ITA 722(2)-08

IN THE INCOME TAX APPELLATE TRIBUNAL
JAIPUR BENCH 'A' JAIPUR.

(BEFORE SHRI I.C. SUDHIR AND SHRI B.P. JAIN)

ITA NO. 722 & 723/JP/2008.
Assit. Year : 2003-04 & 2004-05.

M/s. Om Metals Infraprojects Ltd., (Formerly M/s. Om Metals Ltd.) Om Power, Church Road, M.I. Road, Jaipur.	vs.	The Commissioner of Income-tax-I, Jaipur.
(Appellant)		(Respondent)

Appellant by : S/Shri Vijay Mehta & Mayur Kishnadwala
Respondent by : Shri Rajesh Kundan

ORDER

PER SHRI I.C. SUDHIR, J.M.

In both the appeals preferred by the assessee, the validity of order of revision under section 263 of the IT Act has been questioned, whereby the ld. CIT has held the assessment order allowing deduction under section 80IA(4) on the Goshi Khurd Project as erroneous and prejudicial to the interest of revenue. It has also been contended that the ld. CIT has failed to appreciate that the assessment order had merged in the appellate order dated 17.12.2007 passed by the ld. CIT(A).

2. We have gone through the orders of the lower authorities, material available on record and the decisions relied upon while considering the arguments advanced by the parties.

3. The relevant facts are that during the assessment year 2003-04 claiming deduction under section 80IA(4) at Rs. 94,39,081/- and in assessment year 2004-05 at Rs.

2,38,27,475/- in respect to the profit earned from the Goshi Khurd Project, the assessee filed its return of income, which was accepted by the AO. The assessee has earned profit from the Goshi Khurd Project wherein dam gates have been constructed and installed by the assessee. The ld. CIT was however, of the different opinion that as per the provisions of section 80IA(4) for the relevant previous year, the enterprises or undertaking carrying on the business of "Developing the Infrastructure facility" was eligible for deduction but only the profit earned from "Operating and maintaining the infrastructure facility" was exempt and not the profit derived from "Developing the infrastructure facility". He was of the view that the assessee company is only a contractor carrying out specific work with respect to the irrigation project and is not the "Developer" of irrigation project. He referred the amendment introduced by Finance Act. 2007 with retrospective effect from 1.4.2000 wherein position has been cleared in the Explanation that nothing contained in this section shall apply to a person who executes works contract entered into with the undertaking or the enterprises, as the case may be. A show cause notice was issued to the assessee for the proposed action under section 263 of the Act and after considering the cause shown by the assessee, the ld. CIT did not agree therewith on the basis that as per the provisions of section 80IA(4) only the profit earned from " operating and maintaining" the infrastructure facility was exempt and not profit derived from "Developing" the infrastructure facility. He remained also of the view that the decision of Patel Engineering Co. vs. ACIT, 84 TTJ 646 (Mum.) relied upon by the assessee is misplaced as it relates to assessment year 2000-01 when provisions of section 80IA(4) were different. He did not accept the contention of the assessee that the amendment by the Finance Act, 2007 does not apply to it as it is not a contractor but is itself an

enterprise and undertaking. The ld. CIT also referred the assessment order for assessment year 2005-06 dated 27.12.2007 wherein the AO has discussed the issue elaborately. He accordingly set aside the assessment order on the issue with direction to the A O to make fresh order in the light of the discussion made by him in his order under section 263 in question after giving opportunity to the assessee in respect of claim of deduction under section 80IA(4).

4. In support of the ground, the ld. A/R submitted that the assessee is manufacturing dam gates/redial gates/stop lock. An agreement was executed between the Vidharbha Irrigation Development Corporation, Nagpur, a Government of Maharashtra Undertaking and the assessee for supply, erection, installation of dam gates in functional condition. The AO at the time of assessment has considered all the issues of infrastructure provided and has accordingly allowed the claimed deduction under section 80IA(4) of the Act. Out of any activity i.e. (i) Developing or (ii) Operating and maintaining or (iii) Developing, operating and maintaining ....." is eligible for deduction under section 80IA(4) of the IT Act, 1961. In relation to the amendment made by Finance Act, 2007 he submitted that it applies to the person who enters in contract with the undertaking or enterprises, whereas assessee company has taken the direct contract from Maharashtra Government as such assessee is itself the enterprise and undertaking, hence the Explanation added will not affect the eligibility of deduction under section 80IA(4) in the case of assessee and based on the law at the time of assessment the claim was allowed and in said legal position there is no change. The ld. CIT has now withdrawn the claimed allowed relief. The ld. A/R submitted that the ld. CIT has referred the assessment order for the assessment year 2006-07 to come to the conclusion that assessee is not a

