IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1146 OF 2004
WITH
INCOME TAX APPEAL NO. 934 OF 2008

The Commissioner of Income Tax Central-II,
Aayakar Bhavan, 4th Floor, M. K. Road,
Mumbai-400 020. … Appellant

Versus

M/s. Patel Engg. Ltd.,
Patel Estate, S. V. Road,
Jogeshwari (West),
Mumbai-400 102. ... Respondent

Mr. N. C. Ranganayakulu for the Appellant.

Mr. Percy Pardiwala, Senior Advocate a/w. Mr. Madhur Agarwal, Mr. Punit Shah, Mr. Ranjit Shetty, Mr. Rahul Dev and Ms. Avina Karnad i/b Argus Partners for the Respondent in ITXA 934/08.

Mr. Rafique Dada, Senior Advocate a/w. Mr. Percy Pardiwalla, Senior Advocate, Mr. Madhur Agrawal, Mr. Ranjit Shetty, Mr. Punit Shah, Mr. Rahul Dev and Ms. Avina Karnad i/b Argus Partners for the Respondent in ITXA 1146/04.

CORAM : M. S. KARNIK AND
S. M. MODAK, JJ.

JUDGMENT RESERVED ON : 12th FEBRUARY, 2026

JUDGMENT PRONOUNCED ON : 11th MARCH, 2026

JUDGMENT (PER M. S. KARNIK, J.):

1. These are appeals under the provisions of Section 260A of the Income-Tax Act, 1961 (“the said Act” for short) preferred by the Revenue

challenging orders dated 22nd June, 2004 and 26th February, 2008 passed by the Income Tax Appellate Tribunal ("ITAT" for short). The respondent is an assessee under the provisions of the said Act and the relevant assessment years are 2000-2001 and 2001-2002.

2. By the impugned orders, the appeals filed by the assessee were allowed by the ITAT. These appeals were admitted on the following substantial question of law:-

> a) The substantial question of law arises in the present appeal is regarding the correct interpretation of Section 80IA (4) of the Income-Tax Act, 1961 and whether in the facts and circumstances of the case and in law the Hon'ble Tribunal is right in holding that the assessee is a developer of infrastructure facilities and eligible for deductions of Rs.80,47,09,510/- under Section 80-IA (4) in respect of the income derived by the assessee in respect of the two projects under consideration.

3. Income Tax Appeal No. 1146 of 2004 pertains to the Assessment Year 2000-2001 and Income Tax Appeal No. 934 of 2008 relates to the Assessment Year 2001-2002. Since these appeals arise from a similar set of facts, we have referred the facts only from Income Tax Appeal No. 1146 of 2004 herein below:-

The assessee had filed the return of income for Assessment Year

2000-01 on 30.11.2000, declaring a total income of Rs.18,52,40,224/-. During the year under assessment, the assessee was engaged in the activity of construction of two projects, viz. Srisailam Project in Andhra Pradesh and Koyna Project in Maharashtra, the work of which was allotted to the assessee by the respective State Governments. The assessee claimed that the said two projects were infrastructure projects and the assessee had developed the same and, therefore, it was entitled to deduction under Section 80-IA (4) in respect of the profits derived from the execution of the said projects. For the reasons discussed in the assessment order, the Assessing Officer came to the conclusion that the assessee fulfilled none of the conditions mentioned in Section 80-IA for claiming deductions.

4. It is the case of the Revenue that though the assessee is a company registered in India, it did not own the infrastructure facility of Koyna and Srisailam for which it claims deductions. The Koyna Project belongs to the Maharashtra Government and has been funded by the Government of India through World Bank loan. Similarly, Srisailam Project is owned by the Andhra Pradesh State Electricity Board which is a Public Sector undertaking of the Andhra Pradesh Government. It is, therefore, the opinion of the Assessing Officer that the assessee failed to meet the conditions stipulated under Section 80-IA (4) of the Act. The Assessing Officer disallowed the deductions as claimed by the assessee.

5. The assessment order is dated 13th March, 2003. Being aggrieved by the assessment order, the assessee preferred its appeal before the Commissioner of Income Tax-Appeals ("CIT (A)" for short). The CIT (A) vide its order dated 10th February, 2004 confirmed the order of the Assessing Officer and dismissed the appeal of the assessee for the reasons recorded.

6. Being aggrieved by the said order of the CIT(A), the assessee preferred its appeal before the ITAT. The ITAT vide its impugned order dated 22nd June, 2004, allowed the appeal of the assessee and dismissed the cross appeals filed by the Revenue.

Submissions of the Appellant

7. Shri Ranganayakulu, learned counsel for the Revenue invited our attention to the findings of the CIT(A) and the Assessing Officer to contend that the orders passed by them correctly interpret the scope and purport of Section 80-IA(4) of the said Act. It is submitted that the materials on record clearly demonstrate that the assessee cannot be said to be a developer of the aforesaid two projects and therefore the Assessing Officer was justified in disallowing the deductions under Section 80-IA (4), which was confirmed by the CIT (A).

