions of section 80IA(4) in

respect of the projects undertaken. The learned Counsel for the assessee contended that the question No.1 framed by the members of the Division Bench refers to deduction under the provisions of section 80-IA(4) in respect of the “projects” undertaken. He submitted that there were five projects in assessment year 2000-2001 and seven projects in assessment year 2001-2002 in respect of which eligible income was earned. While referring to pages 5 and 6 of the order passed by the learned Judicial Member, the learned A.R. stated that he allowed deduction u/s. 80-IA(4) in respect of all the projects. Then he took us through the order passed by the learned Accountant Member and contended that the only project which has been discussed in the body of the order is Koyna Hydro Electric Power Project Stage-IV and as such it should be presumed that he agreed on the view point of the learned Judicial Member in respect of the allowability of deduction under this section on other projects. He further referred to para 8 of the order passed by the Hon’ble President, who initially acted as Third Member in this case and stated that it has been admitted that the controversy was centered only on one project and it was nobody’s case that the assessee is not entitled to deduction in respect of the other projects. It was, therefore, requested that the question so proposed be modified by this Bench so as to substitute the word “project” with the word “projects” and resultantly this Bench should render its decision only on the Koyna Hydro Electric Power Project. The sum and substance of the learned A.R.’s submission was that the learned Judicial Member had allowed deduction u/s. 80-IA on all the projects undertaken by the assessee whereas the learned Accountant Member disentitled the assessee to deduction only in respect of Koyna Hydro Electric Power Project and hence this Bench should decide the granting or otherwise of deduction only on the Koyna Hydro Electric Power Project as there was concurrence between the Members of the Division Bench as regards the allowability of deduction on the remaining projects. The learned Departmental Representative strongly opposed the view point of the learned A.R. by submitting that the learned Accountant Member had denied deduction u/s. 80-IA in entirety and as such it could not be presumed that both the Members had allowed deduction in respect of other projects.

28. After considering the rival submissions and perusing the relevant material on record we find this submission advanced on behalf of the assessee sans merit. From the order of the learned Accountant Member of the Division Bench it is more than clear that he differed with the “views regarding the admissibility of deduction u/s. 80-IA of the Act”. There is no express reference or implied inference in the order of the learned Accountant Member accepting the view point of the learned Judicial Member on the question of allowability of deduction u/s. 80-IA in respect of the other projects. He disagreed with the ld. JM in entirety and denied the full amount of deduction. It was only for illustrative purpose that he took up the facts of Koyna Hydro Electric Power

Project for discussion and demonstrated his view point on the question of deduction u/s. 80-IA in total. This position is borne out from para 3 of the learned Accountant Member's order by which he has mentioned that the amendment made in section 80-IA by way of insertion of the *Explanation* has clarified the position even if there was some lack of clarity in the provision as they existed. It is further noticed that both the Members of the Division Bench have referred the afore-stated question no. 1 u/s. 255(4), which speaks about the denial of deduction u/s. 80-IA(4) in respect of the "projects" undertaken. There is unanimity between the members of the Division Bench on the question so framed. It shows that whereas the learned Judicial Member allowed deduction u/s. 80-IA on all the projects but the learned Accountant Member negated the assessee's claim of deduction under this section on all the projects. The mid way approach, now sought to be adopted by the learned A.R. by arguing that both the members allowed deduction in respect of all the projects except one, is only with a view to curtail the scope of question before this Bench and thus getting the benefit in respect of other projects, which was neither intended nor actually allowed by the Id. AM. Again his reference to para 8 of the order passed by the Hon'ble President dated 14th March, 2008, with an attempt to bring home the point that it was nobody's case that the new *Explanation* has any application to other projects except one, is devoid of any merit. It is apparent from the order passed by the Hon'ble President that he simply recorded the argument of the learned A.R. in that para and the same is not his finding, which is amply demonstrated by the use of the sentence : "in other words, it was, therefore, argued that there is no decision on four cases by the learned Accountant Member". When the Hon'ble President has referred the matter to a Larger Bench without expressing his opinion on the questions referred to him u/s. 255(4), it is wrong to infer any decision having been rendered by the Hon'ble President on any of the projects.

29. Both the sides, in their preliminary objection, have relied on the judgment of the Hon'ble Madras High Court in the case of *Dynavision Ltd. (supra)*. The facts of that case reveal that there was difference between the Judicial Member and Accountant Member. Both the Members formulated their separate questions. When the matter came up before the Third Member he noted that there was no uniformity even in identifying the points of difference amongst the Members. In order to sort out the controversy he formulated his own question and then proceeded to decide accordingly. It was on such framing of question by the Third member that the Hon'ble High Court held that the President or the Third Member has no right to go beyond the scope of reference. While setting aside the order of the Third member it was directed to rehear only on the difference of opinion expressed by the members of the Division Bench. From this judgment it is abundantly clear that the question(s) formulated by the differing members cannot be altered or

reframed by the Bench while hearing the matter u/s. 255(4) of the Act. Adverting to the facts of the instant case we note that both the differing members of the Division Bench referred question , in unison, about the deduction u/s. 80-IA(4) in respect of the `projects' undertaken by the assessee. As such the making of a submission by the learned A.R. at this stage for the modification of the question restricting the word "project" to singular rather than plural as appearing in the question originally framed by both the members, is in clear violation of the above noted judgment in the case of *Dynavision Ltd. (supra)*, which has been pressed into service by the learned A.R. himself. On the legal issue as well as on merits, we are unable to accept this contention urged on behalf of the assessee about the proposed modification of the question. As such we are of the considered opinion that the question as formulated and placed before us is depicting the true controversy as regards the difference of opinion between the members of the Division Bench on the allowability or otherwise of deduction u/s. 80-IA(4) on all the projects.

