आयकर अपीलीय अधीकरण, न्यायपीठ – "C" कोलकाता,

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

(समक्ष)Before **श्री ऐ. टी. वर्की,** न्यायीक सदस्य **एवं/and** श्री एम .बालागणेश, लेखा सदस्य)

[Before Shri A. T. Varkey, JM & Shri M.Balaganesh, AM]

I.T.A. Nos. 990 /Kol/2013
Assessment Years: 2006-07

Deputy Commissioner of Income-tax, Circle-8, Kolkata	Vs.	M/s. ABCI Infrastructure Pvt. Ltd. (PAN: AACCM3317R)
Appellant		Respondent

Date of Hearing	03.11.2017
Date of Pronouncement	10.01.2018
For the Appellant	Shri David Z. Chawngthu, Addl. CIT, Sr. DR
For the Respondent	Shri Miraj D. Shah, AR

ORDER

Per Shri A.T.Varkey, JM

This appeal filed by the re enue is against the order of Ld. CIT(A)-VIII, Kolkata, dated 18.01.2013 for AY 2006-07.

2. The main grievance of the revenue is against the action of the Ld. CIT(A) in quashing the reopening of the assessment u/s. 147 of the Income-tax Act, 1961 (hereinafter referred to as the "Act").

3. Brief facts of the case as seen from the statement of facts filed by the assessee before the Ld. CIT(A) are that assessee is a corporate body engaged mainly in the business of infrastructure development and also having a small scale industry (hot mix plant) in the North Eastern Region of India. However, according to the AO, the assessee company is engaged in the business of constructing roads, highways, bridges and railway tracks etc. on contract with various State Govt., Railways, BRTF etc. According to assessee, since the assessee company was in the business of infrastructural development and having a small scale industry in the North East Region it is eligible to claim deductions u/s. 80IA and 80IC of the Act for its business of infrastructure, development and manufacturing respectively and accordingly while filing the return of income the assessee filed the audited accounts,

tax audit report and auditor's certificate certifying the amount eligible for deduction u/s. 80IA and 80IC of the Act. Scrutiny assessment in respect to original assessment was so completed u/s. 143(3) of the Act vide order dated 31.12.2008 and the total income was determined at Rs.4,99,876/- after partially allowing deduction u/s. 80IA of the Act (without allowing the claim on interest component included in it) and the AO totally denied the assessee's claim of deduction u/s. 80IC of the Act.

4. Thereafter notice u/s. 148 of the Act was issued by the AO on 10.09.2010 and after recording the reasons which are given below the AO reopened the assessment, which action of AO was set at naught by the Ld. CIT(A), which action of Ld. CIT(A) is under challenge before us. In order to appreciate the reopening of the assessment, the reasons recorded by the AO is very important and it is reproduced below:

"Sub: Reasons for issue of notice under section 148 of the Income Tax Act, 1961 for AY 2006-07 - reg,

With reference to the above, the reasons for reopening of the assessment for the AY 2006-07 as sought by you are as under. :-

From an examination of the assessment records it is observed that you changed your name to M/s. ABCI Infrastructures (P) Ltd. from M/s. Maxxcom Vyapar (P) Ltd. w.e.f. 01/02/2002 and that your company had taken over M/s Anupam Bricks & Concrete Industries (Hot Mix Plant Unit) w.e.f. 01/0212002 with the intent to change the nature of the existing business and to start a business of construction. Simultaneously, there were also changes in the portfolio of the directors. As per the Tax Audit Report1iled along with the return of income, it is seen that your company was engaged in the business of Civil Construction and Manufacturing of Construction Materials. As per the P&L Ale., the total income for the year ended on 31/03/2005 was Rs.4,69,31,185/- which included income of the company's Contract Unit as well as the Hot Mix Plant Unit. Deductions under Chapter VIA was claimed as per below –

(a) Deduction of Rs.2,86,71 ,025/- u/s.801A of Act for the Contract Unit:

During the year the company had undertaken various civil works for the Railways, State Government and other Local Authorities on contract basis.

(b) Deduction of Rs.68.94,257/- u/s.80IC of Act for the Hot Mix Plant Unit:
The Separate Notes on Accounts for both the units state that raw materials purchased were incurred for Civil Construction and Manufacturing of Hot Mix Products. However, it is observed that Bitumen, Chips, Sands and Earth were procured for the Hot Mix Plant and such materials were transferred to the other unit for construction activity.