8. Learned counsel submitted that the ITAT erred in holding that the assessee fulfills all the requisite conditions prescribed under Section 80-IA

(4) and thereby erred in deleting the disallowance of deduction of Rs.80.47 Crores. Learned counsel has emphasised on the fact that the assessee was merely a contractor and the real developers were the respective State Governments, who have awarded the contract to the assessee. He submitted that the deduction under Section 80-IA (4) was meant to be provided to the developers of infrastructure projects because the Government did not have sufficient resources to meet the finance of the infrastructure projects and for further encouraging the participation of private sector in the development of infrastructure sector. The exemption under Section 80-IA (4) was provided to the persons who develop infrastructure projects by mobilizing their own resources. According to the learned Senior Advocate, the Assessing Officer has rendered clear findings to the said effect in the Assessment Order that the project of Koyna is owned by the Maharashtra Government and the Srisailam Project is owned by the Andhra Pradesh Government.

9. It is submitted that the assessee was paid periodically for the work executed by it and therefore, the claim of the assessee is not sustainable since not only the Government of Maharashtra and the Government of Andhra Pradesh are the real developers in respect of the said two projects but the projects were even financed by the respective State Governments.

10. In the submission of learned counsel, the CIT(A), in paragraph Nos.

7.17 to 7.20 has observed that the assessee has not entered into an agreement with the Government Authorities to develop new infrastructure facilities as per Section 80-IA (4) and so called development of infrastructure facilities was not carried out by the assessee on its own for Section 80-IA (4) to apply.

11. Learned counsel submitted that the Tribunal erred in observing that the assessee had transferred the facilities provided by it by handing over the possession thereof to the Government of Maharashtra/APSEB as required by the agreement, as such handing over can never amount to transfer of infrastructure facility. It is the contention of the learned Senior Advocate that the assessee was never in possession of the so called infrastructure facility or the land on which the infrastructure project was constructed and that the assessee enterprise had never entered into an agreement with the Government for transferring the new facility which it claimed to have developed. Much emphasis is placed by learned counsel to submit that the term 'handing over' cannot be equated with 'transfer' and that the ownership of the land was always vested with the Government. It was further urged that the entire infrastructure facility was not developed by the assessee but what was developed was only the last stage which was stage-IV of the development project.

12. Our attention is brought by learned counsel to the invitation for the

bid by the Government of Maharashtra which refers to the present position of work. The Executive Engineer clearly stated that some work has already been carried out departmentally and on LCB contract. Further, the construction shaft on head race tunnel has been completed departmentally whereas the work of head race tunnel through construction shaft for 500 m length was awarded under an LCB contract, i.e. to other parties. Similarly, the work relating to access tunnel to emergency value tunnel, the adit to head race tunnel and the inter-adit to pressure shaft was also awarded under an LCB contract, i.e. given to other parties. According to learned counsel, this makes it very clear that the assessee is only one among the other contractors and what the assessee was carrying out was only the civil works on construction jobs in a small portion of the overall project. Therefore, the assessee had no control or domain over its areas of work or the project. The certificate issued by the Chief Engineer only stated that the water from Shivajinagar lake of Koyna Hydraulic Electric Project is utilized for water supply, irrigation etc. Learned counsel submitted that the Tribunal failed to appreciate the observations of the Assessing Officer in it's order that though the Koyna dam was constructed, it does not mean that it was constructed by the assessee. It is just that the facility claimed to have been developed by the assessee was on the last stage of the already developed project. Learned counsel submits that the Tribunal ought to

have appreciated that merely handing over a part of the project which the petitioner had developed in terms of the agreement would not amount to a transfer within the meaning of Section 80-IA (4). It is urged that it was always State Government which was in possession of the infrastructure facilities and the land on which the infrastructure project was constructed.

13. Learned counsel for the appellant in support of his submission relied upon the decision of the Hon'ble Supreme Court in **Commissioner of Income Tax, Orissa & Ors. Vs. M/s. N. C. Budharaja and Company & Ors.**[1]

Submissions of learned Senior Advocate for the Respondent

14. Shri Rafique Dada and Shri Pardiwala, learned Senior Advocates for the assessee, on the other hand, invited our attention to the detailed findings recorded by the ITAT in support of his submission that the view of the ITAT being completely in consonance with the provisions of Section 80-IA, the impugned order does not call for any interference. We have referred to the submissions of learned Senior Advocates in detail while analysing the rival submissions.

Considerations

15. The assessee is a public limited company engaged in the business of developing civil engineering projects such as tunnels, water supply projects, irrigation projects, hydel power projects, dams, bridges, rail

1 1994 Supp (1) SCC 280

projects etc. The assessee has *inter alia* claimed deduction under Section 80-IA of the Act, available to developers of such infrastructure facilities while filing its income tax returns. The returns filed by the assessee were selected for scrutiny assessment, culminating into assessment orders under Section 143(3) of the Act for the assessment years in question. The Assessing Officer, in the assessment orders so passed, disallowed the deductions claimed by the assessee under Section 80-IA (4) of the Act.