30. In support of his submission that the dispute as per both the members was confined to the income from one project only, the ld. AR initially restricted his arguments to that project alone. But when during the course of hearing it was pointed out that from the language of the question framed by both the members, it appeared that the entire amount of deduction u/s 80-IA was in dispute, the ld. AR was called upon to address the Bench on the admissibility or otherwise of the entire amount of deduction as claimed in respect of all the projects and also the effect of Explanation as inserted by the Finance Act 2007 below sub-section (13) of section 80-IA and further as substituted by the Finance Act, 2009, then he made submissions in this regard, which have been taken into consideration.

31. Now we proceed to answer this question on merits. From the above noted facts it is seen that the dispute centers around the allowability or otherwise of deduction u/s. 80-IA in respect of the projects in both the years under consideration. In order to appreciate the rival contentions it is *sine qua non* to have a quick look at the history of section 80-IA, insofar as it is relevant for our purpose. It was introduced by the Finance (No.2) Act, 1991 with a view to encourage private sector participation and to attract capital funds on infrastructure development. Later on this section was amended by the successive Finance Acts. Major changes were brought by Finance Act, 1995 by which for the first time a five year tax holiday was provided for all infrastructure facilities. Circular No.717 dated 14th August, 1995 clarifies, in this regard, that the industrial modernization requires a massive expansion and qualitative improvement in infrastructure. Additional resources are needed to fulfill the requirement of the country within a reasonable time frame. Keeping this requirement in mind a ten year concession including a five year tax holiday

was allowed to any enterprise which develops, maintains and operates a new infrastructure facility such as roads, highways, expressways etc. as may be notified by the Board on BOT or BOOT or similar other basis. It was made clear that the enterprise has to be owned by the company registered in India or a consortium of such companies. It was further stated that the tax holiday will be in respect of income derived from the use of the infrastructure facilities developed by them. The scope of this section was further enlarged by the Finance Act, 1999 by which new sections 80-IA and 80-IB were substituted in place of the existing section 80-IA. Whereas the earlier section 80-IA with caption “Deduction in respect of profits and gains from industrial undertaking etc. in certain cases” allowed deduction in respect of profits and gains derived from any business of an industrial undertaking or a hotel or an operation of ship or developing, maintaining and operating any infrastructure facility or scientific and industrial research and development or providing telecommunication services etc., the new section 80-IA provides ‘deduction in respect of profits and gains from industrial undertaking or enterprises engaged in infrastructure development etc.’ and section 80-IB grants “deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings”.

32. Before we test the facts of our case on the touchstone of the prescription of section 80-IA, it will be in the fitness of things to reproduce relevant portion of this section as applicable to the years in question, reading as under:-

“80-IA (1) Where the gross total income of an assessee includes any profits and gains derived from any business of an industrial undertaking or an enterprise referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to hundred per cent of profits and gains derived from such business for the first five assessment years commencing at any time during the periods as specified in sub-section (2) and thereafter, twenty-five per cent of the profits and gains for further five assessment years :

Provided that where the assessee is a company, the provisions of this sub-section shall have effect as if for the words “twenty-five per cent”, the words “thirty per cent” had been substituted.

(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in

which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park or generates power or commences transmission or distribution of power:

Provided that where the assessee begins operating and maintaining any infrastructure facility referred to in clause (b) of Explanation to clause (i) of sub-section (4), the provisions of this sub-section shall have effect as if for the words "fifteen years", the words "twenty years" had been substituted.

(3)

(4) *This section applies to -*

(i) *any enterprise carrying on the business of (i) developing, (ii) maintaining and operating or (iii) developing, maintaining and operating 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;*

(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, (ii) maintaining and operating or (iii) developing, maintaining and operating a new infrastructure facility subject to the condition that such infrastructure facility shall be transferred to the Central Government, State Government, local authority or such other statutory body, as the case may be, within the period stipulated in the agreement;*

(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 (hereinafter referred to in this section as the transferor enterprise) to another enterprise (hereinafter 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, bridge, airport, port, inland waterways and inland ports, rail system or any other public facility of a similar nature as may be notified by the Board in this behalf in the Official Gazette;

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

(c) a water supply project, irrigation project, sanitation and sewerage system;

The following clause (c) was substituted for the existing clause (c) of Explanation to clause (i) of sub-section (4) of section 80-IA by the Finance Act, 2000, w.e.f. 1-4-2001:

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

(ii)[undertaking of telecommunication]

(iii)[undertaking of industrial park]

(iv)[undertaking of generation and distribution of power]

(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made.

(6)

(7) *Where the assessee is a person other than a company or a co-operative society, the deduction under sub-section (1) from profits and gains derived from an industrial undertaking shall not be admissible unless the accounts of the industrial undertaking for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant, as defined in the Explanation below sub-section (2) of section 288, and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant.*

(8)

(9)

(10)

(11)

(12)"

33. On the analysis of the provisions of section 80-IA, it is noticed that sub-section (1) provides that deduction shall be allowed in computing the total income of an assessee from the profits and gains derived from any business of an industrial undertaking or an enterprise referred to in sub-section (4). It implies that the deduction is available to the assessee in respect of profits and gains from the eligible business. Thus it is not the entire income of the assessee which qualifies for deduction under this section but only that part of it which result from the eligible business. It is so for the reason that albeit the benefit is to be availed by the assessee, but it applies only to the profits and gains of the eligible enterprise and not to the assessee owning such enterprise. Sub-section (2) states that the deduction under sub-section (1) may be claimed by the assessee for any ten consecutive assessment years out of fifteen years **beginning from the year** in which the enterprise **develops and begins to operate** any infrastructure facility. On a careful perusal of the language of this sub-section two points emerge. First the word “and” has been used between `develops` and `begins to operate`. The use of the word “and” clearly brings out that both the conditions need to be cumulatively satisfied by the eligible business. It indicates that the infrastructure facility should not only be developed but also operated by the assessee so as to make its income qualify for deduction. The second condition which comes to light is the period of ten years out of first fifteen years has to commence when the enterprise develops and begins to operate any infrastructure facility. From here it can be noticed that the eligibility of deduction cannot be prior to the development and operation of the infrastructure facility. Unless the assessee really develops and begins to operate infrastructure facility there is no question of granting any deduction for the reason that the period of deduction cannot commence unless the