2. As per the provisions of the Act, where the gross total income for the year includes profits and gains derived by an undertaking or an enterprise carrying on business of -i) developing, or (ii) operating & maintaining, or (iii) developing, operating and maintaining any infrastructure facility, the assessee shall be entitled to claim deduction u/s.80IA of an amount equal to hundred percent of the profits and gains derived from such business. However, such deduction snail not be allowed if the undertaking was formed by splitting up or reconstruction of a business already in existence or was formed by the transfer to a new business of

machinery or plant previously used for any purpose. In the present case, your company was not involved in any developing , maintaining and operating or any infrastructure project and had merely executed the contract work. Moreover, your company was formed by reconstruction of the existing business. For these reasons, deduction us/.80IA of the Act is not allowable to your company.

3. Further, as per the provisions of Section 80IC of the Act, where the gross total income of assessee includes profit and gains derived from the manufacture or production of any article thing, not being any article or thing specified in the Thirteen Schedule, the assessee shall be entitled to a deduction of specified percentage of profits. Other conditions stipulated u/s.80IC for being eligible to claim deduction under this Section include that there must be a substantial expansion of the unit, the undertaking must be situated in specified area of specified States, it must not be formed by splitting up or reconstruction of a business already in existence and it was
not formed by the transfer to a new business of machinery or plant previously used for any purpose. Your company does not satisfy these conditions. So, no deduction u/s.80IC of the Act is allowable to you.

4. Thus, I have reason to believe that income chargeable to tax has escaped assessment because your company is not entitled for claim of deduction under section 80IA and under section 80IC of the Act."

5. Before adverting to analyse the reasons, we would like to point out that though the AO reopened the assessment in respect of Sec. 80IC claim of the assessee that is for its hot mix plant in North Eastern Region, it is to be pointed out that in the original assessment by a reasoned order, the AO had denied 80IC claim made by the assessee. However, the AO has again in his reason to reopen the assessment has brought in the 80IC claim of the assessee and in the reassessment order has granted 80IC deduction to the assessee. It should be remembered that in CIT Vs Sun Engineering (1992) 198 ITR 297 (SC), the Hon'ble Supreme Court ha held that the reopening of assessment is done for the benefit of the revenue and, therefore, since the AO in the original assessment had denied the claim u/s. 80IC of the Act, the AO while reopening the assessment ought not to have reviewed the earlier order passed by the AO in the original assessment, since AO does not enjoy the power of review of his own order. So the order granting 80IC deduction is per-se bad in law.

6. The AO can reopen an assessment only if he has "reason to believe" that income chargeable to tax has escaped assessment. It should be remembered that "reason to believe" postulates a foundation based on information and belief based on reason. After a foundation based on information is made, there still must be some reason, which should warrant holding a belief that income chargeable to tax has escaped assessment. It is well settled that if an original assessment has been completed u/s. 143(3) of the Act, the reopening can be

done by AO only if there is tangible material before him and it is equally well settled that AO cannot review his own order. From a perusal of the reasons recorded (supra) it is noticed that the AO gives thrust for reopening the assessment in respect to earlier action of allowing deduction under sec. 80IA of the Act. The AO notes that the assessee was engaged in the business in civil construction and has claimed deduction of Rs.2,86,71,025/- u/s. 80IA of the Act for the contract unit. According to the AO, during the year, the assessee company had undertaken various civil works in Railways, State Govt. and other local authorities on contract basis. He notes that the assessee company was not involved in any developing, maintaining and operating any infrastructure project and had merely executed the contract work and, therefore, is ineligible to claim deduction u/s. 80IA of the Act. Thus the major thrust for reopening the assessment in respect to Sec. 80IA of the Act claimed by the assessee is that assessee is merely a works contractor and not a developer and, therefore, not eligible for deduction u/s. 80IA of the Act. He also notes that the assessee's business was formed by reconstruction of the existing business and deduction cannot be allowed if the undertaking was formed by splitting up or reconstruction of business already in existence or was formed by the transfer to a new business of machinery or plant previously used for any purpose. On the aforesaid r asoning the AO reopened the assessment. The Ld. Counsel for the assessee drew our attention to the original assessment passed by the AO on 31.12.2008 and drew our a tention to para 3.1 to 3.3 wherein the AO has noted as under:

> *"3.1. As per computation sheet produced by the assessee, he has shown total income of Rs.2,86,71,025/ as profit **from contract after** considering depreciation as per I T Act and claimed deduction u/s. 80IA @ 100%. However on going through the Profit & Loss Account, it has been found that assessee has earned interest of Rs. 28,34,024/- and on this interest income deduction u/s. 80IA was claimed by the assessee.*
>
> *3.2. It is well settled in various cases that interest received from surplus fund will be treated as income from other source. Thus, deduction i/s. 80IA will not be allowed on interest income of Rs. 28,34,024/-.*
>
> *3.3 Without prejudices to above, deduction will be allowed only on profit & gains from industrial undertaking or enterprises engaged in' infrastructure development. Interest received is not part of the earning of the infrastructure developments, hence, deduction u/s. 80IA will not be allowed; on said income. It is also well settled in the various cases such as -*
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> *i. In the case of Pandian Chemicals Limited Vs. C.I.T (2003) 262(ITR) 278 (Supreme Court) that interest income shall be treated as income from other sources and not under head business & profession.*
>
> *ii. In the case of CIT; Vs. Menon Impex P Ltd. that interest on deposits was not derived from exports, it could not be said that there was a direct nexus between the interest income and the*

industrial undertaking. The assessee was therefore not entitled to the exemption u/s. 10A of the Income Tax Act.

iii. Similar decision in: the case of C. I. T Vs. Rane (Madras) Limited (Chennai).

And then in the original assessment order passed on 31.12.2008 he has computed the gross total income at Rs.4,99,77,876/- and gave deduction under Chapter VI of Sec. 80IA of the Act.

"Gross total income		*Rs,499,77,876/-*
U/s. 80IA	*Rs.283,72,740/-*	
Add: Dep. As per IT Act	*Rs. 79,92,772/-*	
	Rs.363,65,512/-	
Less Dep. As per IT Act	*Rs. 76,94,487/-*	
	Rs.286,71,025/-	
Less: Intt. Income	*Rs. 28,34,024/-*	
Deduction allowed u/s. 80IA		*Rs.258,37,001/-*
Assessed Income		*Rs.241,40,875/-"*

7. From the aforesaid order passed by the AO in the original scrutiny proceedings dated 31.12.2008 it is very clear that the AO h d clearly taken note that assessee has shown Rs.286,71,025/- as profit from contract and has claimed deduction u/s. 80IA of the Act @ 100% and thereafter, found fault with the assessee's said claim only in respect of the interest component of Rs.28,34,024/- on which the deduction u/s. 80IA of the Act was claimed which he did not allow and reduced it as clearly seen from the order as well as from the computation (supra). Thus we note that the assessee in its computation sheet produced before the AO during original assessment has clearly shown that the total income of Rs.286,71,025/- as profit from contract and claimed depreciation. Thus, it is not the case where the assessee had misled the AO in any manner while making the claim u/s. 80IA of the Act. All the statutory requirements as per law for claiming deduction like tax audit report, etc. were filed before the AO and the AO had applied his mind and then had granted the deduction u/s. 80IA of the Act. The action of the AO to reopen an assessment completed earlier u/s. 143(3) of the Act without any tangible material ought not to have been done. We note that the AO has done the reopening and consequent reassessment on the basis of the very same material which was before the earlier AO. So, the AO on the same material on which the predecessor of AO has taken a plausible view during the original assessment, has ventured in the reassessment to take a different view, which action is akin to review of his own order which power AO does not enjoy. The Hon'ble Supreme

Court in CIT Vs. Kelvinator India Ltd. (2010) 310 ITR 561 (SC) has reiterated the well settled law that AO has no review powers as under:

> *"On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from April 1, 1989), they are given a go-by and only one condition has remained viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-April 1, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words 'reason to believe' failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of 'mere change of opinion', which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reasssess. But reassessment has to be based on fulfillment of certain pre-condition and if the concept of 'change of opinion' is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of 'change of opinion' as an in-built test to check abuse of power by the Assessing Officer. Hence, after April 1, 1989, the Assessing Officer has power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the bel ef. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words 'reason to believe' put also inserted the word 'opinion' in section 147 of the Act. However, on receipt of representations from the companies against omission of the words 'reason to believe', Parliament reintroduced the said expression and deleted the w rd 'opinion' on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No. 549, dated October 31, 1989 ([1990] 182 ITR (St.) 1, 29), which reads as follows:*
>
> *'7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression "reason to believe" in section 147 - A number of representations were received against the omission of the words 'reason to bel eve' from section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in the place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same.' [Emphasis supplied]*
>
> *For the aforestated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs."*

