

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, AHMEDABAD
BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

I.T.A. No. 2826/Ahd/2007
(Assessment Years: 2003-04)

M/s. Akash Infra Projects P. Ltd. Pankaj R. Shah & Associates, Chartered Accountants, 61-62, Stadium House, Navrangpura, Ahmedabad-380009	Vs.	ITO Ward-3, Gandhinagar
[PAN No. AADCA3708M]		
(Appellant)	..	(Respondent)

I.T.A. No. 770/Ahd/2008
(Assessment Year: 2004-05)

M/s. Akash Infra Projects P. Ltd. Pankaj R. Shah & Associates, Chartered Accountants, 61-62, Stadium House, Navrangpura, Ahmedabad-380009	Vs.	ITO Ward-4, Gandhinagar
[PAN No. AADCA3708M]		
(Appellant)	..	(Respondent)

I.T.A. No. 4002/Ahd/2008
(Assessment Year: 2005-06)

Akash Infra Projects Pvt. Ltd. 2, Abhishek Complex, Sector-11, Gandhinagar	Vs.	ACIT Gandhinagar Circle, Gandhinagar
[PAN No. AADCA3708M]		
(Appellant)	..	(Respondent)

I.T.A. No. 1577/Ahd/2009
(Assessment Year: 2006-07)

M/s. Akash Infra Projects P. Ltd. Pankaj R. Shah & Associates, Chartered Accountants, 61-62, Stadium House, Navrangpura, Ahmedabad-380009	Vs.	ACIT Gandhinagar Circle, Gandhinagar
[PAN No. AADCA3708M]		
(Appellant)	..	(Respondent)

I.T. A. No. 1679/Ahd/2011
(Assessment Year: 2007-08)

Akash Infra Projects Pvt. Ltd. 2, Abhishek Complex, Sector-11, Gandhinagar	Vs.	ACIT Gandhinagar Circle, Gandhinagar
[PAN No. AADCA3708M]		
(Appellant)	..	(Respondent)

Assessee by	:	Shri Mehul K. Patel, A.R.
Revenue by	:	Shri R. R. Makwana, Sr. DR
Date of Hearing		13.06.2022
Date of Pronouncement		22.06.2022

ORDER

PER MADHUMITA ROY, JM:

The bunch of appeals preferred by the assessee are directed against the orders passed by the Ld. CIT(A), Gandhinagar, Ahmedabad on different dates for A.Y. 2003-04 to 2007-08. Since, the grounds of appeal preferred by the assessee are arising out of the identical issues, these are heard analogously and are being disposed of by a common order for the sake of convenience.

ITA No. 2826/Ahd/2007 A.Y. 2003-04 is taken as lead case.

2. A perusal of the grounds of appeals, it would indicate that there are certain common grounds, in the assessee's appeals which are as follows—

i) Common ground raised in all the appeals of the assessee is, denial of claim of deduction under section 80IA(4) of the Income Tax Act, 1961 by treating the assessee-company as a 'Contractor' and not 'Developer' by the Department. However, the Revenue is

challenging the action of the Ld. CIT(A) in granting deduction under Section 80IA(4) of the Act for the Asst. Years 2003-04 and 2007-08.

ii) The second main ground in respective appeals is with regard to disallowance of interest and other income as not eligible for deduction under Section 80IA(4) of the Act.

iii) The third ground in respective appeals is with regard to disallowance of depreciation on plant & machinery has also been challenged before us.

3. The brief facts leading to the issue is this that the appellant is a private limited company engaged in the business of Infrastructure Development, filed its return of income on 28.11.2003 declaring total income of Rs. 5,18,334/- which was processed under Section 143(1)(a) of the Act followed by a scrutiny proceeding. Notice under Section 143(2) dated 12.10.2004 was issued under Section 142(1) dated 20.06.2005 along with detailed questionnaire and after notice under Section 143(2) dated 20.06.2005. The assessee claimed deduction under Section 80IA(4)(i) of the Act of Rs. 48,19,950/- arising out of engagement in the development of roads for the year under consideration. The assessee claimed to have required qualification for coming under the zone of deduction in terms of the said section. However, such claim of the assessee was not found allowable and the assessment was completed with addition of Rs. 48,19,650/- disallowing claim under Section 80IA(4)

which was, in turn, confirmed by the First Appellate Authority. Hence, the instant appeal before us.