16. For the assessment year in question, the Assessing Officer analysed various agreements entered into between the assessee and the Government/ Government authorities/Government corporations/statutory bodies and disallowed the deduction claimed in the said assessment year *inter alia* on the following grounds:-

(1) The assessee is only a civil contractor and not a developer of the infrastructure. Since the assessee was paid periodically for the works executed by it and no financial risk was undertaken by the assessee, the assessee cannot be termed as a developer of the infrastructure. The various amounts expended by the assessee were in the nature of expenditure and not investment.

(2) Under Section 80-IA of the Act, the enterprise should own the infrastructure for which such enterprise should enter into an agreement with the Central Government or State Government or

other local authorities.

(3) The infrastructure was not "transferred" to Central Government or State Government or local authority or any other statutory body by the assessee.

(4) The assessee had not started operating and maintaining the infrastructures on or after 1st April, 1995.

(5) The assessee had not developed any infrastructures as defined under Explanation to Section 80-IA (4) of the Act.

(6) The assessee has only developed a part of the infrastructure and not the whole of it.

(7) The assessee had merely carried out the works as per specifications laid down by the concerned Government or local authority.

17. Before proceeding any further, it would be apposite to refer to the relevant provisions of the said Act as placed for our consideration by learned Senior Advocates Shri Dada and Shri Pardiwala. Prior to amendment vide Finance Act, 1999, Section 80-IA was substituted vide the Finance Act, 1991, to incentivize the private sector to participate in infrastructure development and key industrial activities, which were traditionally dominated by public sector. Initially, as this provisions stood, it provided deduction for profit and gains derived from any business of an

industrial undertaking or cold storage or hotel or from operation of ships.

18. Subsequently, vide Finance Act. 1995, the Government introduced sub-section (4A) to Section 80-IA of the Act as it then stood, providing a tax holiday in respect of infrastructure development. In the memorandum explaining the provisions of Finance Bill, 1995, it is recorded that since the Country is deficient in respect of infrastructure such as expressways, highways, airports, ports, etc., additional resources would be needed to fulfill the needs of the Country. With the said intent, the Government allowed a five-year tax holiday for any enterprise which builds, maintains and operates any infrastructure facility such as roads, highways or expressways or new bridges, airports, ports and rapid rail transport systems on BOT or BOOT or similar other basis. Section 80-IA was accordingly amended/modified by Finance Act, 1995, with effect from 1st April 1996, i.e. from A.Y. 1996-97, and sub-section (4A) was inserted whereby profit and gains derived from a business for developing, maintaining and operating any infrastructure facility were also allowed deduction for a number of years as specified in the section.

19. Till the assessment year 1999-2000, Section 80-IA granted deduction in respect of percentage of the profits to the assessees who were engaged in the activity of development, operation and maintenance of an infrastructure facility ie. doing all the three activities. The deduction was

not available to assessees who were engaged in only developing or only operating and maintaining of infrastructure facility.

20. Section 80-IA was substituted vide the Finance Act, 1999 w.e.f. 1st April 2000, which provided for a separate and detailed framework for infrastructure facilities. Under this amendment, section 80-IA was liberalized to provide that any enterprise carrying on the business of either (i) developing, (ii) operating and maintaining or (iii) developing, operating and maintaining an infrastructure facility, would qualify for deduction under section 80-IA. The section offered deduction at 100% of the profit for ten consecutive assessment years out of twenty years to be selected by the assessee.

21. Post the amendment vide the Finance Act, 1999, the extract of section 80-IA of the Act, insofar as relevant to the present case, reads as under:-

> *"Section 80-IA. Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.-*
>
> *(1) Where the gross total income of an assessee includes any profits and gains derived from any business of an industrial undertaking or an enterprise referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to hundred per cent of profits and gains derived from such business for the first five assessment years commencing at any time during the periods as specified in sub-section (2) and*

thereafter, twenty-five per cent of the profits and gains for further five assessment years.

(4) This section applies to -

(i) any enterprise carrying on the business of (i) developing, (ii) maintaining and operating or (iii) developing, maintaining and operating any infrastructure facility which fulfils all the following conditions, namely -

(a) it is owned by a company registered in India or by a consortium of such companies;

(b) it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for (i) developing, (ii) maintaining and operating or (iii) developing, maintaining and operating a new infrastructure facility subject to the condition that such infrastructure facility shall be transferred to the Central Government, State Government, local authority or such other statutory body, as the case may be, within the period stipulated in the agreement

(c) it has started or starts operating and maintaining the infrastructure facility on or after the 1st day of April, 1995;

Provided that where an infrastructure facility is transferred on or after the 1st day of April, 1999 by an enterprise which developed such infrastructure facility (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:

Provided further that nothing contained in this section shall apply to

any enterprise which starts the development or operation and maintenance of the infrastructure facility on or after the 1st day of April, 2017.