8. From the aforesaid dictum of the Hon'ble Supreme court, we note that the AO has no power to review and, therefore, the order is bad in law and has to be set aside. Moreover, on merits also, we note that in a similar case the Coordinate Bench of this Tribunal in DCIT Vs. Simplex Somdatt Builders JV, ITA No.1684/Kol/2011 for AY 2007-08 order dated 18.06.2013 in similar facts of the case has held that assessee's claim is allowable u/s. 80IA of the act as under:

"11. We have considered the rival submissions. Admittedly, a perusal of the agreement entered into between the assessee and the Govt of Andhra Pradesh Irrigation & CAD Department shows that the assessee has taken EPC/Turnkey contract of the flood flow canal project from SRSP. The name of the contract has been extracted earlier in this order. The scope of the work is also extracted above. Admittedly, the assessee has taken a turnkey contract from the Irrigation Department, Govt. of Andhra Pradesh. The turnkey contract is in respect of the irrigation project. Irrigation project is an infrastructure facility within the scope of Explanation to section 80IA(4) of the Act. The provisions of section 80IA(4) is to be controlled by the Explanation to section 80IA, which has been substituted by the Finance (No.2) Act, 2009 with retrospective effect from 1-4-2-2000. This Explanation is found after sub-section (13) of section 80IA. The said Explanation attempts to control the provisions of sub-section 4. More so, it says that nothing contained in section 80IA would apply in relation to the business referred to sub-section (4), which is in the nature of works contract. A works contract is not defined in section 80IA. Now, what would come into consideration is whether the substituted Explanation after sub- clause (13) changed the nature of the meaning of 'infrastructure facility' provided in the Explanation to section 80IA(4). Admittedly, the Explanation to section 80IA(4) gives the meaning the term 'infrastructure facility'. The substituted explanation after sub clause (13) brings in the nature of work as a works contract. The provisions of section 194C, which deals with TDS in respect of payment to contractors for carrying out any work in the Explanation thereto as explained the term 'work' to be an inclusive definition, but has provided an exclusion to be 'does not include manufacturing or supplying of a product. according to requirement or specification of the customer by using materials purchased from a person, other than such customer'. Thus, with this in mind, a perusal of the turnkey contract agreement entered into by the assessee with the Irrigation Department, Govt of A.P clearly shows that the construction of all the structures of the whole canal system is to be as per approved design drawings, specifications of the department etc. The survey is to be done as per investigation and designing criteria of the Irrigation Department. This is also as per article 11.1 of the agreement. The assessee is to procure the materials independently and those materials are to confirm to the specifications provided. The assessee is also to make its arrangements for storage of the materials. This is as per article 107 of the agreement. Thus admittedly the work done by the assessee falls in the exclusion provided to the meaning of the work given in the Explanation to section 194C of the Act. Once it falls outside the meaning of term 'work' for the purpose of section 194C, the question that arises is can it be said that the assessee is doing the work contract as provided in the substituted Explanation in section 80IA after sub clause (13)?, The answer would be emphatic no.

12. This is because the assessee is doing the activity of development of an infrastructure facility as provided under section 80IA(4). The project is a Turnkey project and it cannot form nor have a character of a works contract. Works contract would be applicable to the repairs and maintenance of an existing project. Works contract cannot be in relation to the development of a new project. One of the arguments raised by the learned Sr.DR that the intention of the substitution of the Explanation after sub clause (13) of section 80IA was to deny, the benefit of deduction u/s. 80IA(4) in respect of works contract, but to provide the deduction to such undertakings, which is doing the business of building, operating and Transfer (BOT) and building owning, operating and transfer BOOT as also PPP contracts does not hold water in so far as an irrigation project can never function under BOT or BOOT or PPP . In the circumstances, we are of the view that the assessee's claim is not hit by the substituted Explanation as provided after sub clause(13) of section 80IA.. Here, we may mention that this view finds support from the decision of the co-ordinate of the tribunal, [ITAT, Hyderabad Bench, Hyderabad in the case of GVPR Engineers Ltd & Ors (refer to supra). We may mention here that our view also finds support from the decision of the co-ordinate bench of this tribunal, ITAT Cuttack Bench, Cuttack in the case of ARSS Infrastructure Projects Ltd Vs. ACIT, Circle-2 (1), Bhubaneswar in ITA Nos. 142, 143/CTK/2010 & 483,484/CTK/2011 dated 13-06-2013, wherein one of us was a party and in which case it has been held as under :-