enterprise develops and begins to operate the infrastructure facility. Adverting to the facts of the instant case we find that the assessee is only a civil contractor who has been assigned the job of civil construction such as constructing the tunnel etc. Its duty ends when the tunnel etc. is constructed according to the specifications given by the Government / Statutory Bodies. The infrastructure facility as such will begin to operate only after the assessee has done his job and the other necessary works in connection with the development of infrastructure facility are completed. Since the assessee is out of the sight much prior to the actual operation of the infrastructure facility, the mandate prescribed by sub-section (2) is failing in this case. Sub-section (3) which concerns with the conditions to be satisfied by an industrial undertaking for general and distribution of power, is obviously not applicable to the instant case.

34. Sub-section (1) speaks about the business of an enterprise referred to in sub-section (4). In so far as the business of the eligible infrastructure facility is concerned, clause (i) of sub-section (4) is applicable here. In order to be eligible for deduction the enterprise must fulfill all the conditions as laid down in sub-clauses (a), (b) and (c). As per the language of this clause, primarily it should be an enterprise carrying on the business of (i) developing, (ii) maintaining and operating or (iii) developing, maintaining and operating any infrastructure facility. So the enterprise should carry on the business of (i), (ii) or (iii) and fulfill all the conditions enshrined in sub-clauses (a) to (c) of this clause. The learned Counsel for the assessee has made out a case that the benefit of this section is available to an enterprise carrying on the business of (i) developing or (ii) maintaining and operating or (iii) developing, maintaining and operating any infrastructure facility. According to him there is a word “or” between (i) and (ii) which clearly suggests that the benefit of deduction is available even to a developer who does not maintain and operate the infrastructure facility. He submitted that his case is covered in (i) preceded by the word `or’ which is sufficient compliance since the developer simpliciter of the infrastructure facility is also eligible for deduction. He further explained that the work done by the assessee is of developing the infrastructure facility as without the construction of tunnels, the functioning of the infrastructure facility is impossible. It was stated by him that the infrastructure facility was one larger job, which could be accomplished by several small jobs. As the civil construction is an important segment of the big whole, in his opinion, any person executing even a part of the jobs concerning the infrastructure facility, shall be eligible for deduction.

35. It appears that the Id. AR has taken assistance from the language of this section reading the word “or” between (i) and (ii) from the provisions as applicable to assessment year 2002-2003 onwards, which are obviously not relevant for our purpose. We are dealing with

assessment years 2000-2001 and 2001-2002 and the punctuation sign of coma is used between (i) and (ii) and not the word “or” as suggested by the learned A.R. It shows that the benefit of deduction in these years is available not to the developer of the infrastructure facility until he maintains and operates it as well. The same condition can be found in sub-section (2) also as discussed above. In view of the fact that coma has been used between (i) and (ii) and the word “or” has been used only between (ii) and (iii) of sub-section (4)(i), it shows that there are two types of eligible assesseees for deduction under this section in the years under consideration. First are those who develop the infrastructure facility and after some time transfer it to someone else [on or after 1.4.1999 as per proviso below sub-clause (c) to sub-section (4)(i)] to operate on their behalf in accordance with the agreement with the Central/State Government or local/statutory authority. Second category comprises of those who develop the infrastructure facility and also themselves operate and maintain the same. The use of punctuation sign coma between clauses (i) and (ii) cannot be substituted with the word “or” as used between (ii) and (iii) of sub-section (4)(i). Each and every word or sign of punctuation used by the legislature in the language of section carries its own meaning and depicts the intention of the legislature. It is not as if coma has been accidentally inserted between (i) and (ii) as against the intention of using the word “or”, as suggested by the learned A.R. Wherever the legislature intends to provide for choosing one of the alternatives it uses the word “or” between such options but where the intention is to make operative all the given propositions punctuation sign coma or/and the conjunction “and” is used between or amongst the relevant propositions. A useful reference can be made to the language of fifth proviso to section 80HHC which uses the word “or” between clauses (a) and (b) and then between various components of these clauses. The Mumbai Bench of the Tribunal in the case of *Mehta Manufacturer Vs. ITO [(2009) 120 TTJ (Mum) 234]* had an occasion to interpret the fifth proviso and it held that loss as per computation under clause (a) or clause (b) or clause (c) of sub-section (3) of section 80HHC is required to be set off against the amount which bears to 90% of the amount specifically categorized either under clause (a) or under clause (b) of the fifth proviso the same proportion as the export turnover bears to the total turnover. It was also held that the word “or” used between clauses (a) and (b) of the fifth proviso cannot be read as “and”. Under these circumstances we are of the considered opinion that the word “or” cannot be read between (i) and (ii) when the punctuation sign of coma has been used in the language of the provision.