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, inland ports or navigational channel in the sea;"

22. Thus, vide the aforesaid amendment to section 80-IA, the scope of the section was widened to include any enterprise which develops, or maintains and operates, or develops, maintains and operates an infrastructure facility, subject to satisfaction of all other conditions of the said section.

23. Simultaneously, section 10(23G) was also amended vide Finance Act 1999 to extend the benefit of exemption to the specified entities in respect of investment in enterprises wholly engaged in either (i) developing, (ii) maintaining and operating or (iii) developing, maintaining and operating an infrastructure facility.

24. The Central Board of Direct Taxes ("CBDT") in its Circular No. 779 dated 14th September 1999 (in paragraph 11.2 thereof) also clarified the following in respect of amendment to section 10(23G):-

> *"The Act amends this clause to enhance the scope of the nature of infrastructure activities eligible for exemption under this clause. It provides that enterprises wholly engaged in either (1) developing, (iii) maintaining and operating an infrastructure facility would now be eligible for the exemption. With this amendment, it is made clear that any enterprise engaged in developing, maintaining and operating the infrastructure facility or maintaining and operating the infrastructure facility or only developing the infrastructure facility would also be eligible for exemption under this clause"*

25. The purpose of the amendment to section 80-IA of the Act, therefore, was to also allow deduction to any enterprise that only develops an infrastructure facility.

26. Section 80-IA(1) of the Act was further amended by Finance Act, 2001, extending the deduction under sub-section (4) of section 80-IA of the Act to hundred percent of the profit earned by an assessee for a period of ten consecutive years instead of deduction of twenty-five percent of the profits for the subsequent five years. The section, therefore, read as under:

> *"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"*

27. Section 80-IA(4)(i) was also amended by the Finance Act, 2001 by substituting, the following words:

> *"of (1) developing or (ii) operating and maintaining or (iii)*

developing, operating and maintaining in place of the words "of (i) developing, (ii) maintaining and operating or (iii) developing, maintaining and operating." (See relevant extract of Finance Act 2001 at Sr. No. 33 of COD)

28. The above amendment was carried out to make it amply clear that a person who only develops but does not operate or maintain the facility is also eligible for deduction under section 80-IA of the Act. The insertion of "or" after each of the activities was clearly clarificatory in nature with an intent to avoid any confusion in this regard. The same is clarificatory in nature also because, the memorandum explaining the provisions of Finance Bill, 1999 itself, in the explanation with respect to modification of section 10(23G) of the Act, states that the exemption under the said section is sought to extend the benefit to enterprises engaged in (i) developing, maintaining and operating or (ii) developing, or (iii) maintaining and operating an infrastructure facility would now be eligible for the benefit. Clearly, therefore, by virtue of this amendment vide Finance Act 2001, the intention of the legislature was further fortified to the extent that any enterprise which is engaged only in development of an infrastructure facility is also eligible for deduction under section 80-IA of the Act.

29. Thereafter, vide Finance Act 2007 (with retrospective effect from 1st April 2000), an Explanation to section 80-IA of the Act was inserted to the effect that the deduction under section 80-IA of the Act would not be

available to a person who executes a "works contract" entered into with the undertaking or enterprise. The Explanation read as follows:

> *"For the removal of doubts, it is hereby declared that nothing contained in this section shall apply to a person who executes a works contract entered into with the undertaking or enterprise, as the case may be."*
> *(See relevant extract of Finance Act 2007 at Sr. No. 34 of COD)*

30. In the memorandum explaining the provisions of Finance Bill, 2007, the intent behind introducing the said Explanation has been stated. The memorandum explains that the tax benefit under section 80-IA of the Act was introduced for the reason that industrial modernization requires a massive expansion of, and qualitative improvement in, infrastructure (expressways, highways, airports, ports etc.) which was lacking in our country, and the purpose of the tax benefit has all along been for encouraging private sector participation by way of investment in development of the infrastructure sector and not for the persons who merely execute the civil construction work or any other works contract. They further clarify that in a case where a person makes the investment and himself executes the development work i.e., carries out the civil construction work, he will be eligible for tax benefit under section 80-IA. In contrast to this, a person who enters into a contract with another person [i.e.. undertaking or enterprise referred to in section 80-IA] for executing works contract, will not be eligible for the tax benefit under section 80-IA.

31. Thereafter, vide Finance Act, 2009 (with retrospective effect from 1 April 2000), the above Explanation was substituted as follows:

> *"For the removal of doubts, it is hereby declared that nothing contained this section shall apply in relation to a business referred to in subsection (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)."*

32. We find substance in the submission of Shri Dada that the Explanation inserted by the amendment made vide Finance Act, 2007 as well as Finance Act, 2009 is not applicable in the case where the assessee executes the work by shouldering investment & technical risk by employing team of technically & administratively qualified persons and where it is also liable for liquidated damages if it fails to fulfil the obligation laid down in the agreement.

