

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE**

**BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER
AND SHRI R.S. PADVEKAR, JUDICIAL MEMBER**

**ITA No.657/PN/2010
(Assessment Year : 2006-07)**

Kirloskar Brothers Limited,
Yamuna, Survey No.98/3 to 7,
Baner, Pune – 411 045.

PAN : AAACK7300E Appellant

Vs.

Dy. Commissioner of Income Tax,
Circle 11(1), Pune. Respondent

**ITA No.671/PN/2010
(Assessment Year : 2006-07)**

Dy. Commissioner of Income Tax,
Circle 11(1), Pune. Appellant

Vs.

Kirloskar Brothers Limited,
Yamuna Building, S.No.98-(3-7),
Baner Road, Opposite Sadanand Resort,
Pune – 411 045.

PAN : AAACK7300E Respondent

Assessee by : Mr. C.H. Naniwadekar
Department by : Mr. A. K. Modi &
Mr. S. K. Singh

ORDER

PER G. S. PANNU, AM

The captioned cross-appeals by assessee and Revenue are directed against the order of the Commissioner of Income Tax (Appeals)-I, Pune dated 26.02.2010 which, in turn, has arisen from an assessment order dated 29.12.2008 passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (in short "the Act"), for the assessment year 2006-07.

2. First, we shall take-up the appeal of the assessee wherein the substantive Ground of Appeal raised relates to denial of assessee's claim for deduction u/s 80IA of the Act amounting to Rs.40,02,10,981/- in respect of infrastructure facility developed for M/s Sardar Sarovar Narmada Nigam Limited (SSNNL).

3. The assessee before us is a company incorporated under the provisions of the Companies Act, 1956, and is inter-alia, engaged in the business of manufacture and sale of power driven pumps, Valves, Hydro Turbines, Machine, tools as well as trading in engineering and electrical products, project execution and services. For the assessment year under consideration, it filed a return of income on 29.11.2006 declaring total income of Rs.1,03,47,89,228/- which was subject to scrutiny assessment. In the ensuing assessment various additions/disallowances were made which was the subject-matter of appeal before the CIT(A) who has allowed partial relief and accordingly assessee as well as Revenue are in appeal before us by way of the captioned cross-appeals.

4. The first major dispute between the assessee and the Revenue, as manifested by Ground of Appeal No.1 in assessee's appeal relates to assessee's claim for deduction u/s 80IA of the Act amounting to Rs.40,02,10,981/- in relation to profits of an infrastructure project- 'Saurashtra Branch Canal Pumping Scheme' executed for M/s Sardar Sarovar Narmada Nigam Ltd. (hereinafter referred to as 'SSNNL'). The said claim of the assessee has been denied by the Assessing Officer as well as the CIT(A) on the ground that the conditions prescribed in section 80IA(4)(i) of the Act are not fulfilled by the assessee.

5. Before we proceed to enumerate the objections of the Revenue and the contra stand of the assessee on such objections, it would be appropriate to

note the background of the claim made in the return of income. The assessee company is engaged in the core business of undertaking large infrastructure projects in Water Supply, Power Plants and Irrigation, as well as supply of Industrial Pumps, Agricultural Pumps and Domestic Pumps, Valves, Motors and Hydro Turbines, etc.. During the financial year 2002-03, assessee was awarded the work of 'Saurashtra Branch Canal Pumping Scheme' to be executed on Turnkey Contract basis by SSNNL, a fully Government of Gujarat owned entity. Sardar Sarovar dam is constructed at Nagagam, Dist. Bharuch (Gujarat). One canal from the dam goes to the State of Rajasthan for irrigation and water supply purposes. A branch of this main canal has been carried out in the westerly direction towards the area of Saurashtra & Kutch, which are perennially drought affected areas of Gujarat State. While taking water through this branch canal to Saurashtra area, having regard to topography of the area the water had to be lifted to a height of about 200 feet in a stretch of 44 KMs. Since SSNNL did not have the necessary solution, assessee company was appointed to execute the said pumping scheme. Accordingly, assessee executed the pumping scheme by conceptualizing, designing, engineering, manufacturing, erecting, testing and commissioning and operating five pumping stations in this stretch of 44 KMs. The scope of the work awarded to assessee is contained in letter of Award issued by SSNNL, a copy of which is placed in the Paper Book at pages 66 to 69, and the work is titled as 'SBC Pumping Scheme' to be executed on a turnkey basis. The assessee company claimed deduction u/s 80IA of the Act with respect to the profits and gains from the said project. The initial assessment year was 2003-04 wherein the said claim was allowed in an assessment made u/s 143(3) of the Act. Similarly, in assessment year 2004-05 also assessee was allowed the deduction in an assessment made u/s 143(3) of the Act. However, the aforesaid two assessments were a subject-matter of revision by the Commissioner u/s 263 of the Act whereby it was held that the assessee was not entitled to deduction u/s 80IA of the Act. However, the said order of the