36. Here it is important to mention that the legislature inserted the word `or' between (i) and (ii) w.e.f. 1.4.2002, which is applicable to A.Y. 2002-03. So w.e.f. the A.Y. 2002-03, not only the enterprise (i) developing, (ii) operating and maintaining the infrastructure facility shall be entitled to deduction, but also the enterprise which is only (i) developing or (ii) operating and

maintaining the infrastructure facility. From such year onwards the enterprise which only develops the infrastructure facility and thereafter transfers it to someone else for operating and maintaining on behalf of transferee shall also be covered for the purposes of granting benefit. The difference in the situation between A.Y. 2002-03 onwards and prior two years is that whereas the operation and maintenance of the infrastructure facility on behalf of the enterprise developing is necessary in the former period, but in the later period the operation and maintenance shall be on behalf of the transferee enterprise itself. Since in the years in question the transfer of the enterprise for operation and maintenance has necessarily to be on behalf of the enterprise developing the infrastructure facility, and for the time being assuming without admitting the contention of the Id. AR that the assessee is developer of infrastructure facility, it does not satisfy the other condition of its transfer for operating and maintaining on its behalf for the obvious reason that there is no transfer at all of any infrastructure facility from the assessee, much less for operating and maintaining on its behalf.

37. Be that as it may it remains to be examined as to whether the assessee can be called as 'developer' within the meaning of section 80-IA(4). The learned Counsel submitted that the work done by the assessee made it a developer entitled to deduction. Shri Vijay Mehta, the learned Counsel for the intervener contended that the "works contract" has not been defined in the context of section 80-IA and hence in the absence of assignment of any definition by the statute, its meaning should be understood in the common parlance. According to him a developer is a person who develops the facility and such person may or may not be a contractor. On the other hand a contractor is stated to be a legal term whose rights and duties vis-à-vis contractee are determined by way of legal document called the contract. He cited an example that if a contract to construct a highway from Mumbai to Delhi is given to a person he is contractor as well as developer. As against that a person who has been given a contract for painting or beautification is merely a contractor but not a developer. According to him while developing a project, a developer has to make technological inputs, entrepreneurial inputs etc. Besides, there is financial involvement in terms of deployment of man and machine as well as bank guarantees. He went on to explain that the developer undertakes the risk and reward of the project and is accountable to the authorities for the development work carried out by him. In his opinion the assessee in the present case cannot be characterized anything other than a developer.

38. In the oppugnation, the learned Departmental Representative submitted that the construction is a minor part of the development. According to him, development includes the

works to be done relating to the planning, designing, engineering and financing etc. of the project. He relied on the judgment of the Hon'ble Supreme Court in the case of *HAL Ltd. Vs. State of Orissa* [55 STC 327] in which it has been observed that in a contract for work, the person producing has no property in the thing produced as a whole, even if part or whole of the material used by him may have been his property earlier. He also relied on another judgment of the Hon'ble Summit Court in the case of *Tamil Nadu Vs. Anandam Vishwanathan* [(1989) 1 SCC 613] in which it was held that the nature of contract can be found only when the intention of parties are found out. The fact that in the execution of the works contract some material are used and the property in the goods so used passes to the other party, the contractor undertaking the work will not necessarily be deemed, on that account, to sell the material. It was, therefore, argued that the developer is a person who brings in additional resources by way of investment and technical expertise for developing the infrastructure facilities. Since the assessee had simply done a part of work of civil construction relating to the infrastructure facility, he stated that it is not eligible for deduction.

39. We find it as an undisputed position that the words 'developer' and 'contractor' have not been defined in or for the purposes of section 80-IA. The primary question which arises is that how to find out the meaning of a word or an expression which is not defined in the Act. It is a settled legal position that ordinarily the meaning or definition of a word used in one statute cannot *per se* be imported into another as has been held by the Hon'ble Supreme Court in the case of *Union of India Vs. R.C.Jain* [(1981) 2 SCC 308]. Therefore, the meaning of the words developer and contractor, as put forth before us by the rival parties from other legislations, be they State or Central enactments, cannot be automatically applied in the present context. In order to ascertain the meaning of a word not defined in the Act, a useful reference can be made to the General Clauses Act, 1897. If a particular word is not defined in the relevant statute but has been defined in the General Clauses Act, such definition throws ample light for guidance and adoption in the former enactment. According to section 3 of the General Clauses Act the definitions given in this Act shall have applicability in all the Central Acts unless a contrary definition is provided of a particular word or expression. On scanning section 3 of the General Clauses Act we observe that neither the word 'contractor' nor 'developer' has been defined therein. Thus the General Clauses Act is also of no assistance in this regard. Going ahead, when these words are neither defined in the Income Tax Act, 1961 nor in the General Clauses Act, the next question is that where from to find the meaning of such words. There is no need to wander here and there in search of answer which has been aptly given by the Hon'ble jurisdictional High Court in the case of *Abdulqafar A.Nadiadwala Vs. ACIT and Ors.* [(2004) 267 ITR 488 (Bom.)]

wherein the Hon'ble High Court was looking into the meaning of the words 'goods' and 'merchandise', which are not defined u/s. 80HHC in the context of Income Tax Act, 1961. The Hon'ble High Court held that : "it is well settled that in the absence of there being anything contrary to the context, the language of a statute should be interpreted according to the plain dictionary meaning of the terms used therein". Similar view has been expressed by the Hon'ble Supreme Court in the case of *CWT Vs. Officer-In-Charge (Court of Wards), Baigah [(1976) 105 ITR 133 (SC)]* in which it was held that the ordinary dictionary meaning of a word cannot be disregarded.