33. Dealing with the submission of the Revenue that the assessee is a contractor and not a developer for the purpose of Section 80-IA, it is seen that during the assessment year, the assessee was essentially engaged in the business of activity of development of construction of two projects i.e., Koyna Project executed pursuant to the agreement with the Government of Maharashtra, and Srisailam Project executed pursuant to the agreement with the Government of Andhra Pradesh. The Koyna dam was constructed with the purpose of irrigation and water supply in Konkan region and also with the intent to generate

hydro-electricity. The Srisailam Project situated on Krishna river, is a multi-purpose project developed for the purpose of water supply, irrigation and generation of hydro-electric power.

34. Shri Dada submitted that the meaning of term "developer" means a person carrying out the action of development. We therefore find force in the submission of Shri Dada that development by its intrinsic nature means bringing something into existence by way of scientific structural planning, technical expertise and precise execution. As against that, a works contract means a contract executed as per the planning, design and direction of some other person. The primary point of distinction between a developer and a contractor, as rightly submitted by Shri Dada, is essentially to be determined based on the terms of the contract, and by applying two primary factors to the facts of the case, them being (i) whether the financial, operational and other executional risks were borne by the assessee or not, and (ii) whether the planning, development and design has been carried out by the assessee or it is merely executing/performing specific actions as per the directions of the Government.

35. Shri Dada further apprised this Court of the role played by the Assessee in the execution of the two projects. Insofar as the Srisailam

Project is concerned, learned Senior Advocate submitted that the project is a multipurpose project intended to harness the potential of River Krishna for generating 900 MW of power through an underground powerhouse. It was stated that the Assessee was required to develop an underground tunnel connecting the river to the underground powerhouse so as to facilitate the inlet of river water into the powerhouse turbines and that the said tunnel was about 347 meters in length and 16.1 meters in height. Learned counsel further submitted that the Assessee was also required to develop underground structures such as surge chambers, draft tube tunnels and tail race tunnels, which were designed to regulate the velocity of water for irrigation purposes, thereby enabling the generation of approximately 60,000 million cubic feet of water for irrigation in the State of Andhra Pradesh. These tunnels were stated to extend to about 2323 meters in length and 16.1 meters in height. It was also submitted that for executing the said works, the Assessee engaged around 40 engineers and consultants, about 30 subcontractors, more than 800 skilled workers and over 1000 semi-skilled and unskilled workers. The Assessee also deployed various machinery and equipment, including 10 excavators, 20 trucks, 80 tippers, 10 dumpers, around 100 drilling machines, 11 concrete pumps, as well as stone crushers and

compressors. The total value of the machinery and assets deployed for the project was stated to be approximately Rs.30 crores, including machinery worth about Rs.20 crores purchased specifically for executing the project.

36. With regard to the Koyna Project, learned counsel submitted that the Assessee was entrusted with the construction of the inlet tunnel up to the point of the powerhouse as part of a multipurpose project. It was submitted that the Assessee carried out a specialized underwater blasting operation, stated to be the first of its kind in Asia, and incurred substantial expenditure in acquiring the necessary technology for its execution in India. Learned counsel further submitted that the project was technical in nature and that the design, layout and execution methodology were prepared by the Assessee and provided to the Government of Maharashtra. It is stated that for the execution of the said project, the Assessee deployed approximately 25 engineers, 50 supervisory staff, about 250 skilled workers and around 750 unskilled workers and labourers. The Assessee also deployed several assets, including 6 excavators, 2 EOT cranes, crushing plants, pumps, blowers and control laboratory apparatus. The value of the machinery and assets deployed for the project was stated to be approximately Rs.10 crores, including machinery worth about Rs.4 crores purchased specifically for executing the project.

37. Further, it is pointed out that the assessee has borne and undertaken all the development risks, geological risks and investment risks. There is no serious dispute on these factual aspects. We therefore find substance in the submission of Shri Dada that the assessee is a developer of the projects and not merely a works contractor. The assessee, as can be seen from the work performed by the assessee as described above, was not involved in merely executing any specific direction given by the authorities. The assessee was involved in complete development of the project from designing the project as per the specification provided in the tender, deciding the assets to be deployed on its choice and discretion, amount and resources to be invested, costing the same out, bearing the financial and operational risk and ultimately executing the project. Insofar as both these projects are concerned, the government had expressed its vision. The submission of Shri Dada that so far as the projects are concerned, the aspect of how to develop, how to plan, as well as how to execute the same were all at the discretion and commercial decision of the assessee appeals to us. There is no contra material on record to dispute this fact.

38. Further, if the argument of Revenue is accepted, then no assessee will ever be construed to be a developer where Government awards these contracts. If that makes the Government a developer and not the assessee who is actually developing the project, then no assessee can be called a

"developer" for the purpose of Section 80-IA of the Act.