developer but a contractor in view of the Explanation introduced to section 80IA(4) vide amendment by the Finance Act, 2007 with retrospective effect from 1.4.2000. The ld. A/R referred page 24 of the Paper book Vol. I wherein the position of section 80IA(4)(i) has been narrated during the assessment years 2001-02 to 06-07. The ld. A/R thereafter referred page 277 of the paper book Vol. III wherein comparative statements of deduction under section 80IA(4(a) of the Act has been narrated during the assessment years 1995-96 to 2000-01. He also referred page 276 of the paper book Vol. III wherein comparative statements of deduction under section 80IA(4)(i) during the assessment years 2001-02 to 06-07 has been narrated. As per him, section 80IA(4)(c) of the Act defines the starting period, once assessee is entitled under section 80IA(i). The clause (c) lays there in section 80IA before and after amendments made therein. The ld. A/R thereafter referred pages 278 to 312 of the paper book Vol. III i.e. copy of the decision of Mumbai Bench of the Tribunal in the case of Patel Engineering Co. Ltd. vs. ACIT, 94 ITD 411 (Mum.) following which the AO allowed claimed deduction to the assessee during the years under consideration. He also referred the following decisions :-

DCIT vs. ABG Heavy Industries Ltd.
20 SOT 525 (Mum.)

Ocean Sparkle Ltd. vs. DCIT
99 TTJ 582 (Hyd.)

Gujarat Industrial Development Corpn. & Others vs. CIT
227 ITR 414 (SC)

CIT vs. Max India Ltd.
295 ITR 282 (SC)

ACIT vs. Bharat Udyog Ltd.
24 SOT 412 (Mad.)

DCIT vs. Intercontinental Consultants & Technocrats Pvt. Ltd.
117 TTJ 932 (Del.)

Maj. Gen. (Retd.) Kanwarjit Singh Gill, L/H of Smt. Narinder Kaur Gill (Decd.) vs. ACIT, 101 TTJ 538 (Amritsar)

5. The ld. A/R also referred pages 26 to 29 of the paper book Vol. I wherein write up on the purpose of installation of gates on the reservoir and its function in the Goshi Khurd Project has been narrated by the Vidharbha Irrigation Development Corporation, Nagpur, a Government of Maharashtra Undrtaking, who had invited the tender with general and technical specifications of work. He also referred pages 78 to 270 of the paper book Vol. II wherein tendered documents floated by Vidharbha Irrigation Development Corporation, Nagpur (a Government of Maharashtra Undertaking) narrating the commercial terms and conditions of the contract for spillway crushed gates, designs, manufacture, supply and erection of radial gates with hoist, embedded parts, ancillary equipment and accessories etc. have been detailed. The ld. A/R submitted that clause (c) to section 80IA(4) is not applicable to developer. Proviso after clause (c) to the said section deals with transferee. The ld. A/R while referring pages 25 to 33 of the assessment order for assessment year 2006-07 submitted that if the logic given by the AO in para 2.7.7 is accepted then there was no need to insert " or " between developer and maintenance and operation. The ld. A/R submitted that the term "development" is having higher degree of involvement than maintenance and operation. The word " contractor" is not opposite to " developer". A contractor is a person who accepts the terms and conditions of working and a developer is a person who executes the contract.

6. The ld. A/R also referred page 273 of the Paper Book-III i.e. copy of page 312 (Statute) of ITR Vol. 289 wherein clarification regarding Developer with reference to infrastructure facility, industrial park etc. for the purpose of section 80IA has been made. In this statute it has been proposed to clarify that the provisions of section 80IA 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 case when 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 80IA. In contrast to this, a person who enters into a contract with another person (i.e. undertaking or enterprises referred to in section 80IA) for executing works contract, will not be eligible for the tax benefit under section 80IA. He has also referred Circular No. 717 dated 6.2.1995 published in 212 ITR (St.) 336, placed at page 274 of the Paper Book-III wherein it has been mentioned that industrial modernization requires a massive extension and qualitative improvement in infrastructure. Our country is deficient in infrastructure such as expressway, highway, airport, port and rapid rail transport systems. Additional resources are needed to fulfill the requirement of the country with a reasonable time frame. In many countries the BOT (Build-Operate-Transfer) or the BOOT (Build-Own-operate-Transfer) concepts have been utilized for developing new infrastructure. The ld. A/R thereafter referred page 82 of the Paper Book-II to narrate the meaning of "Contractor" as per section 1 of the detailed tender notice floated by Vidharbha Irrigation Development Corporation, Nagpur (VIDCN) as per which " Contractor" shall mean the person, firm or company who enters into contract, with the Corporation shall include their executors, administrators, successors and submitted assignees. He also referred