Commissioner has since been set-aside by the Tribunal on the limited aspect of the validity of invoking section 263 of the Act by the Commissioner and not on the merits of the admissibility or otherwise of assessee's claim of deduction u/s 80IA of the Act. However, in the captioned proceedings for assessment year 2006-07, the dispute relates to the merits of the claim. During the assessment proceedings, the Assessing Officer observed that the contract awarded to the assessee by SSNNL was in two parts, the first part for design, manufacture and supply of equipments and second part for execution and commissioning of the equipment supplied, operating and maintaining the equipment for a limited period to ensure satisfactory performance. As per the Assessing Officer, assessee was not a developer as envisaged in section 80IA(4) of the Act inasmuch as assessee merely carried out a job on works-contract basis for SSNNL and no infrastructure facility was created or developed by the assessee. It is also stated that project was neither financed by the assessee through its own investment and nor constructed under BOT, BOLT or BOOT basis and thus assessee was not eligible to the claim deduction u/s 80IA of the Act. As per the Assessing Officer, assessee had entered into an agreement with SSNNL, which was not a Central or State Government or a local authority or any other statutory body; and, thus the condition prescribed in sub-clause (b) of clause (i) of sub-section (4) of section 80IA of the Act was not fulfilled. As per the Assessing Officer, assessee was merely engaged in the activity of manufacture and supply of pumps and related equipments; and, the consideration was received for supply of pumps and equipments to SSNNL. Further, the Assessing Officer held that assessee executed a works contract and acted as a contractor, and he also referred to the Explanation inserted below section 80IA of the Act by Finance (No.2) Act, 2009 w.r.e.f. 01.04.2000 whereby it is clarified that such deduction would not be available in relation to a business which involves execution of a works contract. As per the Assessing Officer, entire investment in the project has not been made by the assessee company and 80% of the project cost has been

received from SSNNL, hence it could not be said that assessee funded the project without assistance from SSNNL. For all the above reasons, the claim of deduction u/s 80IA(4) of the Act was denied by the Assessing Officer. The CIT(A) has also upheld the stand of the Assessing Officer and accordingly, assessee is in appeal before us.

6. Before us, the learned counsel for the assessee has furnished a detailed Paper Book which inter-alia, contains a copy of the contract with SSNNL and other material which we shall refer to subsequently in the order. The learned Departmental Representative has also referred to the orders of the authorities below in the course of the hearing. Rival submissions have been heard and the relevant material perused on record.

7. At the outset, we may refer to the relevant provisions of section 80IA of the Act, which have a bearing on the issue. Pertinently, the claim of the assessee has to be examined with reference to the provisions of section 80IA(4) of the Act as are applicable for the year under consideration. The relevant portion of section 80IA is reproduced hereinafter:-

“80-IA. [(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), 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 of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.]

.....
(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 develops] a special economic zone referred to in clause (iii) of sub-section (4)] or generates power or commences transmission or distribution of power [or undertakes substantial renovation and modernisation of the existing transmission or distribution lines] :

[**Provided** that where the assessee develops or operates and maintains or develops, operates and maintains any infrastructure facility referred to in clause (a) or clause (b) or clause (c) of the 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.]

.....

- (4) *This section applies to—*
- (i) *any enterprise carrying on the business [of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining] any infrastructure facility which fulfils all the following conditions, namely :—*
- (a) *it is owned by a company registered in India or by a consortium of such companies [or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;]*
- [(b) *it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility;]*
- (c) *it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995:*

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

[Explanation.—For the purposes of this clause, “infrastructure facility” means—

- (a) *a road including toll road, a bridge or a rail system;*
- (b) *a highway project including housing or other activities being an integral part of the highway project;*
- (c) *a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;*
- (d) *a port, airport, inland waterway or inland port;]*

8. Pertinently, section 80IA(1) of the Act prescribes for a deduction with respect to the profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) of section 80IA of the Act. The claim of the assessee before us is that it has undertaken a business referred to in sub-section (4) of section 80IA of the Act while undertaking and executing the contract with SSNNL pertaining to the ‘Saurashtra Branch Canal Pumping Scheme’. The eligible business for the present purpose is referred in clause (i) of sub-section (4) of section 80IA of the Act. The claim of the assessee is that it is carrying on the business of (i) developing or (ii) operating

and maintaining or (iii) developing, operating and maintaining the infrastructure facility referred to as 'Saurashtra Branch Canal Pumping Scheme', and therefore such business qualifies to be an eligible business for the purposes of section 80IA(4) benefits. As per the assessee, the expression "infrastructure facility" has been defined in the Explanation below clause (i) of section 80IA(4) of the Act which, inter-alia, includes a water supply project, irrigation project, etc.. In this manner, assessee has sought to justify that the execution of the project pertaining to 'Saurashtra Branch Canal Pumping Scheme' is a project which is within the domain of the expression "infrastructure facility" for the purposes of section 80IA(4) of the Act.

9. Further, clause (i) of sub-section (4) of section 80IA of the Act prescribes that the enterprise referred therein shall fulfill the conditions prescribed by way of sub-clauses (a), (b) and (c). In terms of sub-clause (a), it is provided that enterprise carrying on the eligible business should be owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act. Sub-clause (b) provides that the enterprise carrying on the eligible business should have entered 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. Sub-clause (c) prescribes that the enterprise should start operating and maintaining the infrastructure facility on or after the 1st day of April, 1995. Ostensibly, the aforesaid three conditions are required to be fulfilled before an enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility is eligible for deduction u/s 80IA(1) of the Act.