4. At the time of hearing of the instant appeal the Ld. Counsel appearing for the assessee reiterated the submissions made before the authorities below. It was further submitted that the assessee has executed construction and development work of roads by entering into agreement with State Local Authorities and with other statutory authorities. It was further contended by the Ld. A.R. that the assessee has fulfilled all the conditions as mentioned under the provisions of Section 80IA(4) and in denying the claim of the assessee the AO wrongly construed that the assessee is a “contractor” and not carried out any development activities. It was further mentioned by the Ld. Counsel appearing for the assessee that the relief under Section 80IA(4) was granted to the assessee for A.Ys. 2009-10, 2010-11 & 2011-12 by the Ld. CIT(A) on the same set of facts. Moreso, no appeal has been preferred by the Revenue against those orders passed by the First Appellate Authorities. He further submitted that though the expression “works contract” has not been defined in the Act but various judicial pronouncements examined the issue and held that the term has wider meaning so as to state that if the activities carried out by the assessee involve development of project, engagement of various agencies, undertaking risk element, raises own finances and invests its own funds in the construction of the project, then the case of the assessee falls within the meaning of expression “developer”. A perusal of the tender documents clearly shows that the assessee has to arrange own finances, purchase own plant & machinery

and purchase all materials at own cost, deploy of qualified personnel for construction and development of infra projects. The authorities gave only general specifications for the project. However, for the specific drawings & designs recommended by the assessee, the same has to be approved by the competent authority and becomes part of the tender. Further that once the tender is awarded, the assessee has to pay earnest money, security deposits, performance guarantee. The assessee is also liable for liquidated damages/penalty, free maintenance and repair during defect liability period. During the construction of project, the assessee has to make all the arrangements and is liable for procurement of water, electricity, all materials, skilled, semi-skilled staff, labourers, plant & machinery, equipments & tools, and also wellbeing of the staff/labourers. He submitted that the assessee is always burdened with financial risk to carry out the project work on own cost with the fixed rate specified in the tender. The payment would be made by the competent authority every after a period upon completion of certain work. The construction and development of infrastructure projects is highly technical and required special skill, adherence to quality etc. Moreover, the assessee is not compensated for increase in prices of materials, cost of labourers, overhead expenses etc. These facts clearly demonstrate that the financial and other risk, responsibility, obligations is undertaken by the assessee in construction and development of the various infrastructure projects. Hence, as per the ratio of the jurisdictional High Court in the case of Radhe Developers (supra), the assessee is not merely a works contractor, but is engaged in development of project as a whole, and therefore, entitled for claim of deduction under section 80IA(4) of the Act. The Ld.

Counsel for the assessee further relied on the following decisions to support his case:

- “1. *Patel Infrastructure (Rajkot ITAT)*
ITA No.627/Ahd/2014, Dated 30/07/2020
2. *Katira Construction Ltd.(Rajkot ITAT) [2020] 119 taxmann.com 489(Rjt)*
3. *S.Sugam Construction P.Ltd.(And ITAT) (2013) 30 taxmann.com 331 (Ahd)*
4. *Bhinmal Contractor Property and Land Developers P.Ltd.(Mumbai ITAT) [2018] 93 taxmann.com 296 (Mum)*
5. *Rohan & Rajdeep Infrastructure (Pune ITAT) [2013] 40 tax.com 136 (Pune)*
6. *ABG Heavy Industries Ltd.(BOM HC) [2010] 189 taxman.com 54 (Bom)*
7. *Koya & Co. Construction P.Ltd. [2012] 21 taxmann.com 35 (Hyd.ITAT)*
8. *GVPR Engineers Ltd. [2012] 21 taxmann.com 25 (Hyd ITAT)*
9. *B.T. Patil & Sons Belgaum Construction P.Ltd. [2013] 34 taxmann.com 97 (Pune ITAT)”*
10. *Radhe Developers Vs.CIT, 341 ITR 403 (Guj)*

5. On the other hand, the Ld. DR supported the orders passed by the authorities below.

6. We have heard the rival submissions made by the respective parties; we have also perused the relevant materials including the orders passed by the authorities below. It appears from the record that the Ld. AO has denied deduction claimed under section 80IA(4) of the Act by holding that the assessee has acted as work-contract in the project awarded by the statutory bodies.