10. Now coming to the merits of the deduction u/s. 801A(4) of the Act. A perusal of the provisions of section 801A(4) of the Act shows that in the explanation 'infrastructure facility' has been specified to mean a road including a toll road, a bridge or a rail system. Admittedly, the assessee is doing the business of development of railway tracks and bridges thereof as also roads. If, we are to accept the contention of the Ld. CIT that the provisions of section 801A(4) of the Act after the substitution of the explanation to section 8OIA of the Act was introduced was only for the purpose of giving the benefit to BUT contracts then, the explanation to section 801A(4) of the Act becomes otiose. This is as explanation to section 801A(4) of the Act specifically provides for the road to include a toll road, a bridge or a rail system. BUT contract in respect of the railway system can never exist. Further, a perusal of the provisions of section 801A of the Act shows that the term 'works contract' is not defined in the said section. However, the terms 'works' and 'contract' is defined in the provisions of section 194C of the Act. If a particular word or term is not defined in the specific section then, one could go to other sections in the said Act where the definition would be available to draw a meaning to the said terms. In the provisions of section 194C of the Act, work has been given an inclusive definition but in the subsequent portion it has excluded the manufacturing or supplying a product according to requirement or specification of a customer by using material purchased from a person other than such customer. As has been specified by the Ld. AR the assessee is doing contract work but that work is according to the requirement and specification of the customer and the same has been done by using materials purchase from third parties other than the customers. Thus, though the assessee is doing a works contract the same would not fall within the meaning of the word 'works contract' for the purpose of the Act due to the exclusion provided in the meaning of 'work' in section 194C of the Act. The issue raised by the Ld. CIT that the assessee is not doing the development work but is only doing the contract also does not stand to test as the assessee admittedly is developing the roads and railwa lines and the bridges thereof. Development encompasses within itself contract work. The agreement between the assessee and the customer being the government is for the development of the infrastructure facility being roads and rail systems and bridges by participating in the tenders. Under these circumstances, we are of th view that the AO was right in law in granting the assessee the benefit of deduction u/s. 801A(4) of the Act.

13. In the circumstances, the Assessing Officer is directed to grant the assessee the benefit of deduction u/s. 80IA of the Act as claimed."

9. From a reading of the aforesaid order which is similar to that of the case of assessee and though in that case, the assessee was executing works contract of the Government, the Tribunal held that it would not fall within the meaning of the word 'works contract' for the purpose of the Act due to the exclusion provided in the meaning of 'work' in section 194C of the Act. The issue raised by the AO that the assessee is not doing the development work but is only doing the works contract so is not eligible to deduction u/s. 80IA of the Act is not legally sustainable, as the assessee admittedly is developing the roads and railway lines thereof. Development encompasses within its contract work the agreement between the assessee and the customer being the Government is for the development of the infrastructure facility being roads and rail system by participating in the tenders. Under these circumstances and for the reasons given by the coordinate bench in similar facts in Simplex

Somdatt Builders (supra), we are of the view that the assessee's claim for deduction u/s. 80IA of the Act is allowable and, therefore, the main reason found by the AO to deny the claim does not exist and, therefore, the reason to reopening itself falls. Before we part, the claim of the AO that the assessee company was formed by reconstruction of the existing business, we note that the said fact was also considered by the AO in the original assessment passed on 31.12.2008 at para 4.6.2 to 4.6.8 in which the AO has noted as under:

"4.6.2. In the statement of account of A. Y. 2003-04, assessee has mentioned that on 1/4/2002 the company has taken over the running business of M/s.· Anupam Bricks & Concrete industries, a proprietorship firm of Sri Budhmal Baid (Managing Director of Company) in lieu of which the company has issued shares worth Rs.2,0,00,000/- at premium amount of Rs. 29,40,000/- as per Memorandam of Agreement signed by Company with M/s. Anupam Bricks & Concrete Industries and the total value of assets acquired is Rs. 2,29,40,000/- as per valuation done by independent authority. No good will was considered. The acquired assets includes a Hot Mix Plant valuing Rs. l8,77,160/- & the profit from which was claimed as exempt under Section 80IB of Income-tax Act, 1961.