40. Coming back to our point of ascertaining the meaning of the words 'contractor' as well as 'developer', which have neither been defined in the Act nor in the General Clauses Act, we fall upon Oxford Advanced Learner's Dictionary to find out their meaning. According to this dictionary "developer" is a person or company that designs and creates new products, whereas "contractor" is a person or a company that has a contract to do work or provides services or goods to another. The New Shorter Oxford Dictionary defines the word "contractor" as : "A person who enters into a contract or agreement. Now chiefly *spec.* a person or firm that undertakes work by contract, esp. for building to specified plans". In the light of the meaning ascribed to these words by the dictionaries it is observed that the developer is a person who designs and creates new products. He is the one who conceives the project. He may execute the entire project himself or assign some parts of it to others. On the contrary the contractor is the one who is assigned a particular job to be accomplished on the behalf of the developer. His duty is to translate such design into reality. There may, in certain circumstances, be overlapping in the work of developer and contractor, but the line of demarcation between the two is thick and unbreachable. When the person acting as developer, who designs the project, also executes the construction work, he works in the capacity of contractor too. But when he assigns the job of construction to someone else, he remains the developer simpliciter, whereas the person to whom the job of construction is assigned, becomes the contractor. The role of developer is much larger than that of the contractor. It is no doubt true that in certain circumstances a developer may also do the work of a contractor but a mere contractor *per se* can never be called as a developer, who undertakes to do work according to the pre-decided plan.

41. Further it is relevant to note that the word "developing" used in sub-section (4) is with reference to "infrastructure facility". When we further peruse the meaning of the word "infrastructure facility" as per *Explanation*, it is found to have been defined exhaustively by referring to a road project, airport, port etc, a highway project, a water supply project and

irrigation project etc. Therefore the use of word “developing” in juxtaposition to infrastructure facility indicates that what is eligible for deduction under this sub-section is the profits and gains derived from the development of infrastructure facility and not something *de hors* it. So in order to be eligible for deduction the development should be that of the infrastructure facility as a whole and not a particular part of it, as has been contended by the Id. AR. It may be possible that some part of development work is assigned by the developer to some contractor for doing it on his behalf. That will not put the doer of such work into the shoes of a developer.

42. The paper book filed by the assessee contains the details of three projects viz. Koyna Hydro Electric Project, Bhima Sina Link Canal Tunnel and Jihe Kathapur Lift Irrigation Project. Page 20 onwards is a copy of the Tripartite agreement in relation to Koyna Hydro Electric Project amongst the assessee, M/s Patel Engineering Co. Ltd. and the Government of Maharashtra. As per this agreement, M/s Patel Engineering Co. Ltd. is a contractor whereas the assessee has been indicated as a sub-contractor. The contractor has been assigned some work by the Government of Maharashtra in connection with the Koyna Hydro Electric Project. It is not as if the assessee is developing the entire project. It has been handed over only a particular job of civil work as is apparent from page 1 of the paper book which is a letter from M/s Patel Engineering Co. Ltd. to the Executive Engineer, Koyna Hydro Electric Project. As regards Bhima Sina Link Canal Tunnel project, a copy of the joint venture agreement is placed at page 45 onwards of the paper book. As per this agreement the assessee submitted its bid for the work of constructing Bhima Sina Link Canal Tunnel and approaches at Ch.1/500 to 22/500 at Tal; Madha District Solapur, which was approved. For this unit the assessee along with one M/s Swapnali Construction entered into agreement with the ‘Owner’ viz., Maharashtra Krishna Valley Development Corporation for executing the above stated work. In this joint venture agreement also Maharashtra Krishna Valley Development Corporation has been referred to as the ‘Owner’ and the assessee as a Contractor. Copy of the MoU for joint venture agreement in respect of the third agreement, that is, Jihe Kathapur Lift Irrigation Project is available at pages 72 onwards of the paper book. As per this agreement also Maharashtra Krishna Valley Development Corporation has been referred to as “the owner” whereas the assessee has been described as ‘Joint venture’ for execution of the works referred to in this contract. Thus it is noted from the material on record that the assessee was given civil construction work to be done strictly according to the plan laid down by the State Government / Statutory Authorities. Such authorities have been referred to as ‘the owner’ and the assessee as the ‘joint venture’ for executing the contract. The sphere of work assigned to the assessee is simply to do the specified job of civil construction. It is not involved in the planning and development of the infrastructure

facility as a whole. It is bound to carry out the construction work as per the requirements of State Government(s) /statutory bodies and cannot deviate even an inch from the plan assigned to it. How and under which circumstances can it be called as `Developer' is anybody's guess. In the light of the foregoing discussion it is clear that the assessee is a mere contractor and not developer. We thus agree with the view expressed by the Chennai bench of the tribunal in ACIT VS. Indwell Linings (P) Ltd. (2009) 122 TTJ (Chennai) 137 and respectfully differ with the order passed by the Mumbai bench of the tribunal in Patel Engineering Ltd. VS. DCIT (2005) 94 ITD 411 (Mumbai)

43. Therefore, the claim of the assessee fails on both the counts, viz, it is neither a developer nor it fits into any of the two categories of the eligible businesses of (i) developing, (ii) maintaining and operating infrastructure facility on one hand or (iii) developing, maintaining and operating any infrastructure facility on the other.

44. When we examine the mandate of clause (i) of sub-section (4) of section 80-IA it transpires that the eligible enterprise must fulfill ALL the conditions set out in sub-clauses (a), (b) and (c) of section 80-IA(4)(i).

45. The first condition as per sub-clause (a) is that "it is owned by a company registered in India or by a consortium of companies". No doubt the assessee is a company registered in India but at least in one out of the three projects, the details of which have been submitted in the paper book, the other joint venture partner is a non-corporate assessee. Another significant word used here is "owned", which indicates that the infrastructure facility should be owned by a company so as to be entitled to deduction under this section. As noted *supra* from the copies of agreement entered into by the assessee with the State Government / Statutory Authorities, it is amply clear that only the concerned authority, and not the assessee, has been described as `owner' in unambiguous words. In these agreements the assessee has been referred to as a joint venture for carrying out the specified work only. It is axiomatic that the doing of work assigned to assessee, religiously in accordance with the given specifications subject to the terms and conditions of the agreement and control of the authority, cannot put it in the capacity of owner. Even if the assessee had to make some investment, for the time being, in the shape of purchase of some raw material or incurring of labour etc., which is recouped from time to time by furnishing bills, the assessee cannot claim itself as owner of the work done by it. The assessee is a mere contractor whose tender has been accepted by the competent authorities for carrying out the specified job, the property in respect of which vests with such Government or Local Authority. It is, therefore,

clear that since the work done by the assessee is not owned by it, it does not satisfy sub-clause (a) of section 80-IA(4)(i).