7. Before the Ld. AO the assessee submitted as follows:

- “3. *The assessee comport/vide letter doted 10.03.2006 stated as under :*
"Assessee co was incorporated and registered under the co. Act 1956 in May 1999. The Assessee co has installed a Paver" Pant at village Khorej Nr. Khodiyar railway station in the year

The assessee co engaged in the business of i) Developing or ii) Operating and Maintaining of infrastructure facilities viz Road work.

In the A Y 2003-04 the assessee co has entered in to agreement to construct/developed road at various places with State Govt. Local Authority, and with other statutory authorities. The complete detail of worked carried out in respect of the same was furnished in our earlier submission.

The provisions of section 80IA(4) is very dear that it requires

1. The enterprise should be own by a company or consortiums of co. The enterprise should enter into agreement with Central Govt. State Govt. or a local authority or any other statutory body for i) Developing or ii) Operating and Maintaining of infrastructure facilities within the period stipulated in the agreement The enterprise starts operating and maintaining the infrastructure facilities on, or after the 1st day of April 1995"

Therefore in order to make an enterprise eligible for the benefit of the section one of the important condition is that an enterprise should be entered in to agreement with State govt. Central Govt. local authority or and other statutory authorities. The term contractor is not essentially contradictory to the term "developer".

On the other hand rather section 80IA4 it self provides that in order to develop the infrastructure facilities an enterprise as per agreement with the Central, state Govt. Local authority or other statutory body. So entering in to a lawful agreement and thereby becoming a contactor should no way be bar to the one being a developer. In the instant case assessee co. has entered into agreement for development of infrastructure facilities as per agreement with state authority as per the provision of the act. Hence accordingly in turn is entitled, and entitled to justifiable, to claim, deduction under section 80IA(4).

Second point raise by your goodself that the work was carried out by as per the requirement and specification of local authority. The project was not been developed by your co., but work is carried out as per the various requirement of the owner. And to carry payment were made to us as per the condition of the Tender.

At the out set we like to state that it arrays true that work once undertaken as per the agreement (agreement executed in whatever form) the parties of the agreement should be act according to the terms of agreement and cost of that agreement i.e. financial aspect of the agreement is always based on that scope of work.

Naturally when State Govt. or Central Govt. or other bodies as specify in the act, will desire that work should be accomplished in time limit and as per agreed terms and conditions, but it no way loses the character that undertaking who undertakes the work does not required to apply its technical expertise and know how, undertakes the detail engineering, multiple drawings it also undertake to bear the risk, it has mobilised the technical and other staff, appropriate material and equipment to accomplish the work. And obviously it is only because of its expertise, specialization financial commitment and involvement, that project is completed.

The assessee co. possesses a Drum mixed plant, Paver Project, JCB machine, roller, dumper and other equipment, skill persons, engineers, machine operators etc. require for the work, for the development of road. The directors are also qualified engineers.

The specification mention in tender documents are indicates the nature of work risk and financial involvement etc. It cannot be said that the owner is ultimate designer of the facilities or has developed the infrastructure facility. Therefore govt. is not carrying on any business of construction activity, but the govt. is interested in development of infrastructure project to facilitate the growth.

The work undertaken involved the lot of risk also the continuous running of the plant, have to maintain permanent staff. The working condition, position of land mixture drawings and other technicalities to be followed by the assessee co. in order to developed the infrastructure facilities.

Moreover as per the provisions of Act whatever nature of infrastructure facilities developed is ultimately to be transfer to the govt. or authorities as the case may be within stipulated time limit.

In our case all the developed infrastructure facilities were transferred to the concern authorities.

The agreement copy and tender document is the same what your goodsself possess for verification. The copy of agreement is sign by both the parties, i.e. the authorities as specify in the act and enterprise own by a company registered in India or by a consortium of such company.

The details of work to be carried out and consideration to be received for the said work along other terms and condition including the time limit for its development is specify in the said document. Further a formal work order also submitted to your goodsself for verification.

Therefore in light of our above discussion we like to request your honour that we are very well complied the provisions of the section 80IA(4) of the act and eligible for tax exemption.