pages 97, 100, 101 and narrating the description of the project the scope of the work floated by the VIDCN, page 134 (para 3.2) i.e. about performance, security to special conditions of contract, page 140 (para no. 3.5.1) under contractor's liability and insurance, pages 166, 167, 171, 176, 177 of the tender mentioning scope of work, general description, general conditions, page 208 speaks about contractual obligations, page 223 speaks about the general description of the work, estimated cost, earnest money, security deposit and time allowed for the work, pages 232-233 i.e. clauses (8), (9) and (10) speaks about conditions of payment to the contractor; page 240 clause (17) talks about action and compensation payable in case of bad work ; page 242 clause (20) talks about liability contractor for damage done and for imperfection. The ld. A/R also referred profit & loss account and balance sheet at pages 48 and 49 of the paper book-I reflecting the activities of the assessee involving huge amount in performing the assigned work. The ld. A/R thereafter placed reliance on several decisions cited hereinabove. The ld. A/R submitted that the word "Whole" includes part. Referring assessment order for assessment year 2006-07 the ld. A/R submitted that it is wrong on the part of the AO to hold that the Developer is the person who conceives the project. It is not a case of double deduction by different agencies but to the extent of work performed by each agency. "Dam Gate" shall mean functional requirement of the project, in developing of which the assessee has executed a vital part of the project. The ld. A/R submitted that the ld. CIT has invoked the provisions of section 263 solely on the basis of objections of audit party as evidenced from pages 5 to 23 of the Paper Book-I i.e. copy of audit query from the Office of the Accountant General (Comm.) and receipt audit).Rajasthan, Jaipur dated 19.9.2006, Assessing Officer's reply in response to the said audit query. The ld. A/R while

concluding his arguments again placed heavy reliance on the decision of Mumbai Bench of the Tribunal in the case of Patel Engineering Co. Ltd. vs. ACIT (supra) recently followed by the same bench in the case of ACIT vs. Bharat Udyog Ltd., 24 SOT 412 (Mumbai).

7. The ld. D/R on the other hand tried to justify the order under section 263 of the Act in question.. He submitted that the contentions of the assessee are not sustainable in law and the assessee's appeal deserves to be rejected. There is a prima facie case for invoking the provisions of section 263 of the IT Act, 1961 as the order is prima facie erroneous and prejudicial to the interest of revenue. The ld. CIT in the impugned order has only set aside the matter to the AO for passing fresh order after considering all the facts and provisions of law and, therefore, the grievance of the assessee on the merits of the case is pre-mature. Without prejudice to the above submissions, even on merits of the case the assessee is not eligible for deduction under section 80IA(4) of the Act. The ld. D/R submitted that the revisional power conferred on the Commissioner under section 263 is of wide amplitude. The only limitation on his power is that he must have some material which would enable him to form a prima facie opinion that the order passed by the AO was erroneous in so far as it is prejudicial to the interest of revenue. The only issue therefore remains for consideration is as to whether there is a prima facie case that the order is erroneous. In this case it is pertinent to note that the directions of the ld. CIT in the order dated 28.3.2008 in question are *" the A.O. is directed to make fresh order in the light of the discussions in this order after giving due opportunity to the assessee in respect of claim of deduction under section 80IA(4)"*. Therefore, it is clear that the ld. CIT in the impugned order has not directed the disallowance of the deduction under

section 80IA(4) but has merely directed the AO to make a fresh assessment after considering the various facts of the case and provisions of law particularly the retrospective amendment brought into the said section by the Finance Act, 2007 which was not available to the AO at the time of passing of the assessment order under section 143(3). The most controversial issue in this case has been clarified by Amend brought in by the Finance Act, 2007 with effect from 1.4.2000 and this retrospective amendment was not available at the time of passing of the assessment order under section 143(3). The ld. D/R placed reliance on the following decisions :-

Smt. Renu Gupta vs. CIT
301 ITR 45 (Raj.)

Addl. CIT vs. Mukur Corporation
111 ITR 312 (Guj)

CIT vs. M/s. Milling Trading Co. Pvt. Ltd.
211 ITR 690 (Guj.)

Gandevi Taluka Khedut Sahakari Sangh Ltd. vs. CIT
207 ITR 175 (Guj.)