10. Now, the first and the foremost objection taken by the Revenue is that the assessee does not fulfill the condition prescribed in sub-clause (b) of clause (i) to sub-section (4) of section 80IA of the Act. In terms of the said objection, the Revenue contends that assessee has entered into a works contract agreement with SSNNL which is not an entity specified in sub-clause (b) of section 80IA(4)(i) of the Act. According to the Revenue, SSNNL is not a Central Government or State Government or a local authority or any other statutory body, so as to be considered as an entity specified in sub-clause(b) of section 80IA(4)(i) of the Act. As per the Revenue, SSNNL is a company registered under the Companies Act, 1956 and does not fall within the prescription of sub-clause (b) of section 80IA(4)(i) of the Act. As per the Revenue, though the entire share capital in the said company is owned either by the Central or the State Government, yet it can only be called a 'Government company' but it does not come within the purview of the entities specified in sub-clause (b) of clause (i) of section 80IA(4) of the Act. The Revenue has supported its plea by referring to the judgement of the Hon'ble Supreme Court in the case of Steel Authority of India Ltd. vs. Shri Ambica Mills Ltd. & Ors., AIR 1998 SC 418. In terms of the said judgement, it is sought to be canvassed that although capital of SAIL was entirely owned by Government of India, but by virtue of its incorporation under the Companies Act, 1956 its personality was held to be distinct than that of the Government of India. Similarly, reliance has been placed on the judgement of the Hon'ble Supreme Court in the case of Heavy Engineering Mazdoor Union vs. State of Bihar, AIR 1970 SC 82 for the proposition that in the absence of statutory provisions, a commercial corporation acting on its own behalf, though controlled wholly or partially by a Government department, will be ordinarily presumed not to be a servant or agent of the State. On the aforesaid basis, it is sought to be made out that assessee has not entered into an agreement with any statutory body or any other entity specified in sub-clause (b) of section 80IA(4)(i) of the Act for the purpose of executing the work relating to

'Saurashtra Branch Canal Pumping Scheme'; and, thus the mandatory condition prescribed in section 80IA (4)(i)(b) of the Act has not been complied with.

11. Per contra, the learned counsel for the assessee has vehemently reiterated the position of the assessee taken before the lower authorities to the effect that the contract with SSNNL fulfills the condition prescribed in section 80IA(4)(i)(b) of the Act. The arguments of the assessee are two-fold. Firstly, it has referred to the judgements of the Hon'ble Supreme Court in the case of (i) Som Prakash Rekhi vs. Union of India & Anr., 1981 AIR 212; and, (ii) Pradeep Kumar Biswas & Ors. vs. Indian Institute of Chemical dated 06.04.2002, copies of which have been placed on record. On the basis of the aforesaid judgements, it is canvassed that an entity, like SSNNL, is liable to be considered as an instrumentality or an agency of the Government, and thus, it qualifies to an entity specified in section 80IA(4)(i) of the Act. Secondly, it is sought to be made out that having regard to the background and peculiar features of SSNNL, the said concern is executing Governmental functions and is not engaged in any commercial activities. A reference has also been made to the Memorandum and Articles of Association of SSNNL, placed in the Paper Book at pages 26-27 to say that SSNNL functions under the direction and control of Government of Gujarat and further that it was essentially carrying out functions, which are otherwise carried out by the Government, for example, rehabilitation and resettlement of population affected by acquisition of land for Sardar Sarovar project, constructing hydro power generating stations, flood control, irrigation and water supply, etc.. The learned counsel pointed out that all kinds of infrastructure facilities referred in section 80IA(4)(i) of the Act, like Railways, ports, dams, bridges, roads, etc. are always owned by the Government and cannot be owned by private owners. So however, for an efficient execution and handling of such infrastructure facilities, the governments form a Special Purpose Vehicle (SPV) in the form of separate

entity registered under the Companies Act, 1956. It was, therefore, contended that even if such like entities are incorporated under the provisions of the Companies Act, 1956 still having regard to the functions performed, they have to be considered as mere extensions of the Government. By referring to the features of SSNNL, the learned counsel has sought to demonstrate that the tests laid down by the Hon'ble Supreme Court in the case of Som Prakash Rekhi (supra) and Pradeep Kumar Biswas & Ors. (supra) are fulfilled and SSNNL is liable to be considered as a 'statutory body' falling within the meaning of section 80IA(4)(i)(b) of the Act.

12. Before we proceed further, it would be appropriate to briefly refer to the salient features and objects of SSNNL. In this regard, we have perused the Memorandum and Articles of Association of SSNNL, a company incorporated under the provisions of the Companies Act, 1956. The main object of the said company is to execute, operate and maintain the Sardar Sarovar project comprising of a dam across river Narmada in the Nandod Taluka of Bharuch district in the State of Gujarat; a canal system emanating from the reservoir called the Sardar Sarovar impounded by the construction of the said dam; power houses at the foot of the said dam and at the canal head and all other works incidental or ancillary to the said project, in accordance with the directions of the Government of Gujarat. The works relating to dam and power houses are to be carried out under supervision of the Sardar Sarovar Construction Advisory Committee set up by the Central Government pursuant to the decision of the Narmada Water Disputes Tribunal. The directions that may be issued by the Narmada Control Authority and the Review Committee appointed by the Central Government pursuant to the decision of the Narmada Water Disputes Tribunal are also required to be complied by SSNNL.