We further like to invite your kind attention towards the ITAT Mumbai Bench F judgment in case of Patel Engg. Ltd v/s Dy. CIT Central circle reported in 94 ITD 411 (Mumbai) that - Assessee co was engaged in execution of civil contacts - It had taken two contracts from state govt.- In one of the projects, assessee constructed an underground tunnel and specialized structures to supply water from river to power house and to take water back to river for use of irrigation -Similarly, in other project assessee constructed inlet tunnel for water supply up to point of power house - Whether merely because State Government paid for development of infrastructure facility earned out by assessee as a contractor, it could not be said that assessee as a contractor, it could not be said that assessee had not developed infrastructure facility – Held, yes - Whether for availing deduction under section 80-TA, infrastructure facility should not necessarily be owned by assessee - Held, yes - Whether assessee was entitled to deduction under section 80-IA in respect of profit derived from execution/ development of above two projects - Held, yes

In tight of our above detailed submission and ITAT judgment we request your good self to allowed the deduction claimed u/s. 80IA(4A) of the Act””

8. However, while rejecting the claim of the assessee the Ld. AO observed as follows:

“4. The contention of the assesses is not accepted for the following grounds.

- i) The assessee company was not a developer of such facilities but, was a civil contractor not entitle to relief in as much as
 - a) The appellant held no interest in land supporting the facility.*
 - b) The facility was owned by the Government.*
 - c) The appellant was not entrusted operation and maintenance of the facility after it was ready.*
 - d) The appellant was civil contractor.**
- ii) The contract receipts claimed as deductible u/s 80IA(4) includes work done for BSNL, IFFCO etc. which are not central government, state government or Statutory body.*
- iii) The representative of the assessee in his above reply stated that "entering in a lawful agreement and there by becoming a contractor should no way be bar to the one being a developer". In the case of*

assessee the issue is regarding the work carried out in the capacity of contractor not in a capacity of a developer. The assessee company token a work in a capacity of contractor not being a developer.

- iv) *The assessee company has carried out construction of work of Ahmedabad Urban Development Authority, Road & Building Department of various district and Panchayat by filing a competitive tender to open market and agreed to work as specification of design, type of work, material etc. designed by the statutory authority. Hence the work done as per terms and conditions of the contract and design, structure, thickness of metal work, asphalt etc. so the assessee company has to work within the frame work decided by the statutory authority.*
- v) *If the contention of the assessee is treated as accepted then the every subcontractor engaged by the assessee company for this work would eligible for deduction u/s 80IA(4). Like transport contractor to carriage grit, sand, asphalt etc., a labor contractor even a financier would claim that they develop infrastructure facility.*
- vi) *The assessee company sighted the decision of the Hon'ble I.TAT. Bench-F, Mumbai in case of Patel Engineering Ltd. 94 ITD 411. I have gone to the said judgment. The facts of assessee company are different than the facts referred judgment. Some of them are stated under:*
- a) *Patel Engineering Ltd. was taken a two major work of contracts, to construct under ground tunnel and specialized structure to supply water from river to power house and back to river and another project is to construct in let tunnel for water supply up to point of power house which requires design, architecture, structure design, specification etc. whereas the assessee company carry out the construction of part of road as specified in the contract, design, structure planning etc. were already done by statutory body.*
- b) *On going through the judgment it is noticed that the following words appearing.*
- "The assessee had developed infrastructure facility as agreement with the Maharashtra State Government/APSEB. Therefore merely because in the agreement for development of infrastructure facility".*

So, it is cleared from the above text that Patel Engineering Ltd. Had entered and agreement for development not for merely contract. As the copy/details of the same agreement is not available it could not be stated that what sort of

development was agreed by Patel Engineering Ltd. Whereas in the case of assessee company no development agreement entered with any government or statutory body which the prime requirement of provisions of section 80IA(4) Income Tax Act, 1961.