CIT vs. Mahavar Traders,
220 ITR 167 (M.P)

8. On the merits of the case, the ld. D/R submitted that the issue has been discussed at length in the assessment order of the assessee for assessment year 2005-06 passed on 27.12.2007, which has been mentioned by the ld. CIT in his order under section 263. The assessee is not the developer of the infrastructure project, which has been explained at length by the AO in the assessment order for assessment year 2005-06 placed at page 35 of the Paper Book filed by the department that M/s. Vidharbha Irrigation Development Corporation, Nagpur is the developer of the Project and the assessee is a mere contractor

performing specific work for the Corporation. Without prejudice to the above submissions that the assessee is not the developer of the Irrigation Project, it is further submitted that under section 80IA(4), "developers" who do not "operate and maintain" the infrastructure facilities are not eligible for the deduction. For the relevant previous year the enterprise or undertaking carrying on the business of "developing" the infrastructure facility was eligible for the deduction but only those profits which were derived from "operating and maintaining" the infrastructure facility were exempt and not the profits derived from merely "developing" the infrastructure facility. He submitted that the issue as to whether the contractors associated with the infrastructure project were eligible for the deduction or not had become debatable and in order to put such debates to rest, by the Finance Act, 2007, an Explanation was added with retrospective effect from 1.4.2000 and, therefore, the same has to be read into the above provisions during assessment years 2003-04 and 2004-05. As per this Explanation, nothing contained in section 80IA shall apply to a person who executes a works contract entered into with the undertaking or the enterprises, as the case may be. The assessee is covered by this Explanation as it executes works contracts entered into with the undertaking i.e. Vidharbha Irrigation Development Corporation, Nagpur and hence is not eligible for the deduction under section 80IA(4). This fact has been explained at length by the AO in the assessment order for assessment year 2005-06. The decision of the Mumbai Bench of the Tribunal in the case of Patel Engineering Co. Ltd. vs. DCIT, (supra) heavily relied upon by the ld. A/R is not correct and the reasons for the same have been explained by the AO in the assessment order for A.Y. 2005-06 on page 28 of the Paper Book. Moreover, this decision relates to the assessment year 2000-01 when the word " or " was not there in

clause (4) by the Tribunal has mentioned this point and discussed the provisions of this clause as amended by the Finance Act, 2001 with effect from assessment year 2002-03. This amendment was not retrospective. Therefore, the Tribunal has proceeded on the provisions of law, which were not even in existence for the relevant appeal. The department has not accepted this decision and has preferred appeal before Hon'ble Bombay High Court which is still pending. Further the Explanation to clause (c) of section 80IA(4)(i) defines 'infrastructure facility' to mean, amongst other things, 'a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system'. Simply supply and installation of a dam by the assessee does not constitute 'Irrigation Project' within the meaning of section 80IB(4) nor the scope of work as defined in tender documents, falls within the ambit of infrastructure facility as defined by the Explanation to clause (c) of section 80IB(4)(i). In view of the above submissions, it is clear that assessee is not eligible for the deduction under section 80IA(4) and therefore the assessment order passed by the AO under section 143(3) for assessment year 2003-04 and 2004-05 are erroneous and prejudicial to the interest of revenue and the ld. CIT has correctly exercised the jurisdiction under section 263 in setting aside these orders for fresh consideration on the claim of this deduction by the assessee. The ld. D/R also placed reliance on the decision of Special Bench of the Tribunal stated to be on an identical issue in the case of IVRCL Infrastructure & Projects Ltd. vs. ACIT, Circle 2(1), Hyderabad, ITA No. 1237/Hyd/2004 (assessment year 2001-02) dated 25.4.2008.

9. In rejoinder, the ld. A/R submitted that ld. CIT in the order dated 28.3.2008 under consideration has no where directed the AO to make fresh order in the light of the

discussions in this order after giving due opportunity to the assessee in respect of the claim of deduction under section 80IA(4).

10. After considering the above submissions the issue emerges for our adjudication is as to whether the assessment order was erroneous in so far as it is prejudicial to the interest of the revenue as; held by the ld. CIT. For deciding this issue, we have to examine the eligibility of assessee for claiming deduction under section 80IA during the years under consideration. The assessee has claimed to have developed two projects i.e. Goshi Khurd Project under an agreement with Vidharbha Irrigation Development Corporation (a Government of Maharashtra Undertaking) and the Vijaywada Project under an agreement with the Government of Andhra Pradesh (Irrigation and Command Area Development Department). Regarding the allowability of deduction under section 80IA(4) on the above projects and other deductions, the AO sought directions under section 144A of the Act from ld. Additional CIT, which was responded in details. The AO has reproduced these directions of ld. Additional CIT at page 3 of the assessment order. After discussing the issue at pages 18 & 19 of the assessment order, the AO disallowed the claimed deduction under section 80IA(4) in respect of Vijaywada Project on the basis that no new infrastructure facility had been developed. No grievance has been expressed by the assessee in this regard before the Tribunal. The sole grievance of the assessee before us is setting aside under the revisional order the claim of deduction under section 80IA(4) on Goshi Khurd Project allowed by the AO after discussing the issue in detail at pages 12 to 18 of the assessment order.