39. At this juncture, it is pertinent to refer to the decision of this Court in **CIT Vs. ABG Heavy Industries Ltd.[2].** The assessee therein was awarded a contract for leasing of Container Handling Cranes at the Jawaharlal Nehru Port Trust (JNPT). Revenue alleged that the assessee therein is not a developer of the facility but had only supplied and installed the Container Handling Cranes at JNPT and is therefore not eligible for deduction under Section 80-IA of the Act. This Court noted the legislative intent of the provision which was private participation in infrastructural development of the nation. After perusing the order of the Tribunal and the facts of the case of the assessee, this Court, at para 18, came to the conclusion that the obligations which have been assumed by the assessee under the terms of the contract are obligations involving the development of an infrastructure facility. Further, it was the argument of the Revenue that the assessee therein was not operating and maintaining the facility and was therefore not eligible for deduction under Section 80-IA of the Act. This Court in para 24 held that upon harmoniously reading the provisions, along with the law as amended by Finance Act, 2001, it can be concluded that deduction is available to an assessee who either (i) develops; or (ii) operates and maintains; or (iii) develops, maintains and operates that infrastructure facility. Therefore, we find favour with the submission of the

2 (2010) 322 ITR 323 (Bombay HC)

assessee that the condition of operating and maintaining the infrastructure facility is not necessary in order to be eligible for deduction under Section 80-IA of the Act, and an assessee engaged only in development of infrastructural facility is also eligible for deduction under Section 80-IA of the Act.

40. It is also profitable to note the decision of the Gujarat High Court in **PCIT Vs. Montecarlo Construction Ltd., Ahmedabad**[3]**.** The assessee therein was engaged by the State Government bodies for construction and infrastructure projects. The allegation of the Revenue was that the assessee was merely a contractor and not a developer of the infrastructure project. The CIT (A) as well as the ITAT, after perusing the nature and scope of work done by the assessee from designing to executing the project, the risks borne by the assessee, and the terms of agreement of the assessee therein with the government bodies, came to the conclusion that the assessee was a developer of the infrastructure facility and not merely a contractor, and was therefore eligible for deduction under Section 80-IA of the Act. The argument of the insertion of Explanation by Finance Act, 2009 with retrospective effect from April, 01, 2000 was also considered by the Gujarat High Court. The Court came to the conclusion that the assessee is a developer and not a contractor, and is therefore eligible for

3 (2024) 161 taxmann.com 222 (Gujarat High Court)

deduction under Section 80-IA of the Act. In **PCIT Vs. Montecarlo Ltd.**[4], Gujarat High Court followed its earlier order in case of **PCIT Vs. Montecarlo Construction Ltd., Ahmedabad** (supra), and held that the assessee was a developer of the infrastructure facility and not a contractor, and was thus eligible for deduction under Section 80-IA of the Act. The Revenue filed a Special Leave Petition against this order of the Gujarat High Court. The Hon'ble Supreme Court in **PCIT Vs. Montecarlo Ltd.,**[5] dismissed the SLP filed by the Revenue on there being a delay as well as on merits. The Hon'ble Supreme Court also observed that the original order of the Gujarat High Court in **PCIT Vs. Montecarlo Construction Ltd., Ahmedabad** (supra) was not challenged before the Supreme Court and had thus attained finality.

41. The facts of the present case, in terms of the agreement, terms of payments, risks undertaken by the assessee are quite close to the facts in **PCIT Vs. Montecarlo Construction Ltd., Ahmedabad** (supra).

42. The assessee also placed reliance on the decision of the Gujarat High Court in **PCIT Vs. N.C.C. M.S.K.E.L (JV)**[6] wherein the assessee was developing the airport, in terms of the contract awarded for the development of the airport, and the assessee therein was alleged to have been undertaking a works contract and not being a developer and was

4 (2025) 475 IR 143 (Gujarat High Court)
5 Special leave Petition (Civil) Diary No.(S). 41220/2025, dated January 09, 2026
6 (2024) 168 taxmann.com 596 (Gujarat High Court)

therefore held to be ineligible for deduction under section 80-IA of the Act. The Court held that the assessee had undertaken the financial and entrepreneurial risk to qualify as a developer and is therefore eligible for deduction under Section 80-IA of the Act.

43. Let us deal with the next submission of Shri Dada. That the deduction claimed by the assessee is in line with the legislative intent. The legislative intent of introducing the provision of Section 80-IA of the Act was to address the deficiency faced by the country in respect of infrastructure such as expressways, highways, airports, ports, etc., which needed additional resources. With that intent, a five-year tax holiday was originally introduced by Finance Act, 1995 to any enterprise which builds, maintains and operates any infrastructure facility such as roads, highways or expressways or new bridges, airports, ports and rapid rail transport systems on BOT or BOOT or similar other basis, as is explained in Memorandum explaining the provisions of Finance Bill, 1995. The Government, upon realizing that a lot of assessees could actually have expertise only either in developing the infrastructure project, or only in operating and maintaining an infrastructure project, amended and substituted Section 80-IA of the Act by introducing Finance Act, 1999, granting deduction to enterprises engaged in only developing of infrastructural facility as well. The Government, even in the Memorandum

explaining the provisions of Finance Bill, 2007, wherein the Explanation regarding works contractor being non-eligible was introduced, reiterated that the tax benefit under Section 80-IA of the Act was introduced for the reason that industrial modernization requires a massive expansion of, and qualitative improvement in, infrastructure (expressways, highways, airports, ports etc.) which was lacking in our country, and the purpose of the tax benefit has all along been for encouraging private sector participation by way of investment in development of the infrastructure sector.