- c) *It is further noticed from the text of the judgment that the Patel Engineering Ltd. had entered into an agreement with the Government of Maharashtra and with APSEB. APSEB is a statutory body. Whereas the assessee company make a contract with AUDA and other statutory body for the specified work according to design, structure, style as agreed in contract. The Government of Gujarat (State Government)*
- vii) *The work carried out by the assessee company are in nature of contract only, as the roads, stated be developed are the portion of whole infrastructure facility by the statutory body.*
- viii) *The statement by the assessee company that "the owner is ultimate designer of the facilities or has developed the infrastructure facility. Therefore govt. & not carrying on any business of construction activity, but the govt. is interested in development of infrastructure project to facilitate the growth." is incorrect. The statutory body i.e. AUDA and other R & B departments are definite/absolute owner of the road constructed by the assessee company. Further the assessee company stated that the infrastructure facility was transferred back. The contention is incorrect as the ownership was never transferred to the assessee company by Government of statutory body.*
- ix) *The possession of a Drum mixed plant. Paver Project, JCB machine, roller, dumper and other equipment, skill persons, engineers, machine operators etc, does not qualify the assessee company for deduction u/s 80IA(4).*
- x) *The assessee company stated that they have carried out work as per agreement executed in whatever form and acted according to the terms of agreement and cost of that agreement. The assessee company fails to establish that work (as per the agreement) involves any development work. All the specification design etc. are provided by the other party not by the assessee company.*
- xi) *Even though the H'onble I.T.A.T., Mumbai given the decision in favor of Patel Engineering Ltd. It is not known that the department has accepted the findings of the H'onble I.TAT., Mumbai. However it is cleared that the Assessing Officer at Mumbai and the CIT(Appeals) did not accepted the contention of the contractor assessee."*

9. The Ld. CIT(A) while confirming the order of rejection passed by the Ld. AO mainly concluded on the ground that though the assessee engaged designers and skilled technicians for executing the final details of the designs and project but there were always under the control and subject to the approval of the contract and therefore, the appellant could not be regarded as a developer of infrastructure facilities.

10. While analyzing the work pattern of the assessee we would like to mention the following details available on record particularly the tender document, the financial statement of the assessee and other details annexed to the Paper Book filed before us for determination of the issue as to whether the assessee is a “work contractor” or “developer” and is entitled to deduction claimed under Section 80IA(4) of the Act even after the Explanation inserted after sub-Section 13 of Section 80IA of the Act by the Finance (No.2) Act 2009 w.e.f. 01-04-2000.

The Explanation reads as follows:

Explanation.—For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub-section (1).

11. The above explanation has denied the benefit of deduction under Section 80IA(4) of the Act to a person who executes a project which is in the nature of works contract. In that view of the matter, the first and foremost condition imposed upon an assessee is to establish that he worked not as ‘work contractor’, but as a ‘developer’.

12. On the other hand, a 'contractor' is a person who undertakes work on a contract basis. He does not assume risks and responsibilities like that of a developer. He merely carries out the work as has been instructed to him by the principal. Moreover, in case of such work the contractor gets fixed amount of revenue for executing such work and is not entitled to any share of profit from revenue generated by the developer/land owner. In other words, the developer acts as a principal whereas the contractor acts as an agent in performing the functions as required by the developer. The developers, in true sense, are the persons who are carrying out the business of developing or operating and maintaining or developing, operating and maintaining the infrastructure facility whereas the contractors are those persons who merely execute part of these functions on behalf of developer and do not own any risks and responsibilities of the work. In such cases, the contractors may not be eligible for the deduction under Section 80-IA of the Act as they are not developing any infrastructure facility but only providing assistance to the actual developer.

13. In view of the above, in order to ascertain whether a civil construction work is assigned on development basis or contract basis only the terms and conditions of the agreement needs to be considered. Only on the basis of the terms and conditions and the scope, ambit and nature of the contract assigned it could be ascertained whether it is a "work contract" or a "development contract".

14. It is admitted fact that the assessee is registered as category I contractor for Road with the State Government. The appellant company has also deposited Rs. 22,50,000/- for granting of Registration which is to be refunded only on surrender of said Registration Certificate. For coming under the zone of construction as eligible for participating in the Tender processes/Bid as per the Tender document available before us being part of the Paper Book the appellant has to be the owner of the following equipments as available at Page 12 & 13 thereof:

- a. *Tractor trolley-2*
- b. *Dozer, 80HP @ 20 cum per hour*
- c. *Hydraulic Excavator*
- d. *Motor Grader*
- e. *Tractor Rotavator*
- f. *Water Tanker 6 KL capacity*
- g. *Wet Mix Plants*
- h. *Batch Mix HMP*
- i. *Electric Generator*
- j. *Front end Loader 1 cum bucket capacity*
- k. *Paver finisher hydrostatic with sensor control*
- l. *Vibratory Roller*
- m. *Tipper*
- n. *Mechanical Broom*
- o. *Air Compressor*
- p. *Bitumen pressure distributor*
- q. *Emulsion pressure distributor*
- r. *Concrete Mixer*
- s. *Asphalt Tanker*
- t. *Set of all laboratory Testing Equipments*
- u. *Weigh bridge(preferably with electronic set up)”*

15. Clause 1 of the Tender document clearly specifies that no contract will be awarded except to responsible bidders capable of performing the class of work contemplated. Before the award of the contract, any bidder may be required to show that he has necessary facilities, experience, ability and financial resources to perform the work in satisfactory manner

within the time stipulated. The bidder may be required to furnish the department with the statement as to their experience and financial status.