13. The other objects, inter-alia, include undertaking resettlement and rehabilitation of the population affected by the Sardar Sarovar project; to

construct, operate and maintain hydro power generation stations along with canal system, transmission lines, etc.. The objects also include promoting schemes in the State of Gujarat for flood control in the Narmada river basin and schemes for irrigation and water supply in the State for utilization of water from Sardar Sarovar. In sum and substance, the objects to be pursued by SSNNL are pre-dominantly functions which are ordinarily performed by Government.

14. On this point, we may refer to the decision of the Ahmedabad Bench of the Tribunal in the case of JCIT vs. Sardar Sarovar Narmada Nigam Ltd., (2005) 93 ITD 321 (Ahd). Though the said decision has been rendered in a different context, but what is of relevance for us is the discussion made by the Bench which brings out the background and the manner in which SSNNL came to be incorporated by the Government of Gujarat. As per the discussion in the case of Sardar Sarovar Narmada Nigam Ltd. (supra) and the other material placed in the Paper Book, the following fact position emerges.

15. That in order to settle the dispute on distribution of the water of Narmada River, the Central Government had formed a Narmada Water Dispute Tribunal in 1969. In terms of the settlement arrived at by the Tribunal in 1979, the dam (i.e. Sardar Sarovar Dam) was to be constructed by the Government of Gujarat and the water was to be shared amongst the three States of Gujarat, Madhya Pradesh and Rajasthan. For erection of the dam, the Government of Gujarat set up a department called Narmada Development Department (NDD). NDD functioned as a Government Department and started erection work of the dam. In around 1988, the Government of Gujarat was advised that for efficient administration, execution and accountability the work may be carried out by a Nigam (i.e. a corporate body). Accordingly, the Government of Gujarat passed a resolution No. NMD/1073(86)33/(2)H dated 21.03.1988 which converted NDD into a fully owned Government company,

namely, SSNNL. Accordingly, a corporate entity was incorporated by the Government of Gujarat under the provisions of the Companies Act, 1956 for execution of Sardar Sarovar project. Subsequently, the Government of Gujarat vide a resolution dated 31.08.1988 transferred the entire staff and officers working under the control of the Narmada Development Department to SSNNL. The Gujarat Government also transferred the assets of the Sardar Sarovar project to SSNNL vide a G.R. No. COR-1488-H dated 27th October, 1988.

16. The aforesaid background of the manner in which SSNNL came to be incorporated and read with the main objects contained in the Memorandum and Articles of Association of SSNNL, show that it was to work under the direct supervision and control of the Government of Gujarat. The other objects which we have enumerated above also show that SSNNL is to be understood as a Special Purpose Vehicle (i.e. SPV) through which the Government of Gujarat is carrying out functions of a State.

17. At this point, we may refer to the judgement of the Hon'ble Supreme Court in the case of Som Prakash Rekhi (supra). In the said case, dispute was between Burmah Shell, a company under the Companies Act, 1956, and one of its former employees. The company M/s Burmah Shell was acquired by Government of India and later it was known as Bharat Petroleum. A Writ Petition was filed by the employee against Bharat Petroleum. A preliminary objection arose as to whether the Writ Petition was maintainable against M/s Bharat Petroleum as it was neither a statutory corporation and nor a Government department. The Court examined whether it was a State within the meaning of Article 12 of the Constitution of India. The Hon'ble Supreme Court laid down certain tests in this context and the relevant portion of the Head notes of judgement is as under :-

“2. Some of the tests laid down by this Court for deciding whether a body is State within the meaning of Article 12 are :

- (i) *If the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.*
- (ii) *A finding of State financial supports plus an unusual degree of control over the management and policies might lead, one to characterize an operation as State action.*
- (iii) *The existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.*
- (iv) *Whether the corporation enjoys monopoly status which is State conferred or State protected is a relevant factor.*
- (v) *If the functions of the corporation are important public functions and related to governmental functions it would be a relevant factor in classifying the corporation as instrumentality or agency of the Government*
- (vi) *If a department of Government is transferred to a corporation, it would be a strong factor supportive of the inference that it is an instrumentality of the State*
- (vii) *Where the chemistry of the corporate body answers the test of State if comes within the definition of Article*
- (viii) *Whether the legal person is a corporation created by a statute, as distinguished from under a statute is not an important criterion although it may be an indicium.”*

18. As per the Hon'ble Supreme Court, if the aforesaid tests are fulfilled by an entity, it would qualify to be understood as an instrumentality of State. As per the Hon'ble Supreme Court, the aforesaid tests provide an aid to determine whether a particular body is a State within meaning of Article 12 of the Constitution of India. Emphasizing the import of the aforesaid tests, the Hon'ble Supreme Court noted that true test is not how the legal entity in question was created but why it was created. The Hon'ble Supreme Court also observed that all the tests may not be applicable or satisfied in a given case, but one will have to arrive at a conclusion based on the cumulative effect of the said tests.