10.1. On perusal of revisional order under section 263 in question, we find that reasons for treating the assessment orders for the years under consideration on the issue as

erroneous so far as it is prejudicial to the interest of revenue and setting aside of these orders remained as under :-

(i) As per the provisions of section 80IA(4), for the relevant previous year, the enterprise carrying on business of developing the infrastructure facility was eligible for deduction only on the profit earned from "operating and maintaining" the infrastructure facility ;

(ii) The enterprise was not eligible for deduction on the profit derived from "developing" the infrastructure facility ;

(iii) The company is only a contractor carrying out a specific work with respect to the irrigation project and is not the developer of the irrigation project ; and

(iv) This view has been clarified by the Explanation inserted by the Finance Act, 2007.

11. The ld. CIT also disagreed with the assessee that decision of Mumbai Bench of the Tribunal in the case of Patel Engineering Co. Ltd. vs. ACIT (supra) covers the issue. He observed that the citation is misplaced as this decision relates to assessment year 2000-01, wherein the provisions of section 80IA(4) were different. The ld. CIT noted further that this decision has not been accepted by the department as appeal has been preferred by the department before the Hon'ble Mumbai High Court, which is pending. There is no dispute that under the provisions of section 263 the ld. CIT has been empowered with supervisory jurisdiction and it is not an arbitrary or unchartered power for invoking these provisions under section 263 of the Act. For application of provisions u/s 263, two conditions are required to be fulfilled. Firstly, the order of the AO sought to be revised is erroneous and secondly, such order is prejudicial to the interest of revenue.

"Erroneous assessment" refers to an assessment that deviates from the law, or, one, which has been passed by the AO without making any enquiry, or, in undue haste. An order cannot be termed as "erroneous" unless it is not in accordance with law or it has been passed without making any enquiry. An assessment order cannot be treated as erroneous by the ld. Commissioner simply because he is nurturing different view on the issue than that of the AO. If an order is "erroneous" but not prejudicial to the interest of the revenue, then also, the power of suo muto revision cannot be exercised. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed, or that by the application of relevant statute, on an incorrect or incomplete interpretation, a lesser tax than what was just has been imposed. The Hon'ble Bombay High Court in the case of CIT vs. Gabriel India Ltd., 203 ITR 108 (Bom.) has been pleased to hold that a decision of the AO cannot be held to be erroneous simply because in his order he did not make an elaborate discussion on an issue. Under this background, we have to now examine as to whether the assessment orders were erroneous in so far as it is prejudicial to the interest of the revenue justifying the revisional action under section 263 of the Act in question by the ld. CIT. In this regard we first prefer to examine the eligibility of assessee to claim deduction under section 80IA(4) of the Act. In this regard we have to examine also as to how the provisions of section 80IA(4) in assessment year 2003-04 are different from those in assessment year 2000-01 and how that difference adversely affects the claim of deduction of the assessee as per the comparative chart of the provisions of section 80IA(4), placed at page 24 of the Paper Book-I and page 277 of the Paper Book-III. It emerges that the journey of this provision started from the assessment year 1995-96 onwards. The comparative chart also suggest that the

provisions have been gradually liberalized with every amendment. In the assessment year 2001-02 the deduction under section 80IA(4)(i), subject to fulfillment of prescribed other conditions was available to any enterprise carrying on the business of (i) "developing", (ii) "maintaining and operating" or (iii) "developing, maintaining and operating" any infrastructure facility. As per clause (c) to this section water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system were also included in infrastructure facility. In assessment year 2002-03 the word " or " was introduced in between like (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility. In assessment years 2003-04 to 06-07 there was no change in the said provision. In the assessment year 2006-07 in clause (a) to that section i.e. one of the other conditions required to be fulfilled for claiming the deduction the wordings " it is owned by a company registered in India or by consortium of such companies" were extended by adding wordings " ..... Or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act ". By the Finance Act, 2007, an Explanation was introduced at the bottom of the section 80IA with retrospective effect from 1.4.2000. Vide this Explanation meant for removal of doubt, it has been declared that nothing contained in this section shall apply to a person who, executes a works contract entered into with the undertaking or enterprises, as the case may be. Referring this Explanation, the submission of the ld. D/R remained that assessee is not the developer of infrastructure project and actually M/s. Vidharbha Irrigation Development Corporation, Nagpur is the developer of the project and assessee is a mere contractor perfoming specific work for the Corporation. We do not agree with this plea of the ld