44. In line with the legislative intent of the provisions of Section 80-IA of the Act, the assessee entered into contracts with the Government of Maharashtra and Government of Andhra Pradesh for development of Koyna Project and Sarsailam Project respectively. The contention of the Revenue that the assessee was not eligible for deduction under Section 80-IA of the Act on the allegation that the assessee is a works contractor and not a developer, is completely contrary to the legislative intent of the provision, which was to provide tax holiday to achieve private participation in infrastructural development of the country.

45. The said intent has also been relied on by this Court in **CIT Vs. ABG Heavy Industries Ltd.** (supra), wherein the Court has, in paragraphs 8 to 10 (ITR Volume 322, page 328 to 330) explained the legislative intent of

introducing the provisions of Setion 80-IA of the Act.

46. Further, we find substance in the submission of Shri Dada that the said provision of the Act should be interpreted in a manner as to make it workable. If the contention of the Revenue is accepted that the assessee is not a developer and is therefore not eligible for deduction under Section 80-IA of the Act, it leads to absurdity. This is because if the interpretation is accepted, no assessee would ever be able to claim deduction under Section 80-IA of the Act. In case of every public project where the Government has sought private participation for which it has granted the tax holiday, it will be the case of the Revenue that the entity executing the project is merely a works contractor and not a developer and, is therefore, not entitled to deduction under Section 80-IA of the Act. Further, the Government, in the tenders, is bound to specify the specifications of the project and also the payment terms, particularly when the entity is merely developing the project. If, just because the Government specifies its needs from the particular project and provides for a periodic payment, the assessee is treated as a contractor instead of a developer, then no assessee would ever be able to claim the deduction under Section 80-IA of the Act.

47. In our considered opinion, the argument of the Revenue that the project belongs to the Government and, therefore, the assessee is not a developer, also leads to an absurd result, because no public project,

especially like roads, expressways, dams,etc. could belong to a private participant and are bound to be a part of the Government's initiative. This contention of the Revenue does not appeal to us because the Section itself mandates that the deduction is available to an assessee only if 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.

48. The Hon'ble Supreme Court in **CIT Vs. J. H. Gotla**[7] has held that the provisions of the Act should be read rationally in order to make the same workable.

49. This Court in **Narang Overseas (P.) Ltd. Vs. ITAT**[8] has held that if a strict and literal construction of the statute leads to an absurd result, i.e., a result not intended to be subserved by the object of the legislation ascertained from the scheme of the legislation, and, if another construction is possible apart from the strict/literal construction, then, that construction should be preferred to the strict/literal construction. So also, where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the Legislature, the Court might fine tune the language used by the Legislature so as to achieve

7 (1985) 156 ITR 323 (SC)
8 (2007) 295 ITR 22 (Bombay High Court)

the intention of the Legislature and produce a rational construction.

50. The Hon'ble Supreme Court in **Government of Kerala Vs. Mother Superior Adoration Convent**[9] in interpreting the exemption provision contained in Section 3(1)(b) of the Kerala Building Tax Act, 1975, held that in order to give full effect to the beneficial provisions of the Act, in interpreting an exemption provision, a literal formalistic interpretation is to be eschewed, and it is to be understood as to what is the object sought to be achieved by the provision, and construe the statute in accordance with such object. The Supreme Court further held that assuming any ambiguity arises in such construction, such ambiguity must be construed in favour of that which is exempted.

51. We, therefore, find force in the submission of Shri Dada that the interpretation adopted by the Revenue to hold the assessee to be ineligible for deduction under Section 80-IA of the Act renders the Section unworkable for any assessee to ever be eligible for deduction under Section 80-IA of the Act.

52. The next question is whether the receipt of periodic payment disqualifies the assessee from the benefit of deduction. It is the contention of the Revenue that there is no financial involvement of the assessee in the two projects as the assessee was paid at each stage of work executed by it.

9 (2021) 126 taxmann.com 68 (SC)

It is also contended by the Revenue that the assessee has been paid periodically and it can therefore be construed to be works contract and not development by the assessee.