19. The claim of the assessee before us is that SSNNL complies with all the tests laid down by the Hon'ble Supreme Court in the case of Som Prakash Rekhi (supra). First test is whether the share capital of the corporation is held

by the Government. In the present case, the entire share capital of SSNNL is admittedly owned and held by the Government of Gujarat. The second test is as to whether the State exercises unusual degree of control over the management and policies and financial support is received from the State. In our considered opinion, the said test is fulfilled in the case of SSNNL as per the detailed discussion made by the Ahmedabad Bench of the Tribunal in the case of Sardar Sarovar Narmada Nigam Ltd.. Moreover, the Memorandum of Association and Articles of Association of SSNNL clearly establish that the said concern is operating under superintendence and direction of the Government of Gujarat. It has also been pointed out before us that the Directors of the SSNNL are drawn from the officials of the Government of Gujarat. The next test is the existence of deep and pervasive State control. In this context, it emerges that the Board of Directors of SSNNL are appointed by the Gujarat Government and it consists of the Government employees of the rank of Secretary/Additional Secretaries. The next test is whether the corporation enjoys monopoly status which is otherwise conferred on a State. The objects to be pursued by the SSNNL, the powers conferred on it, as revealed by the Memorandum of Association clearly suggest that SSNNL is in the activity of executing, operating and maintaining the Sardar Sarovar project comprising of a dam across river Narmada, a canal system, the Sardar Sarovar power houses at the foot of the said dam, etc.. All these aspects clearly show that SSNNL is involved in carrying out State monopoly functions, like operation of Airports, Ports, Railways, etc.. The next test is whether the functions performed are important public functions related to governmental functions. In the case of SSNNL, it is quite obvious that apart from executing, operating and maintaining the Sardar Sarovar project it is also involved in promoting schemes in the State of Gujarat for flood control in the Narmada river, irrigation and water supply schemes for utilization of water from Sardar Sarovar. All these are essentially government functions and obligations, which are being performed by SSNNL. The next test is if a Department of a

Government is transferred to a corporation. In this context, it is quite clear that the erstwhile Narmada Development Department consisting of its employees as well as the assets of Sardar Sarovar project were transferred enbloc by the Government of Gujarat to SSNNL. The next test is as to whether the chemistry of the concerned body answers the test of a State. In our view, the said test is also fulfilled in the face of the fact that the incorporation of SSNNL, its ownership, management, control as well as the powers have a unmistakable stamp of a Government.

20. In view of the aforesaid discussion, in our view, the tests laid down by the Hon'ble Supreme Court in the case of Som Prakash Rekhi (supra) are fulfilled in the present case and it would be appropriate to deduce that SSNNL is an instrumentality or an agency of the State. Therefore, SSNNL is to be understood as an entity akin to those specified in sub-clause (b) of clause (i) to sub-section (4) of section 80IA of the Act. Therefore, the objection of the Revenue that SSNNL was a company incorporated under the provisions of the Companies Act, 1956 and is therefore outside the purview of section 80IA(4)(i) of the Act is unfounded. In-fact, the Hon'ble Supreme Court in the case of Som Prakash Rekhi (supra) specifically observed that merely because an entity is created under a statute and not created by a statute is not an important criteria. The test relating to the purpose, State control and functions performed are more important and determinative of the issue. Such tests, in our view, are clearly applicable in the case of SSNNL, and it is to be understood as an entity specified in section 80IA(4)(i)(b) of the Act.

21. The CIT(A) and the learned Departmental Representative appearing for the Revenue has relied on the judgement of the Hon'ble Supreme Court in the case of Steel Authority of India Ltd. (supra) and that of Heavy Engineering Mazdoor Union (supra) to say that entities such like SSNNL cannot be considered as statutory bodies even though the entire share capital is owned

by the Government of India. We have considered the said judgements and find that the ratio decided therein has no relevance to the issue in dispute before us. In the case of Steel Authority of India Ltd. (supra), dispute related to certain commercial transactions between a private company and SAIL and no issue arose as to whether Steel Authority of India Ltd. was special purpose vehicle carrying out State functions or not. It may also be important to note that Steel Authority of India Ltd. is in the business of sale and manufacturing of steel which perhaps cannot be looked upon as a State monopoly function as distinct from the activities of SSNNL, which is the subject-matter for consideration before us.

22. In the case of Heavy Engineering Mazdoor Union (supra) also the emphasis was again with respect to the functions of commercial corporation, though wholly owned by the Government. In the case before us, i.e. SSNNL, it is clear that SSNNL is not a commercial corporation, but it has been formed with the intent and purpose for carrying out essentially governmental functions which are otherwise a monopoly or an obligation of the Government. For all these reasons, the facts in the case before us are quite distinct from those in the cases of Steel Authority of India Ltd. (supra) and Heavy Engineering Mazdoor Union (supra).

23. In the light of the aforesaid discussion, in our view, SSNNL being a mere extended arm of the Government of Gujarat carrying out governmental functions can be understood as an entity qualifying for consideration u/s 80IA(4)(i)(b) of the Act. The objection of the Revenue in this context is thus rejected.

24. The second objection taken-up by the Revenue is that assessee was not a 'developer' so as to be eligible for deduction u/s 80IA(4) of the Act. As per the Revenue, assessee was merely awarded a contract for execution of

work by SSNNL. As per the Assessing Officer, assessee has executed a works contract and therefore, it was merely a 'contractor'.