D/R as if the same is accepted, then the very purpose of legislature to extend incentive for development of infrastructure will be frustrated. As per dictionary and judicial meaning of the words " develop", "developer" and "development" as per the material placed on record on behalf of the assessee it comes out that "developer" means a person who makes the things happen. It is the assessee in the present case who mobilizing and synthesizing people, plans, technical expertise, supervision, co-ordination and control etc. develop and create the infrastructure facility and M/s. Vidharbha Irrigation Development Corporation, Nagpur (a Government of Maharashtra Undertaking) as evident from the contents of the tender floated by them placed at pages 58 to 250 of the Paper Book-II, is merely the sponsor of the project. The term "contractor" is not essentially contradictory to the term "developer". On the contrary, the section 80IA(4) itself provides that the assessee should develop the infrastructure facility as per the agreement with the Government. In our view even the insertion of Explanation 2 to section 80IA vide Finance Act, 2007, as discussed above, has not altered this situation. The said amendment does not apply to a works contract entered into by the Government and the enterprise. It only applies to a work contract entered into between the enterprise and other party " the sub-contractor". This amendment merely aims at denying deduction to the sub-contractor who executes a works contract with the enterprise. In fact, the insertion of the Explanation supports the case of the assessee that the enterprise earning profit from the project as a infrastructure developer-contractor. The Mumbai Bench of the Tribunal in the case of Patel Engineering Co. Ltd. vs. ACIT (supra) relied upon by the AO vide para 8 thereof, under almost similar facts and circumstances has held that the assessee therein was the developer or infrastructure project and eligible for deduction under section 80IA. As per

the Law Dictionary, the term "development" is bringing into being, converting natural resources, like land into a specific purpose by building extensively, realizing and making real the potential of natural resources, and bring to a more advanced or effective stage etc. For a ready reference, we are reproducing here under para 47 of the said decision in the case of Patel Engineering Co. Ltd. :-

> " There has also been the contention of the Revenue that the assessee is a contactor, executing civil contract and so it cannot be the developer as such. However, we are unable to agree with this contention of the Revenue. A person, who enters into a contract with another person will be a contractor no doubt; and the assessee having entered into an agreement with the Government of Maharashtra and also with APSEB for development of the infrastructure projects, is obviously a contractor but that does not derogate the assessee from being a developer as well. The term "contractor" is not essentially contradictory to the term "developer". On the other hand, rather section 80IA(4) itself provides that assessee should develop the infrastructure facility as per agreement with the Central Government, State Government or a local authority. So, entering into a lawful agreement and thereby becoming a contractor should, in no way, be a bar to the one being a developer. The assessee, presently under consideration before us, has developed infrastructure facility as per agreement with Maharashtra State Government/APSEB. Therefore, merely because, in the agreement for development of infrastructure facility, assessee is referred to as contractor or because some basic specifications are laid down, it does not detract the assessee from the position of being a developer, nor will it debar the assessee from claiming deduction under section 80IA(4). Discussed/considered as above, we hold that the assessee having carried out the work of constructing the above mentioned two projects, namely Srisailam Project and Koyana Project, as detailed above, is appropriately a developer of the said two infrastructure

facilities, and in turn is entitled, and entitled justifiably, to claim deduction under section 80IA(4)."

This action itself considers development of water supply and irrigation project as infrastructure facility. The work which the assessee has performed, in our view, is undoubtedly specified work for which contract was entered into. In the present case the assessee has manufactured and installed dam gates, radical gates, stop lock as per the specifications agreed upon in the contract involving huge amount. The assessee had established workshop for manufacturing of gate panels, hydraulic girders, checkered plates, drain hoist and embedded parts etc. After manufacturing these items by the assessee these were assembled and installed at dam site. For manufacturing of these articles, there is a requirement of well equipped mechanized work shop and employment of experts. The term " contractor" is not essentially contradictory to the term "developer". On the contrary, the said section itself provides that the assessee should develop the infrastructure facility as per the agreement with the Government. One of the other conditions in the section is that the enterprise should enter into an agreement with the Central Government or State Government or a local authority or any other statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining" a new infrastructure facility. Thus there has to be an agreement between the enterprise developer and the Government. We thus find substance in the contention of the ld. A/R that assessee is a developer and is not a sub-contractor, who as per the Explanation inserted in the section vide Finance Act, 2007 is not eligible to claim deduction.

11.1. So far as the contention of the ld. D/R is concerned regarding that the assessee is not the developer of irrigation project since under section 80IA(4) "developer" who do

not "operate and maintain" the infrastructure facilities are not eligible for the deduction, we do not agree with. Since in our view the word "OR" has been inserted in section 80IA(4)(i) as any enterprise carrying on the business of (i) developing, or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility has been introduced by the legislature from assessment year 2002-03 only to remove the ambiguity. Hence the insertion of word "OR" was clarificatory in nature. This amended provisions of section were very much in operation in the assessment years 2003-04 and 2004-05 under consideration. The plea of the ld. CIT that as per the provisions of section 80IA(4), for the relevant previous year, the enterprise carrying on business of developing the infrastructure facility was eligible for deduction only on the profit earned from "operating and maintaining" the infrastructure facility and that the enterprise was not eligible for deduction on the profit derived from " developing" the infrastructure facility is over lapping is not acceptable. The ld. CIT, in our view, has mis-read the provision by forming a view that a person who earns profit from projects secured under a works contract is not eligible for deduction under section 80IA(4). A perusal of the said section, however, indicates that there is no such mandate in the section. The term "contractor" is not essentially contradictory to the term "developer". On the contrary, the said section itself provides that the assessee should develop the infrastructure facility as per the agreement with the Government. For facility like water supply or irrigation or road project, rail system, the specification can be only through a facility specific tender. The specifications ensure that the development carried out by the assessee fits into the over all requirement floated by the Government for a particular inrastructure. For example, the Government has certain specifications in mind in respect of full length water supply or