53. It is further submission of the assessee that the test of periodicity of payment cannot be relevant to determine as to whether it is a works contract or project as a developer. We find that the distinction between works contract and a developer is quite significant. A useful reference could be made to the decision of this Court in **CIT Vs. Glenmark Pharmaceuticals Ltd.**[10] which determine the distinction as to whether a particular contract is a works contract or a contract of sale. This Court, in the context of TDS applicability on works contract under Section 194C, drew reference from Section 5 of the Sale of Goods At, 1930. This Court observed that the distinction between contract of sale and works contract is elucidated by the Sale of Goods Act, 1930, where under Section 5(1) thereof, the contract may provide for immediate delivery of the goods or immediate payment of the price or postponement of delivery or payment of the price by installments. The decision of this Court in **CIT Vs. Glenmark Pharmacuticals Ltd.** (supra) was also relied upon by the Gujarat High Court in **CIT Vs. Radhe Developers**[11] while determining whether the assessee executing the projects was works contractor or was a developer

10 (2010) 324 ITR 199 (Bombay High Court)
11 (2012) 341 ITR 403 (Gujarat High Court)

for the purpose of deduction under Section 80-IB (10) of the Act. Therefore, the mere fact that the assessee was receiving periodic payments as and when a particular stage of the project was completed, does not make the assessee a works contractor. The periodic payments are merely a part of the agreement between the assessee and the Government. The person who would bid for a project by incorporating the finance cost that would be incurred in the said project, and while doing so, an assessee is bound to take into consideration the fact of periodic payments that were to be received. The same does not make it a works contract.

54. The facts of the case would reveal that the assessee had deployed machines worth Rs.30 Crores in Srisailam project, including machines costing about Rs.22 Crores bought specifically for the said project. Further, the assessee had machines worth about Rs.10 Crores in Koyna project, including machines costing about Rs.4 Crores purchased specifically for executing the said project. It is the submission of Shri Dada that the assessee was the first one to have performed a highly specialized underwater blast for the first time in Asia, while executing the Koyna project. Therefore, the submission of Shri Dada that the assessee had undertaken financial risk and exposure in the said projects merits consideration.

55. Shri Dada further submitted that the Revenue's contention that the

assessee is ineligible for deduction under section 80-IA of the Act on the ground that it is not the owner of the infrastructural facility is misconceived. He relied on the decision of the Gujarat High Court in **PCIT v. Montecarlo Construction Ltd., Ahmedabad** (supra), wherein the Court, affirming the orders of the CIT(A) and the ITAT, recognized the distinction between a mere contractor and a developer. It was observed that a developer undertakes the overall responsibility for development of the project, including managerial and financial obligations, and exercises control over the project during the development period, even though the ownership of the underlying land remains with the Government. The Court also clarified that merely describing the assessee as a "contractor" in the agreement or the deduction of TDS under the relevant provisions would not determine its status, and that ownership of the infrastructural facility is not a requirement for claiming deduction under section 80-IA.

56. Shri Dada further contended that the Revenue's argument that the assessee is not eligible for deduction because it developed only a part of the projects and not the projects in their entirety is equally untenable. In this regard, reliance was placed on the judgment of the Bombay High Court in **CIT v. ABG Heavy Industries Ltd.** (supra), wherein the Court held that an assessee need not develop the entire infrastructure facility to qualify for deduction under section 80-IA. It was recognized that even

where the assessee undertakes specific components of an infrastructure facility, such as installation, commissioning, operation, and maintenance of port equipment, it would still qualify as a developer eligible for the deduction.

57. Let us deal with the submission of learned counsel for the Revenue that there is no transfer of infrastructure by the developer to the respective State Governments to satisfy the requirement of Section 80-IA. The Revenue contended that since the land on which the infrastructure facility has been developed always belonged to the Government and the assessee has already been paid for construction work, there is no question of transfer of infrastructure facility by assessee. In our opinon, the term "transfer" has to be understood in the factual context of the present case. There is no dispute that the land was handed over to the assessee for carrying out the development work. After completion of the development activity, the same was handed back to the State Government. This would constitute a transfer within the meaning of Section 80-IA (4) 1B which requires development of infrastructure facility and in view of the material on record, it can be safely concluded that the assessee has transferred the infrastructure facility developed by him by handing over the possesssion thereof to the Government as required under the agreement. The land involved in the infrastructure facility always belongs to the Government

whether it would be a case of BOT, BOOT, Build-Transfer (BT) and is handed over by the Government to the developer for development of infrastructure facility/project. In the present case, the project was in the nature of build and transfer being merely a development project and did not involve "operate" aspect of the same. Consequently once the infrastructure facility was developed, the same was to be handed over to the Government on its completion which would amount to a transfer within the meaning of Section 80-IA (4).

58. We have carefully perused the findings recorded by the Assessing Officer as confirmed by the CIT(A) in favour of the Revenue. We have also perused the findings of fact recorded by the ITAT. In the light of the aforementioned discussion and having regard to the well considered findings of the ITAT, we find ourselves to be in agreement with the findings recorded by the ITAT. We, therefore, do not find any merit in these appeals. Therefore, the said appeals are dismissed. Substantial question of law is hence answered against the Revenue and in favour of the assessee.

(S. M. MODAK, J.) **(M. S. KARNIK, J.)**