46. Now we proceed to sub-clause (b) as per which it has entered into an agreement with the Government or Local Authority for (i) developing, (ii) maintaining and operating and (iii) developing, maintaining and operating new infrastructure facility SUBJECT TO THE CONDITION THAT SUCH INFRASTRUCTURE FACILITY SHALL BE TRANSFERRED TO THE GOVERNMENT, LOCAL AUTHORITY OR SUCH OTHER AUTHORITY WITHIN THE PERIOD STIPULATED IN THE AGREEMENT. When we test the conditions set out in sub-clause (b) on the present factual scenario it emerges that the assessee is miserably failing. The assessee merely entered into agreement with State Government or Local Authorities for doing the specified works contract. Neither the assessee can be called as developer of the new infrastructure facility nor there is any stipulation in the agreement by which the infrastructure facility shall be transferred to the Government, Local Authorities or such other Statutory Bodies within the period stipulated in the agreement. A thing can be transferred only when a person holds some ownership or possessory rights over it. In the present context the point of transferring the infrastructure facility to the State Government etc. will arrive only when such infrastructure facility is owned by someone. Since the assessee did not own any area built by it on behalf of the Government or Local authorities, there is no question of transferring such construction much less the infrastructure facility itself. The Id. AR has not invited our attention towards any condition in these agreements, by which the assessee shall transfer the infrastructure facility to the State Government or Local Authorities as the case may be. It cannot, naturally, be so for the reason that the assessee is not the owner of any infrastructure facility which could be transferred to State Government or Local Authorities. Thus it transpires that sub-clause (b) is also not satisfied in the instant case.

47. Now we turn to sub-clause (c) as per which it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995. A proviso attached to sub-clause (c) as per which where an infrastructure facility is transferred on or after the 1st day of April, 1999 by an enterprise which developed such infrastructure facility being the transferor enterprise to another enterprise being the transferee enterprise for the purpose of operating and maintaining the infrastructure facility on its behalf in accordance with the agreement with the Government or Statutory Body etc., the provisions of this section shall apply to the transferee enterprise as if it were the enterprise to which this clause applies and deduction 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. In the hitherto section 80-IA, sub-section (4A) considered the cases for allowing the deduction in respect of enterprise carrying on the business of developing, maintaining and operating any infrastructure facility only. In the new section, there is sub-section (4)(i) and sub-clause (b) by which the enterprises developing, maintaining and operating infrastructure facility have been divided into two clauses i.e. (i) developing, (ii) maintaining and operating and (iii) developing, maintaining and operating. The above referred proviso has also been simultaneously added to sub-clause (c) so as to prescribe the treatment to be given when there is transfer of enterprise by the transferor to the transferee for operating and maintaining of enterprise ON ITS BEHALF. This point has been discussed at length above while considering clause (i) of sub-section (4). It is therefore, lucid that in the years in question the deduction is available to the one who, in fact, operates the enterprise whether as an owner in his own capacity or for and on behalf of the developer.

48. Here it is important to notice that the transfer of infrastructure facility from one person to another should be only for the purpose of operating and maintaining it on its behalf and that too in accordance with the agreement with Central/State Government or Local Authority or Statutory Body etc. We find that the assessee has failed to satisfy the condition as enshrined in sub-clause (c) as it had neither started operating and maintaining the infrastructure facility nor it transferred anything to someone else for operating on its behalf and still further there is no question of concurrence of the concerned authority as there is no such clause in any of the agreements with them. Rather there can not be any question of such operation or maintenance since the infrastructure facility is not at all owned by the assessee.

49. It is appropriate to note that the word “it” used in the beginning of sub-clauses (a) to (c) has been used interchangeably to represent the enterprise carrying on the eligible business as well as the assessee. Whereas the word “it” in sub-clauses (a) and (c) refers to the enterprise, the same word used in sub-clause (b) refers to the assessee.

50. From the foregoing discussion it is manifest that the assessee failed to satisfy the conditions as laid down in clause (i) read with those mentioned in sub-clauses (a) to (c) of sub-section (4) of section 80-IA. It cannot be conferred with the benefit as provided in section 80-IA. It is merely doing work of civil construction, which is a part of the entire infrastructure project and not the whole of it. The claim made on behalf of the assessee that on account of its association with the infrastructure facility in any manner, even though partly, the eligibility for

deduction is earned, is untenable. If this contention, that since it is engaged in some way or the other with the development of infrastructure facility and hence it should be allowed deduction u/s. 80-IA to that extent, is brought to the logical conclusion then even the supplier of iron or bricks will also claim deduction to the extent of income from the such supply for infrastructure. In the same breath the labour contractor to the civil contractor or directly to the authority developing the infrastructure facility would also claim that they are enterprise eligible for deduction under this section and the same be allowed to the extent of their income derived from such supply of labour. Going further even the supplier

of machinery to the Government for the setting up of the infrastructure facility will also claim that he is also an enterprise eligible for the benefit u/s. 80-IA. Going still further even the sub-contractor of the contractor shall also stand included in the beneficiaries of the deduction, which is obviously not the intention of the legislature as borne out from the clear language of section itself and clarified with the help of various circulars such as Circular No. 717 dt. 14.8.1995, No. 14 of 2001, Nos. 3 of 2006 and 2008. It is, therefore, clear that the intention of the legislature is not to provide deduction under this section to anyone except the person or authority which is directly engaged in developing, maintaining and operating the infrastructure facility. In order to be eligible for the benefit of this deduction it should be a complete development of the infrastructure facility and not a part of it. In the present case the infrastructure facilities in respect of which the assessee is claiming deduction, are being set up by the State Government(s) or local/statutory authorities and the assessee is simply engaged in some construction work, thereby contributing partly in the attainment of the object of developing the infrastructure facility. Under such circumstances it does not qualify for deduction within the frame work of sub-section (4)(i) itself.