irrigation system and these have to be specified to each segment developer. Having gone through the decision cited by the parties, we find that the decision of Mumbai Bench of the Tribunal in the case of Patel Engineering Co. Ltd. (supra) fully covers the issue raised herein, as there is no major change in the provisions of this section. From the assessment year 2000-01 to which that decision belongs to and in the assessment years 2003-04 and 2004-05 under consideration rather insertion of the word "OR" in between "developing", "operating and "maintaining" and "developing, operating and maintaining" any infrastructure facility during the years under consideration in the provisions has brought the assessee in a better position devoid of any ambiguity to claim the deduction. Paras 44, 45 and 46 of the said decision in the case of Patel Engineering Co. Ltd. (supra) supports the case of assessee accepting which, in our view the AO had rightly allowed the claimed deduction to the assessee while placing reliance on the said decision. For a ready reference these paras are being reproduced hereunder :-

> "44. We have considered the rival contentions as also the relevant material on record. From the perusal of record, we find that in the Srisailam Project, the assessee company has constructed an underground tunnel to provide water supply by connecting the river Krishna to the power house. The assessee has also constructed underground specialized structures such as surge chamber, draft tube tunnels, tail race tunnel which takes the water back to the river for use for irrigation, etc. Similarly, for Koyna Project, the assessee constructed inlet tunnel for water supply upto the point of power house. The above construction work would, in our considered opinion, amount to development, as a new facility has been developed. In fact, we may note that the Revenue authorities too have not denied the factum of development having taken place; however, the contention of the Revenue has been that the developer is not the assessee but the Government of Maharashtra in respect of Koyna Project and PSEB in respect of the Srisailam project, because, the investments have been made by them.
>
> 45. In the circumstances, as per the contentions raised before us orally as also in writing by the two rival representatives, the moot question that poses itself for our consideration is as to whether the assessee can be said to be

developer when the amount has been paid to the assessee for the development work carried out by the assessee. In order to properly appreciate this question, it would be relevant, and no less beneficial, to refer to the legislative history of section 80-IA. As we have noted earlier, the amendment in section 80-IA was brought about by Finance Act, 1995 w.e.f. 1st April, 1996. By virtue of this amendment, exemption under section 80-IA was provided to any enterprise carrying on the business of developing, maintaining and operating any infrastructure facility. Thus to be eligible for this deduction, an assessee was required to carry out all the three activities, i.e., (i) to develop, (ii) to maintain, and (iii) to operate. After the modification effected by Finance Act, 1999, w.e.f. 1st April, 2000, deduction under section 80IA(4) has become available to any enterprise carrying on the business of (i) developing, or (ii) maintaining and operating, or (iii) developing, maintaining and operating any infrastructure facility. Therefore, from assessment year 2000-01, deduction is available if the assessee carries on the business of any one of the above mentioned three types of activities, and accordingly also when the assessee is carrying on the activity of only developing. When an assessee is only developing an infrastructure facility/project and is not maintaining nor operating it, obviously such an assessee will be paid for the cost incurred by it; otherwise, how will the person, who develops the infrastructure facility project, realize its cost? If the infrastructure facility is, just after its development, ransferred to the Government, naturally the cost would be paid by the Government. Therefore, merely because the Maharashtra Government or APSEB has paid for the development of infrastructure facility carried out by the assessee, it cannot be said that the assessee did not develop the infrastructure facility. If the interpretation canvassed by the Revenue authorities is accepted, no enterprise, carrying on the business of only developing the infrastructure facility, would be entitled to deduction under section 80IA(4).