4.6.3. From the above points, it is clear that the assessee is not entitled to deduction u/s. 80IC as it has purchased old plant from M/s. Anupam Bricks & Concrete Industries. Section 80IB requires that the undertaking "is not formed by splitting up or the reconstruction of a business already in existence" & "it should not be formed by transfer of machinery or plant previously used for any purpose".

4.6.4. Moreover, as per Form No. 10CCB of A.Y. 2002-03 clause 18(a) assessee has mentioned that

"18. Eligible business under section 80-IB

(a) has the industrial undertaking received any machinery or plant on transfer which was previously used for any purpose: Yes / No."

The assessee has marked as Yes'.

It is clear from Form No 10CCB and accounts of statement as mentioned above that the assessee has used old plants and claimed deduction u/s. 80-IB from A.Y. 2003-04.

4.6.5. 0n the above grounds, assessee is not entitled to deduction u/s. 80-IB from AY 2003-04.

4.6.6. In the A.Y 2004-05 and onwards assessee has started claiming deduction u/s. 80IC. For claiming deduction u/s. 80IC it is required that undertaking or enterprise undertakes "substantial expansion". The definition of substantial expansion is as under.

"What is substantial expansion - For the aforesaid purpose substantial expansion is calculated as under -

1. Find out the book value of plant anti machinery (before depreciation) as on the first day of the previous year in which substantial expansion is taken.

2. Find out the amount of investment in plant and machinery during the previous year.

3. Find out (2)/(1)

If the proportion computed under (3) (supra) is 50 per cent or more, then it is taken as substantial expansion."

Without any substantial expansion of the machinery, assessee has claimed deduction u/s. 80IC from A.Y 2004-05 and initial year was mentioned as A.Y. 2003-04. However, in the A.Y 2003-04 he has mentioned initial year as A. Y. 2002-03 and date of commencement of operation is 29/0112001. But from A.Y 2004-05 he has shown that date of commencement is 01.04.2002.

4.7. Assessee is not entitled to deduction u/s. 801B in the A.Y. 2003-04 as such is also not entitled to deduction u/s. 80IC from A.Y. 2004-05 and onwards.

Criteria of expansion depend on whether assessee is entitled to deduction u/s. 80IB or not. In the instant case, assessee is not eligible for deduction u/s. 80IB. Hence question of substantial expansion does not arise.

4.8. On the above basis, deduction u/s. 80IC was not allowed to the assessee on profit from Hot Mixed Plant of Rs.68,94,257/-."

10. From the reading of the original assessment order which is reproduced above, we note that the AO had the knowledge of the assessee taking over the proprietary concern on 01.04.2002 i.e. running business of M/s. Anupam Bricks and Concrete Industries a proprietorship firm of Shri Budhmal Baid, Managing Director of the company in lieu of which the company had issued shares at a premium and the fact that by this process, the assessee acquired the assets including a Hot Mix plant. This fact was in the knowledge of the AO as well as he has considered this fact elaborately as reproduced above in his original assessment order, therefore, right or wrong, the decision taken by him cannot be revisited or reviewed by the AO invoking Sec. 147 of the Act because the AO does not have the power to review his own order. Relying upon the decision of Hon'ble Supreme Court in the case of Kelvinator of India Ltd. (supra), we do not find any legal infirmity in the order passed by the Ld. CIT(A) and hence, the same is hereby upheld. Appeal of revenue is dismissed.

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

Order is pronounced in the open court on 10th January, 2018.

Sd/-	Sd/-
(M. Balaganesh)	(Aby. T. Varkey)
Accountant Member	Judicial Member

Dated : 10th January, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – DCIT, Circle-8, Kolkata.
2. Respondent – M/s. ABCI Infrastructure Pvt. Ltd., 4, Shakespeare Sarani, Kolkata-700 071.
3. The CIT(A) , Kolkata.
4. CIT , Kolkata.
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Sr. Pvt. Secretary