51. Now we shall proceed to examine the effect of the insertion of *Explanation* below section 80-IA(13) by the Finance Act, 2007 which was subsequently substituted with a new *Explanation* by the Finance At, 2009 with retrospective effect from 1.4.2000.

52. The Finance Act, 2007 inserted *Explanation* below section 80-IA(13) with retrospective effect from 1.4.2000 which reads as under:-

“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.”

53. Notes on clauses of the Finance Bill, 2007 at (2007) 289 ITR 237 (St.) explain the rationale behind the insertion of this *Explanation*.

‘It is also proposed to insert an *Explanation* to section 80-IA so as to clarify that nothing contained in the said section shall apply to a person who executes a works contract entered into with the undertaking or enterprise, as the case may be.

This amendment will take effect retrospectively from 1st April, 2000 and will, accordingly, apply in relation to the assessment year 2000-2001 and subsequent years.’

54. Memorandum explaining the provisions in the Finance Bill, 2007 at (2007) 289 ITR 312 (St.) explains the need for the insertion of the *Explanation* as under :-

‘Clarification regarding developer with reference to infrastructure facility, industrial park, etc. for the purposes of section 80-IA.

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 massive 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 for 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 the tax benefit under section 80-IA.*

This amendment will take retrospective effect from 1st April, 2000 and will, accordingly, apply in relation to the assessment year 2000-2001 and subsequent years.’

(Emphasis supplied by us)

55. Thereafter the Finance Act, 2009 substituted *Explanation* below section 80-IA(13) with retrospective effect from 1.4.2000 as under:-

‘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).’

56. We have recorded a conclusion in an earlier part of this order that the law applicable as on the date of passing the order by the Bench in the proceedings u/s 255(4) is applicable. In that view of the matter it is obligatory on us to consider the provisions of section 80-IA as they stand as on today which also includes *Explanation* substituted by the Finance Act, 2009 with retrospective effect from 1.4.2000 covering both the years before us. In this regard the learned AR contended that this *Explanation* substituted below section 80-IA(13), on the first look gives impression that that the deduction is not available to the business which is in the nature of a works contract. He continued with his arguments by stating that if it is read in plain terms then no assessee would be entitled to claim the benefit of this deduction. It was, however pleaded that the *Explanation* should be interpreted in such a way that advances the object of the legislature by granting the benefit of deduction. In his opinion this *Explanation* should be construed in such a manner as to press forward the intention of the legislature in providing deduction where the nature of work done by the assessee is even a part of the entire development of the infrastructure facility. Relying on the judgment of the Hon’ble Supreme Court in the case of *P.R.Prabhakar Vs. CIT [(2006) 284 ITR 548*

(SC)] he contended that the exemption provision should be liberally interpreted. Sounding a contra note, the learned Departmental Representative contended that the section should be interpreted as it stands without doing any violence to the express language thereof. He submitted that when the benefit is not available to the assessee, even as per the admission of the learned A.R., in the light of the *Explanation* then there should not be any question of looking into the hardship caused to the assessee. At this stage Shri Vijay Mehta, the learned Counsel for the

intervener relied on the judgment of the Hon'ble Supreme Court in the case of *State of Tamil Nadu Vs. M.K. Kandaswami and Ors.* [36 STC 191] to contend that in interpreting a provision, a construction which would defeat its purpose should be eschewed. He further referred to another judgment of the Hon'ble Supreme Court in the case of *Collector of Central Excise etc. etc. Vs. Dai Ichi Karkaria Ltd. etc. etc.* [(1999) 156 CTR 172 (SC)] to contend that where two interpretations to the subject were possible then the one favourable to the tax payer should be adopted.

57. We have considered the rival submissions and perused the relevant material on record. The Explanation as inserted by the Finance Act 2007 with retrospective effect from 1.4.2000 made it clear that the benefit of section 80-IA shall not be extended to a person who executes a works contract entered into with the eligible enterprise. It has been clarified 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. Though the intention was to clarify that the benefit of deduction is not to be

allowed to a civil contractor, but it was interpreted by some quarters as applying only to the sub-contractor and not to the contractor. With a view to clarify the position beyond any doubt, the said Explanation was substituted by the Finance Act, 2009 with a new Explanation to clarify that the deduction is not available to 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 an enterprise referred to in sub-section (1). Now with this substitution of Explanation below section 80-IA(13), the entire controversy, created for no reason to needlessly distinguish between contractor and developer, has subsided. The position which was earlier apparent on a careful look of the provisions of sub-section (4) has now been made available even at the cursory look through the Explanation by clarifying the hitherto intention of the legislature that no person executing the works contract shall be eligible for deduction u/s 80-IA, even if it is an enterprise as referred to in sub-section (1). The language of this Explanation makes it crystal clear that the benefit under sub-section (4) cannot be provided to a business referred to in sub-section (4) which is in the nature of works contract awarded by any person including the Central or State Government and executed by the undertaking or enterprise referred to in sub-section (1). From the memorandum explaining the rationale behind the substitution of *Explanation* it can be easily seen that the legislature clarified its intention beyond any doubt that the deduction cannot be allowed in relation to an eligible business which is in the nature of works contract. Even if one

presumes, for a moment, that all the conditions set out in sub-section (4) clause (i) are satisfied, which are actually not fulfilled in the instant case, and

the enterprise is covered under sub-section (1), then also deduction cannot be allowed in relation to a business which is in the nature of a works contract.