16. Clause 1 of the general rules and directions for the guidance of the bidders available at Page 24 of the tender document and Clause 14.4 of Page 33 clarify that the specific drawings and designs are recommended by the contractor which shall be approved by the competent authority and shall part of the accepted Tender. The Tender document further specifies that the bidder has to bring the required qualitative materials at his own cost.

17. We have also perused the quantitative purchase of the Audit Report under Section 44AB of the Act available at the Paper Book filed before us. It is also evident on record that particularly from the Audit Accounts available at Page 112 of the Paper Book that the assessee has purchased the materials of Rs. 3,19,38,994/- during the year under consideration. It is relevant to mention that various materials and mix were required to be tested by the assessee itself as its own cost from time to time at Government recognized laboratories as specified by the Tender document.

18. It is also on record that the assessee has to arrange own finance by raising adequate capital, reserves & surplus, secures & unsecured loans evident in the Balance Sheet available at Page 107 of the Paper Book. The assessee has raised total amount of Rs. 3,56,47,029/- for the year under consideration. The assessee has to use and invest heavily in purchasing plant and machinery in order to fulfilment the eligibility

criteria to bid the Tender and to carry out the project of development of roads. In this regard, we have noted that the gross block of assets are to the tune of Rs. 2,01,36,510/-. Moreso, the assessee has to employ own teams of qualified Civil Engineers and arrange for skilled and semi-skilled and unskilled workers.

19. So far as the financial risk is concerned the appellant has to pay Security Deposit at 10% of the total work order over a contract period. Relevant to mention that the amount of Security Deposit over a period was to Rs. 1,02,47,932/-. It was specifically mentioned in the Clause 1 of terms and conditions of the contract that 50% of the Security Deposit alongwith performance bond shall be refundable within 15 days after the final completion certificate issued as per Clause-7. All dues under this contract or other contract, or otherwise including the royalty charge shall be recovered from the aforesaid amount of 50% of the said Security Deposit in the event no due certificate is produced before the authorities. The remaining 50% of the security deposit shall be refunded after the expiry of the Defect Liability Period in terms of Clause-17 and 17A upon deduction of the amount of expenses, if any, due to the Government under this contract. So far as the liquidated damages is concerned terms have been stipulated that if the contractor fails to complete contract by the stipulated date he shall pay liquated damages of 0.1% of the contract value per day from the date of delaying said work up to the date of completion and handing over to contract.

20. The Defect Liability Period is the period of 6 to 12 months for free maintenance and guarantee period from the certified date of completion work.

21. It was also mentioned in the Tender document that the assessee has to arrange for labour and is also responsible for safety of all concerned. The assessee has to take “Contractor’s all risk insurance”, Workmen compensation insurance, Vaccination Certificate, Medical Aid. The assessee has to provide several equipments, build sufficient huts, providing drinking water, proper sanitation, drainage, rest rooms etc. as per different clause under the contract guidelines. The bidder has to provide canteen to be run on no profit or loss basis and keep the canteen accounts and to get them audited. The contractor will have to construct shed for storing Material at work site having double locking arrangements, has to provide suitable scaffolds and working platforms, gangways, stair ways, and shall comply all types of safety measures. The contractor is not permissible to set fire to any standing general trees, bush, wood or grass without written permission and has to take necessary measures to prevent fire spreading or otherwise damaging surrounding property. The Clause has also made it clear that the contractor would be liable for any damage done in or outside work area. It has to take all necessary measures for safety of traffic during construction and provide, erect and maintain barricades including signs and coma, marking, flags, lights and flagmen, as may be required. The contractor is not permitted to set the work without written approval in default the contract shall be

rescinded and the Security Deposit would stand forfeited as per Clause 26 of the Tender document.

22. In terms of Clause 3 of Tender document if the contractor defaults in work or violates the term of the contract it shall be liable to penalty in terms of lien of Government over the plant, machinery, equipments etc. and forfeiture of security deposit too.