25. On this aspect, it would be appropriate to refer to the scope of work carried out by the assessee. Notably, assessee was awarded the work of 'Saurashtra Branch Canal Pumping Scheme' to be executed on turnkey basis. In the course of execution of the project, assessee was required to conceptualize, design, engineering, manufacture, erect, test and commission and also operate five pumping stations. It has also been pointed out by the assessee that the pumping scheme carried out one of the largest irrigation scheme, which irrigated about 5.4 lakh hectares of land and provided drinking water to 4620 towns and villages. It has also been pointed out by the assessee that it developed certain new technologies in the course of executing the project, namely, Siphon Technology, and the same was got patented also. The assessee also imported Concrete Volute Pump Technology for the project. The use of such technology ensured saving in energy bills. The assessee has also pointed out before the lower authorities that the import of technology and development of new technology done by assessee was without any mandate or requirements from SSNNL, but it was done by the assessee while executing its scope of work awarded by SSNNL. Detailed submissions have been made by the assessee before the lower authorities and the same is also placed in the Paper Book filed before us, including other material in the form of contract with SSNNL, communications with Government of Gujarat and SSNNL, etc. to justify that assessee was not merely acting as a contractor.

26. Having regard to the scope of work executed by the assessee, it is difficult to comprehend that assessee was merely acting as a contractor. In common parlance, a contractor is understood as a person who carries out the assigned work as per the directions given by the contractee. In the present

case, the assessee has used own-developed technology and its own resources to conceptualize, design, erect, commission, test and operate the 'Saurashtra Branch Canal Pumping Scheme'. Therefore, in our view, assessee is to be understood as a 'developer', and distinct from a 'contractor' qua the impugned contract awarded by SSNNL. The Chennai Bench of the Tribunal in the case of ACIT vs. Indwel Lingins (P) Ltd., 122 TTJ 137 (Chennai) has noted that a developer is a person who designs and creates new projects whereas a contractor is a person who has a contract to do work. In the present case, as the scope of work shows, assessee did not merely carry out a contract to do work but was responsible for conceptualizing, designing, erecting, commissioning and operating the water pumping scheme. On the above aspect, the judgement of the Hon'ble Bombay High Court in the case of CIT vs. ABG Heavy Industries Ltd., 322 ITR 323 (Bom), clearly supports the plea of the assessee of being a developer. In the case before the Hon'ble High Court, assessee was awarded a contract by Jawaharlal Nehru Port Trust (JNPT) to supply, install, test, commission and maintain the container handling equipment, namely, the cranes. JNPT was owing the dedicated container handling terminal. The stand of the Revenue was that assessee was not a developer of the infrastructure facility but had only supplied and installed the container handling cranes at the JNPT port. Therefore, it was contended by the Revenue that assessee was not eligible for the benefits of section 80IA of the Act. The Hon'ble High Court has negated the stand of the Revenue and held that the contract executed by the assessee for supply, installation, testing, commissioning and maintenance of container handling cranes at the JNPT terminal tantamounted to development of an infrastructure facility within the meaning of section 80IA of the Act. In our considered opinion, the said judgement of the Hon'ble High Court clearly covers the case of the assessee of being a 'developer' and not merely a 'contractor' for the purposes of section 80IA(4) of the Act.

27. Remaining on this objection, it has also been asserted by the assessee before us that the scope of work assigned by the SSNNL was identical to the scope of work assigned by the Government of Andhra Pradesh to the assessee for its Godavari Lift Irrigation scheme. In so far as the profits relating to the project of Godavari Lift Irrigation scheme is concerned, the benefits of section 80IA has been allowed to the assessee and the assessee has not been treated as a 'contractor'. It has been pointed out that on account of the aforesaid, the stand of the Revenue in relation to the project executed for SSNNL is self-contradictory.

28. Before us, the aforesaid assertions of the assessee have not been assailed by the learned Departmental Representative. Be that as it may, in our view, having regard to the aforesaid discussion, assessee cannot be treated as a contractor for the work assigned by SSNNL and it is to be understood as a 'developer' within the meaning of section 80IA(4) of the Act.

29. Another objection taken by the Revenue is that assessee only constructed/developed the infrastructure facility but did not operate the same. This aspect of the controversy has been clearly answered by the Hon'ble Bombay High Court in the case of ABG Heavy Industries Ltd. (supra). Even an enterprise which is engaged only in development of an infrastructure facility has also been held to be eligible for section 80IA benefits. Therefore, the said objection of the Revenue is not justified. In any case, it has also been pointed out before us that assessee has operated the infrastructure facility for a period of two years. Be that as it may, we find no justification in the aforesaid objection, which is dismissed.

30. It is also a plea of the Revenue that the infrastructure facility is to be owned by the assessee for the purposes of claiming benefit u/s 80IA of the Act. In our view, the aforesaid objection of the Revenue is devoid of any

statutory support from the provisions of section 80IA(4)(i) of the Act. The same is therefore rejected.

31. One of the objections of the Assessing Officer was that the entire investment in the infrastructure project has not been made by the assessee and that 80% of the project cost has been received from SSNNL. Therefore, according to the Revenue, assessee-company has not funded the project without any assistance from SSNNL. This objection of the Revenue, in our view, is quite misconceived because a developer would have income only if he is paid for development of the infrastructure facility. The Mumbai Bench of the Tribunal in the case of ACIT vs. Bharat Udyog Ltd., 118 ITD 336 (Mum) noted that the business activity of the nature 'build and transfer' also falls within the eligible activities for deduction u/s 80IA of the Act. The Mumbai Bench of the Tribunal has made the aforesaid observations in the context of objection raised before it regarding the claim u/s 80IA of the Act on the ground that assessee was paid by the Government for the development work. The aforesaid objection was negated by the Tribunal and the claim of deduction was allowed u/s 80IA of the Act. Thus, we do not find any justification to deny the claim of deduction u/s 80IA(4) of the Act merely because the cost of the project executed by the assessee was not fully funded by the assessee itself.