58. The learned A.R. fairly admitted that the interpretation of *Explanation* below section 80-IA(13) positively takes away the benefit of deduction to an assessee who has been awarded a work contract. His point of view was that the *Explanation* should be interpreted in such a way so that the benefit percolates to the assessee. We are afraid that this contention is incapable of acceptance. It is the primary rule of interpretation that a section should be construed by giving the literal meaning to the words or expressions used in it. The language of a provision is the best vehicle to convey its intention. If the language is unambiguous and admits of no doubt, then it is not open to keep aside the text of section and import some other words into the language of a provision which are not there, in the garb of discovering the intention of the legislature. Employment of such an interpretative process is wholly impermissible. When the words are clear in a provision and convey proper meaning, no liberal interpretation can be allowed to give an unintended benefit as has been laid down by the Hon'ble Supreme Court in the case of *A.M.Moosa Vs. CIT [(2007) 294 ITR 1 (SC)]*. Recently the Hon'ble Supreme court in the case of *Union of India & Ors. Vs. Dharmendra Textile Processors & Ors [(2008) 306 ITR 277 (SC)]* has held that the Court cannot read anything into a statutory provision or a stipulated condition which is plain and ambiguous. The intention of the legislature is primarily to be discovered from the language used which means that attention should be paid to what has been said as also to what has not been said. It was further observed that "the question is not what may be supposed and has been

intended but what has been said". The Hon'ble Summit Court in the case of *Padmasundara Rao (Decd.) And Ors. Vs. State of Tamil Nadu and Ors. [(2002) 255 ITR 147 (SC)]* has held that while interpreting a statute the legislative intention must be found in the words used by the legislature itself. Legislative *casus omissus* cannot be supplied by judicial interpretative process except in case of clear necessity and when reason for it is found in the four-corners of the statute itself. The Hon'ble Supreme Court in the case of *Federation of Andhra Pradesh Chambers of Commerce and Industry & Ors. Vs. State of Andhra Pradesh & Ors. [(2001) 247 ITR 36 (SC)]* has held that it is a trite law that a taxing statute has to be strictly construed and nothing can be

read into it. Similar view has been expressed in several judgments of the Hon'ble Supreme Court including *CIT Vs. Sodra Devi [(1957) 32 ITR 615 (SC)]*, *Smt.Tarulata Shyam & Ors. Vs. CIT [(1977) 108 ITR 345 (SC)]* and *Goodyear India Ltd. and Ors. Vs. State of Haryana & Anr. And State of Maharashtra and Anr. [(1991) 188 ITR 402 (SC)]*. In view of the afore noted pronouncements of law by the highest Court of the land and advertng to the facts of the instant case, we do not find any reason to ignore the clear language of the *Explanation*, which is simple and plain, denying the benefit of deduction to the business which is in the nature of a works contract. There is no need to arbitrarily presume any doubt in the language of section, which does not, in fact, exist, and then proceed to finding out ways and means of granting the benefit to the assessee, which the legislature did not intend. Coming to the judgment of the Hon'ble Supreme Court in the case of *P.R.Prabhakar (supra)*, relied on by the learned A.R., we find that the Hon'ble Court has held that it is now a well settled principle of law that although the exemption provision are to be construed strictly as regards the

applicability thereof to the case of the assessee but once it is found that the same is applicable, the same are required to be interpreted liberally. It is beyond our comprehension as to how this judgment advances the case of the assessee. Even going by the *ratio decidendi* of this judgment it is clear that the provision should be strictly construed as regards the applicability to the case of the assessee. It is only when the applicability is found that the process of liberally interpreting the same commences. Here is a case in which the assessee does not satisfy the applicability condition itself as the profits from works contract awarded to it are excluded from the ambit of the deduction under this provision.

59. Without the aid of *Explanation* to this section we have concluded above that the conditions set out in sub-section (4) clause (i) are not satisfied and hence the assessee cannot claim deduction under this section. The insertion and substitution of the *Explanation* is only to clarify that the deduction cannot be allowed in relation to a business in the nature of works contract under any circumstance. In other words the view emerging from the careful circumspection of sub-section (4) has been endorsed by the *Explanation* and that too with retrospective effect from 1.4.2000 thereby covering both the years under consideration. We, therefore, answer question no.1 in negative by holding that the assessee is not entitled to deduction under the provisions of section 80-IA(4) in respect of the projects undertaken.

60. We want to make it clear that all the cases relied on by both the sides have been duly taken into consideration while deciding the matter. The reference to some of the cases in the order is avoided either due to their irrelevance or to relieve the order from the burden of the repetitive *ratio decidendi* laid down in such decisions. Before parting with these appeals, we place on record our appreciation for the enlightening arguments put forth by both the sides, which have assisted us in the disposal of the issues raised in these appeals.

61. In conclusion we agree with the view expressed by the Id. AM and direct listing of the matter before the Division Bench, for passing an order in accordance with majority view.

Order pronounced on this day of October, 2009

Sd/- (G.C.Gupta) JUDICIAL MEMBER	Sd/- (Pramod Kumar) ACCOUNTANT MEMBER	Sd/- (R.S.Syal) ACCOUNTANT MEMBER
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Mumbai : October, 2009.
Devdas*

Order pronounced on this 26th day of October, 2009.

Sd/- (G.C.Gupta) JUDICIAL MEMBER	Sd/- (S.V.Mehrotra) ACCOUNTANT MEMBER (Nominated)	Sd/- (Pramod Kumar) ACCOUNTANT MEMBER
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Mumbai : 26th October, 2009.

Copy to :

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

TRUE COPY.

By Order

Assistant Registrar, ITAT, Mumbai.