23. In view of the above detailed paper books containing the above tender documents comprising agreement clauses (relevant clauses have already dealt with by us hereinabove) the contents whereof would definitely suggest that the assessee has been entrusted with the work of development infrastructure facilities, and therefore being a 'developer', the assessee would be entitled for deduction under Section 80IA(4) of the Act. Relevant to mention that perusal of all tender documents in respect of the years also mentioned hereinabove reveals that the terms and conditions mentioned therein are almost same except the figures and name of the project.

24. The primary condition is that the enterprise must carry on the work of "developing" an infrastructure facility. As mentioned above, Explanation under sub-Section (13) of Section 80-IA clarifies that this section will not apply to any business which is in the nature of a "works contract". In other words, the essence of this section is that, the benefit of Section 80-IA(4) would be available to a developer and not to a contractor simplicitor. In the present case the lower authorities have denied the benefit of Section 80-IA(4) to the appellant-company on the

assumption that the appellant-company is engaged in executing merely a work contract and it is not carrying on the business of developing an infrastructure facility. The assessee has undertaken entirely and exclusively the projects awarded by the local government authorities, as it is evident from the records as explained and already narrated hereinabove and therefore, there is hardly any basis for assuming that it is merely a contractor executing a works contract. The difference between a "developer" and a "contractor" has to be properly analyzed and understood. This issue has come up before the Hon'ble ITAT, Amritsar Bench in the case of M/s. TRG Industries P. Ltd. in ITA Nos. 433 etc./Asr/2009. The Tribunal after relying various case laws has laid down the following parameters when to treat an assessee as a developer or contractor.

- (i) The assessee does not have to develop the entire infrastructure facility to qualify for deduction u/s.80-IA(4) and if only a part of the infrastructure facility is developed, the assessee would be eligible for deduction.
- (ii) The three requirements of section 80-IA(4) viz. development, operation and maintenance are not cumulative. Thus, an enterprise which only develops facility would also be entitled to the benefit of section 80-IA(4).
- (iii) Merely because the assessee is referred to as a contractor in the agreement, it would not debar it from claiming deduction.
- (iv) Direct agreement between the transferee-assessee and the specified authority is not a mandatory requirement u/s.80-IA(4) of the I.T. Act.

Needless to mention that the assessee qualified all the criterion fixed by the Amritsar Bench

25. We have already dealt with relevant clauses of the tender documents stipulating various conditions viz. financial involvements, risks, obligations and responsibilities of the assessee in developing, operating and maintaining of infrastructure facilities, which clearly make the case of the assessee within the scope and ambit of Section 80IA(4) of the Act so as to claim the impugned deduction.

26. We have considered the judgements relied upon by the Ld. AR passed by different judicial forums including the judgement passed in the matter of Patel infrastructure and Katira construction (supra) passed by the Rajkot Bench and Katira construction passed by the Hon'ble jurisdictional High Court wherein the constitutional validity of insertion of explanation below sub-Section 13 of Section 80 IA of the Act was challenged. The Ld. Representative appearing for the Revenue vehemently argued on this point that the jurisdictional High Court in the said matter already decided the issue against the assessee. Fact remains that the jurisdictional High Court in that particular matter dealt with the constitutional validity of the insertion of explanation as mentioned hereinabove and decided the same in favour of the revenue to this effect that such explanation brought with retrospective effect from 01.04.2000 by the Finance Act No. 2 of 2009 was very well within the competence of Parliament. As such there was no issue whether the assessee was acting as a developer or contractor was raised before the Hon'ble

Jurisdictional High Court neither the said has been decided in the said judgement.

27. We are further noted that relief under Section 80IA(4) of the Act has been granted in favour of the assessee for A.Y. 2009-10, 2010-11 & 2011-12 by the Ld. CIT(A). Upon perusal of the said orders passed by the Ld. CIT(A) being part of the Paper Book filed before us it appears that the Ld. CIT(A) has considered identical work pattern executed by the assessee and finally decided the issue in favour of the assessee. It is relevant to mention that no appeal has been preferred by the Revenue against these orders.