32. In view of the aforesaid discussion, we therefore hold that assessee is eligible for the claim of deduction u/s 80IA of the Act amounting to Rs.40,02,10,981/- in respect of the profits derived from development of infrastructure facility for SSNNL. The order of the CIT(A) is set-aside and the Assessing Officer is directed to allow the deduction.

33. The next Ground of Appeal is with regard to a disallowance of Rs.2,49,66,190/- representing Provision for Pension scheme for employees.

The claim has been denied on the ground that it was a contingent liability and not an ascertained liability.

34. The claim of the assessee was based on the decision of the Hon'ble Calcutta High Court in the case of CIT vs. National Insurance Company of India, 127 ITR 54 (Cal). At the time of hearing, learned counsel for the assessee submitted that a similar issue has been considered by the Tribunal in the case of Kirloskar Pneumatic Co. Ltd. vs. JCIT vide ITA No.485/PN/2001 dated 28.11.2008 for assessment year 1997-98. It has been submitted that the Provision was created based on the actuarial valuation obtained from LIC for the pension benefits of its employees. The learned Departmental Representative appearing for the Revenue has supported the orders of the authorities below by placing reliance on the same.

35. After hearing both the parties and perusing the material available on record, we find that this issue is covered by the decision of the Hon'ble Calcutta High Court in the case of CIT vs. National Insurance Co. India (supra) and the decision of the Hon'ble Bombay High Court in the case of CIT vs. Mahindra and Mahindra Ltd. (2006) 284 ITR 679 (Bom). Further the Hon'ble Supreme Court in the case of Bharat Earth Movers vs. CIT, (2000) 245 ITR 428 has held that the liability was not a contingent liability. In this view of the matter, we are of the opinion that this issue is required to be remitted back to the file of the Assessing Officer for ascertaining the reasonableness of the provision made by the company for meeting the incremental liability of this year incurred by it under pension scheme; proportionate with the entitlement earned by the employees in question, subject to any ceiling if any prescribed in the said scheme as applicable on the relevant period. The Assessing Officer is directed to decide the issue afresh after providing adequate opportunity of being heard to the assessee. Thus, the said Ground of Appeal is allowed for statistical purposes.

36. The next Ground in the appeal of the assessee is with regard to the action of the CIT(A) in restricting the deduction u/s 80IA of the Act for the Godavari Lift Irrigation Scheme developed by the assessee for the Government of Andhra Pradesh. In this context, brief facts are that assessee had claimed a deduction of Rs.39,39,21,458/- with respect to the profits earned from the project Godavari Lift Irrigation Scheme developed for the Government of Andhra Pradesh. The Assessing Officer restricted the claim of deduction to Rs.32,75,60,277/- on the ground that the profit shown by the assessee on this project was abnormally high. Accordingly, he invoked section 80IA(8) of the Act and made a disallowance of Rs.6,63,61,181/- out of the deduction claimed u/s 80IA of the Act. The CIT(A) disagreed with the Assessing Officer and deleted the disallowance of Rs.6,63,61,181/- but made a disallowance of Rs.18,70,849/- on account of the fact that interest expenditure was not allocated to the Godavari project. The assessee is in appeal challenging the disallowance of deduction u/s 80IA of the Act to the extent of Rs.18,70,849/- and the Revenue by way of Grounds of Appeal Nos. 1 to 3 in the cross-appeal has challenged the action of the CIT(A) in setting aside the disallowance of deduction u/s 80IA to the extent of Rs.6,63,61,181/- made by the Assessing Officer. Since the cross-grounds relate to a similar issue, they are being disposed-off together.

37. It was noted by the Assessing Officer that the profit declared by the assessee from the Godavari Lift Irrigation project was 45% whereas in respect of other projects the average profits were in the range of 30%. In arriving at the average profit of 30%, the Assessing Officer took into consideration the profit margin of various projects undertaken by the assessee in different years. Therefore, the Assessing Officer invoked the provisions of section 80IA(8) of the Act and arrived at the mean of average profits at 37.5% and applying this rate the eligible profit computed on the basis of total sales in respect of Godavari project was worked out at Rs.32,75,60,277/- as against

Rs.39,39,21,458/- disclosed by the assessee against which deduction u/s 80IA of the Act was claimed. This resulted in a disallowance of Rs.6,63,61,181/- out of deduction claimed u/s 80IA of the Act.

38. The CIT(A) has disagreed with the Assessing Officer on this aspect. The CIT(A) noted that the Assessing Officer did not point out in discrepancy or defect in the audited Profit & Loss Account of the Godavari project to show that the profit declared by the assessee was inflated or manipulated so as to claim higher deduction u/s 80IA of the Act. The CIT(A) has further noticed that the assessee had explained the reasons for higher profit, namely, that due to import of motors and rotating assembly from Brazil and Japan, the profit in the Godavari project was on a higher side, and such reason was not controverted by the Assessing Officer. For all the above reasons, the CIT(A) has deemed it fit to disregard the action of the Assessing Officer and accordingly the disallowance of Rs.6,63,61,181/- made out of the deduction u/s 80IA of the Act has been deleted by him. At the same time, the CIT(A) noted that the interest expenditure debited to the Profit & Loss Account was not appropriately allocated by the assessee to the Godavari project. The relevant discussion is contained in para 3.3.4 of the order of the CIT(A). The CIT(A) concluded that a sum of Rs.18,70,849/- was required to be allocated to the Godavari project on account of interest expenditure. In this manner, the CIT(A) concluded that the profit of the Godavari project was to be reduced to the extent of Rs.18,70,849/- thereby resulting in scaling down of deduction u/s 80IA of the Act to the said extent.

39. In the cross-appeals before us, the former action of the CIT(A) is challenged by the Revenue whereas the latter action of the CIT(A) is challenged by the assessee. In this background, we have heard the rival submissions.

40. Having considered the rival stands as well as the orders of the authorities below, we find that the CIT(A) made no mistake in disregarding the action of the Assessing Officer scaling down the deduction u/s 80IA of the Act to the extent of Rs.6,63,61,181/- in respect of profits earned from Godavari project. In so far as the assessee's eligibility for the claim of deduction u/s 80IA of the Act with respect to the Godavari project is concerned there is no dispute. We are in agreement with the CIT(A) that the profit shown by the assessee in its books of account relating to the Godavari project has been disregarded by the Assessing Officer on mere conjectures and surmises. No doubt, the profit ratio in case of the Godavari project is higher in comparison to other projects undertaken by the assessee in different assessment years. So however, such a difference can only be a basis to further verify the factual aspects, but the difference in profit-ratio by itself, cannot be a ground to disbelieve the same. The Assessing Officer has not brought out any cogent material or evidence to say that the profits declared by the assessee, based on the audited books of account suffer from any infirmity. Therefore, action of the CIT(A) deleting the disallowance of Rs.6,63,61,181/- out of deduction u/s 80IA of the Act is hereby affirmed.

41. In so far as the action of the CIT(A) in scaling down the deduction u/s 80IA of the Act to the extent of Rs.18,70,849/- on account of allocation of interest expenditure is concerned, we find that the same is quite justified. The assessee has not assailed the factual appreciation of matter undertaken by the CIT(A) with respect to the variation in allocation of interest expenditure and thus the action of the CIT(A) is hereby affirmed on this aspect also.

42. Resultantly, the Grounds raised by the Revenue as well as assessee with respect to the quantification of deduction u/s 80IA of the Act relating to the Godavari project are dismissed.

43. In the result, appeal of the assessee is partly allowed.

44. Now, we may take-up the remaining Ground of Appeal in the cross-appeal of the Revenue. The only Ground remaining is with regard to the action of the CIT(A) in allowing relief of Rs.9,10,110/- in respect of Provision for warranty, which was disallowed by the Assessing Officer.

45. In brief, the relevant facts are that the Assessing Officer made a total disallowance of Rs.1,76,13,328/- on account of Provision for warranty. The Assessing Officer denied the claim of the assessee on the basis of a similar disallowance made in the immediately preceding assessment year 2005-06. However, in the course of proceedings before the CIT(A), assessee contended that the Assessing Officer erred in confusing the calculation made for assessment years 2005-06 and 2006-07 because the Provision made for the year under consideration was on a scientific basis by taking average of expenditure for the last three years as against two years adopted in the assessment year 2005-06. In-principle, the assessee also relied upon the judgement of the Hon'ble Supreme Court in the case of Rotork Control India P. Ltd. vs. CIT, 314 ITR 62 (SC). The CIT(A) noted that in-principle the issue was liable to be decided in favour of the assessee having regard to the decision of the Hon'ble Apex Court in the case of Rotork Control India P. Ltd. (supra). However, the CIT(A) noted that while disallowing the Provision for warranty amounting to Rs.1,76,13,328/-, the Assessing Officer allowed deduction of an amount of Rs.1,67,03,218/- on the ground that the same was actually utilized for the product warranties. Since the CIT(A) directed that the entire Provision for warranty amounting to Rs.1,76,13,328/- is an allowable expenditure, he directed that amount of Rs.1,67,03,218/- allowed by the Assessing Officer be reversed. In this manner, the net relief allowed to the assessee on this ground was Rs.9,10,110/-, which is subject-matter of appeal preferred by the Revenue.

46. At the time of hearing, it was a common point between the parties that the Provision for warranty cannot be considered as a contingent liability following the judgement of the Hon'ble Supreme Court in the case of Rotork Control India P. Ltd. (supra). The CIT(A), in our view, has correctly decided the issue in the light of the judgement of the Hon'ble Supreme Court, which we hereby affirm. Thus, on this aspect, the appeal of the Revenue is dismissed.

47. Resultantly, whereas the appeal of the assessee is partly allowed that of the Revenue is dismissed.

Order pronounced in the open Court on 17th September, 2014.

Sd/-
(R.S. PADVEKAR)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Pune, Dated: 17th September, 2014.

Sujeet

Copy of the order is forwarded to: -

- 1) The Assessee;
- 2) The Department;
- 3) The CIT(A)-I, Pune;
- 4) The CIT-I, Pune;
- 5) The DR "B" Bench, I.T.A.T., Pune;
- 6) Guard File.

By Order

//True Copy//

Sr. Private Secretary
I.T.A.T., Pune