46. We have noticed above that the amendment brought in by the Finance Act, 1999 was with the sole intention/purpose of providing deduction under section 80-IA to the person, who only develops or who only maintains and operates an infrastructure facility. If a person who only develops the infrastructure facility is not paid by the Government, the entire cost of development would be a loss in the hands of the developer as he is not operating the infrastructure facility. When the Legislature has provided that the income of the developer of the infrastructure project would be eligible for deduction, it presupposes that there can be income to developer, i.e., to the person who is carrying on the activity of only developing infrastructure facility. Obvious as it is, a developer would have income only if he is paid for development of infrastructure facility, for the simple reason that he is not having the right/authorization to operate the infrastructure facility and to collect toll therefrom, has no other source of recoupment of his cost of development. Considered as such, we

note that the business activity of the nature of "BT" (build and transfer) also falls within eligible construction activity that is activity eligible for deduction under section 80-IA inasmuch as mere "development" as such and unassociated/unaccompanied with 'operate' and 'maintenance' also falls within such business activity as is eligible for deduction under section 80IA. In the case of such a construction activity, which does not involve the 'operate' aspect, the question of an assessee engaged in such activity (of 'BT' carrying on only 'development') to recover his costs of construction of his own from the infrastructure project/facility itself does not arise, and so for the recoupment of the costs, the same have to be paid whether through running bills or otherwise; and considering the largeness/hugeness of the total financial investment involved, some advance if paid at some point of time, will not, in our view, change the basic nature/feature of the assessee's business activity. Therefore, merely because the present assessee was paid by the Government, for development work, it cannot be denied deduction under section 80-IA(4) of the Act. The illustration of the artist, given by the assessee's counsel during the course of his arguments, is aptly illustrative and befitting. If an artist is asked to paint a beautiful picture and for such painting, payment is made by another person, the creator of the painting will be the artist and not the person who paid for it. We have also noted that the national water policy document furnished by the assessee, on p. 225 of its paper book-1, indicates the purpose of private sector participation. It states that private sector participation may help in introducing innovative ideas, generating financial resources and introducing corporate management an d improving service efficiency and accountability to users. It is revealed from record and has also not been disputed by the Revenue that both the projects executed by the assessee were highly technical and specialized, as also extremely tricky and did involve huge risks as well. It is also revealed from record that for executing such projects, the assessee has deployed people, plant and machinery, technical expertise, know-how and the financial resources as has also been the specific contention of the learned Authorized Representative of assessee as noted by us above."

The Tribunal in that decision has specifically rejected the contention of the revenue that the developer is not the assessee but the Government of Maharashtra and APSEB, the fact of that case are similar to the fact of the present case and the only difference is that in the present case the Government authority is Vidharbha Irrigation Development Corporation. On perusal of the assessment orders in question, we find that the AO has given categorical finding on the issue after discussing the same in detail as evident from

contents of pages 12 to 18 of the assessment order. In our view, he has also rightly followed the decision of the Tribunal on an identical issue under the similar facts and circumstances in the case of Patel Engineering Co. Ltd. vs. ACIT (supra) relied upon by the ACIT before him in support of their submissions. The assessment order, therefore, cannot be held as erroneous merely because the ld. CIT nurturing a different view on the issue. Hence the said assessment orders on the issue, which is not erroneous even if it is prejudicial to the interest of revenue cannot be made a subject matter of revision under section 263 of the Act. There is also no substance in the contention of the ld. D/R that the assessment orders on the issue have only been set aside by the ld. CIT vide the impugned order and the assessee will be at liberty to avail the opportunity to present its case on the issue before the AO in a fresh assessment so directed by the ld. CIT, because it cannot be a acceptable reason for justification of invocation of provisions of section 263 of the Act. The requirement, as discussed above, for invocation of the provisions of section 263 of the Act is that the assessment order on the issue must be erroneous in so far as it is prejudicial to the interest of revenue and mere mentioning of the said two ingredients will not extend any jurisdiction to the ld. CIT to invoke the supervisory provisions under section 263 of the Act. The decision of the Special Bench of the Tribunal in the case of IVRCL Infrastructure & Projects Ltd. vs. ACIT (supra) relied upon by the ld. D/R is also not helpful to the revenue because issue has not been decided in that case for want of verification of some additional evidence and thus matter was set aside to the file of the AO to decide the issue afresh in the light of fresh evidence. Under these facts and circumstances, we are of the view that the assessment orders in question on the issue were neither erroneous nor prejudicial to the interest of revenue hence the ld.

CIT was not justified in setting aside the same. The assessment orders on the issue for the assessment years under consideration are restored while setting aside the revisional order under section 263 in question. The issue is decided in favour of the assessee. Grounds raising the issue are accordingly allowed.

12. In the result, appeals are allowed.

13. The order is pronounced in the open court on 31.12.08.

Sd/-
(B.P. JAIN)
ACCOUNTANT MEMBER

Sd/-
(I.C. SUDHIR)
JUDICIAL MEMBER

Jaipur, Dated : 31/12/2008.
D/-

Copy forwarded to :-

M/s. Om Metal Infraprojects Ltd., Jaipur
The Commissioner of Income-tax-1, Jaipur.
The CIT (A)
The CIT
The D/R
Guard file (ITA No. 722(2)/JP/2008).

By Order,
04/02/09
Sr. PS ITAT JAIPUR.