28. In the light of the above discussion and perusal of various clauses of Tender documents and case laws relied upon by both the parties, it reveals that the tender work under consideration are not for a specific work, rather they are for development facility as a whole. The responsibility is fully assigned to the developer for execution and completion of the work. Various stipulations contained in the Tender documents demonstrate various risks undertaken by the assessee for execution of the project work awarded by the competent authority in terms of financial resources, manpower deployment, both technical and administrative expertise, drawing and designing of the project specifications and getting approval from the competent authority, safety and security of project and human resources, compliances of various statutory rules and laws. Therefore, merely because in the agreement for development of infrastructure facility, assessee is referred to as

contractor or because if some basic specifications are laid down, it does not detract the assessee from the position of being a developer, nor will deprive the assessee from claiming deduction under Section 80IA(4) of the Act. As such, looking to the overall aspects of work undertaken by the assessee we can safely come to the conclusion that the assessee is engaged in development of the infrastructure facility and therefore, a developer, which entails the assessee to claim benefits under Section 80IA(4) of the Act. Thus, the issue of claim of deduction under Section 80IA(4) of the Act is allowed in favour of the assessee and against the Revenue. This common ground raised in all the appeals are accordingly disposed of.

29. Ground No.2 in ITA No. 1679/Ahd/2011 for A.Y. 2007-08:

This ground has already been decided in favour of the assessee in the case Rajkamal Builders Infrastructure Pvt. Ltd. vs. DCIT in ITA Nos. 118/Ahd/2009 and others. While dealing with the issue the Coordinate Bench has been pleased to observe as follows:

“45. During the course of assessment proceedings, the AO noticed that the assessee in the profit & loss account has debited net interest expenses. As per the details furnished, it was found that the assessee has earned interest income from FD and investment in Sardar Sarovar Narmada Nigam and interest from AEC to the tune of Rs.56,96,723/-, whereas interest expenses on bank OD and interest paid to depositors was to the tune of Rs.1,08,38,755/-, and therefore, there was net interest expenses of Rs56,96,723/-. It is also noticed by the AO the assessee has received some other income in the form of dividend, misc. income, service charges. According to the AO, the net profit shown by the assessee inclusive of interest income earned by the assessee from the bank deposits and bonds, and claimed the same as deduction under section 80IA/80IB of the Act. The AO was of view that interest income could not be considered as income derived from industrial undertaking and

therefore interest receipt were not eligible for the deduction, as sought for. He further opined that since the assessee has claimed deduction under section 80IA(4) of the Act of Rs.1,95,62,210/- on several projects, this amount included interest income also. In response to the show cause notice, it was explained by the assessee that the assessee has made different fixed deposits with different bank as security deposits with the Government Authorities in respect of the project contract, and for giving bank guarantees. For getting bank guarantee the assessee has to keep certain amount fixed deposits as margin money. These fixed deposits were made out of borrowed funds for giving security deposits to the Government. Therefore, claim of deduction under section 80IA was fully allowable. However, the AO did not accept this explanation of the assessee. He was of the view that since the assessee has huge surplus funds, the same was parked with the bank and earned interest income, which was not part of the income earned from any industrial activities but receipts from the investment of surplus fund with bank. The AO accordingly disallowed interest income and other income to the tune of Rs.65,58,550/-. In appeal preferred by the assessee, the CIT(A) confirmed the action of the AO. Hence, assessee is before the Tribunal.”

In the absence of any changed circumstances respectfully relying upon the ratio laid down by the Coordinate Bench on the identical issue we decide this ground of appeal in favour of the assessee.

30. Ground No. 3 in ITA No. 1679/Ahd/2011 for A.Y. 2007-08:

The depreciation on plant and machinery to the tune of Rs. 31,78,286/- has been disallowed by the Ld. AO. In fact, the assessee claimed such plant and machinery has been used for development of infrastructure facility project. Since the assessee has not been found to be a developer but a contractor by the Ld. AO, entire depreciation claimed on user of plant and machinery has been disallowed consequentially which was further confirmed by the First Appellate Authority. In this appeal the assessee has already been granted relief by us under Section 80IA(4) and as has concurred the status of a developer and not a contractor, the assessee is entitled to the consequential claim of

depreciation on plant and machinery to the tune of Rs. 31,78,286/-.
Hence, the same is hereby allowed.

31. In the combined results, all the appeals are preferred by the assessee are allowed.

This Order pronounced in Open Court on	22/06/2022
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Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER

Ahmedabad; Dated 22/06/2022

TANMAY, Sr. PS

TRUE COPY

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad