2ND O.P. JALAN MEMORIAL NATIONAL TAXATION MOOT COURT COMPETITION, 2018

MOOT PROPOSITION

HOSTED BY:

THE MOOT COURT COMMITTEE,

NATIONAL UNIVERSITY OF STUDY AND RESEARCH IN LAW, RANCHI

STATEMENT OF UNCONTESTED FACTS

1. Senerix Pvt Ltd. (hereinafter referred to as the "assessee company") is a company incorporated under Companies Act, 1956, having its registered office at Manki. Manki is the capital city of Kunderkhand, which is one of the cities of the Union of Inditva. The assessee company is engaged in taking contractual jobs from the State Government wherein they are awarded contracts over the bids sought by the State Government. It qualifies in the bid thereby qualifying for the job of constructing roads for the Government, for which due security is provided by them to the State Government.
2. The specification of the construction and appropriate maps are provided by the State Government and the assessee company has to execute the work contract for building roads/bridges and other jobs.
3. From time to time, running bills are raised, from which 10% of the security amount is retained by the State Government; and the balance is paid to the contractor. The running bills so issued are passed by the following three departments:
   i. By store managers, who approve the quality of materials used for the construction;
   ii. By the Assistant Engineer, who approves the quality of work done and thereafter;
   iii. By the Finance Department, which passes the bill and gives payment against the remaining bill up to 90%; 10% of the said amount is retained by them against the work so done by the company. The company undertakes the maintenance of the infrastructure for a said period of time.
4. The purchase of materials is to be done by Dian Oil Corporation and Dustan Petroleum Corporation Limited. The labour is to be arranged by them along with all the other necessary equipment. Other materials are to be of the prescribed standard of the Government.
5. These agreements are drawn up in the form of a standard agreement between the State Department and the contractor. Many of the payments against the labour, supply of sand, supply of stone chips etc. are made in cash through internal vouchers. On execution of the work, as per Government standards , the recovers were audited and filed in income or gross turnover of 85 Cr. showing 8.75% net profit after claiming all along with the necessary P&L a/c and balance sheet. In the computation, it further claimed a deduction

under Section (hereinafter referred to as u/s) 80 IA (4) of the Income Tax Act, 1961. (hereinafter referred to as "I.T. Act")

6. The Learned Assessing Officer (hereinafter referred to as the "Ld. AO") issued notices u/s 143 (2) r/w 143 (1) of I.T. Act as the case was selected for computer scrutiny by CASS. The assessee Company complied with all the notices and supporting documents pertaining to all queries raised and the returned income was accepted.
7. On the review of the assessment order by the Ld. AO, the Principle Commissioner of Income Tax (hereinafter referred to as "the PCIT") found that the order passed by the Ld. AO is prejudicial to the interest of revenue against which the notices u/s 263, I.T. Actwere issued by the PCIT. He raised a question stating that the deduction so allowed by the Ld. AO u/s 80 IA (4), I.T. Act was without due inquiry and prejudicial to interest of revenue following which he set aside the order of the Ld. AO for reconsideration of fact.
8. Against the order so passed by the PCIT, the assessee Company preferred an application before the Income Tax Appellate Tribunal (hereinafter referred to as "the ITAT") stating that it was a change of opinion, that the Ld. AO has passed the order after due consideration of facts and the PCIT had no materials on record to disturb the order of the Ld. AO. It was pleaded that after an order was passed after due application of mind, it could not be disturbed, but the ITAT dismissed the appeal and kept the order of the PCIT intact.
9. Against this order of ITAT, the assessee Company preferred an appeal before the Honourable Kunderkhand High Court, but no stay was provided.
10. Meanwhile, as the assessment was getting barred due to limitation, Ld. AO issued notices u/s 142 (1), I.T. Act and asked the assessee Company to produce all the contracts and provide clarification of his status as a "developer" or "contractor".
11. The assessee Company submitted that it was a developer and the contractor is a sub-set of developer. The Ld. AO distinguished both and passed a voluminous order differentiating between contractor and developer and disallowed the deduction u/s 80IA, I.T. Act.
12. Against this, an appeal was preferred u/s 246, I.T. Act before the Learned Commissioner of Income Tax, (Appeals) (hereinafter referred to as "Ld. CIT (A)") stating all the facts before him. He also cited the case of *VRM (I) Ltd v. Department Of Income Tax* wherein

the concerned company was engaged in the business of construction and providing contractual services to Railway and DDA to construct houses was allowed as a deduction u/s 80IA, I.T. Act.The Ld. CIT (A) dismissed the appeal, invoking the provision of Section 80IA (4) of the I.T. Act, wherein the contracted development was not considered to be eligible for deduction under the aforementioned provisions.

13. The assessee Company preferred an appeal before the ITAT stating the factual proposition in a proper format. It relied on the finding given by the Hon'ble Supreme Court in *Radhasoami Satsang v. Commissioner of Income Tax* (193 ITR 321 SC) and *CIT v/s Excel Industries Ltd*. (358 ITR 295 SC) in this regard that consistency should be maintained and the order of the Ld. AO shouldn't be disturbed with additional material in hand.
14. The department preferred an appeal before the ITAT raising a substantiated question of law u/s 260A, I.T. Act.:-
    I. Whether the Hon'ble ITAT was right in allowing the claim made by the assessee Company u/s 80IA(4), I.T. Act. disregarding the fact that if such a deduction is obtained, then all the contracts working under the guidance of Executive Engineer would be entitled to deduction causing law to exchequer?
    II. Whether the ITAT was right in relying upon the case of *Radhasoami Satsang* (supra) where, not change of opinion, but only the error was pointed out?
    III. Whether the subsequent amendment u/s 80 IA (4), I.T. Act. in the statute didn't erase the finding so given by the ITAT?
    IV. Whether the ITAT was right in not differentiating between 'contractor' and 'developer'?
    V. Whether the Tribunal was right in raising litigation, defeating the proposition of Central Government to erase the number of deductions out of Income Tax Act, 1961?

The case is set for arguments

Annexure 1

INCOME TAX DEPARTMENT

1	Name and address of the assessee	:	M/s. Senerix Pvt Ltd, Bhagwan Singh Road, Kanchiwadi, Manki.
2.	PAN	:	XX12568Y
3.	Assessment. Year	:	2011-12
4.	Status	:	Company
5.	Date of order	:	31/12/2012

Assessment Order

1. The Assessee Company filed the return of income for A.Y.2011-12 on 15/10/2011 declaring total income of Rs Nil. The return was processed u/s 143 of the I.T. Act, 1961. The case was selected for scrutiny under CASS. Accordingly, the notice u/s 143(2) was issued on 30/08/2011 and duly served upon the assessee on 12/09/2011, fixing the date for compliance on 11/10/2011.
2. In response to Department notices, Shri Madan, being authorized representative of the assessee appeared from time to time and furnished books of accounts, bank statements and other documents as called for, which were duly examined.
3. The assessee is earning income from civil contract business. The assessee has submitted the details of gross profit & net profit margins with the corresponding turnover.
4. During the course of scrutiny, the following were examined along with ledger copy:
    a) Details of gross profit & net profit margins.
    b) Details regarding contract business activities.
    c) Details of project/contract.
    d) Details regarding material purchase.
    e) Details of all bank accounts maintained by the company.
    f) Details of additions of fixed assets.
    g) Details of work done by all working directors.
    h) Details of shareholder's fund.
    i) Details regarding the share application money.

j) Details of deduction claimed u/s. 80IA.

k) Details of other expenses claimed in P&L a/c.

5. The assessee company has claimed deduction u/s 80IA, a specific query vide question No. 19 of detailed Questionnaire were raised as below:-

"19. Please file the following details regarding your business activity for which you have claimed deduction u/s 80IA:

a. Copy of P&L a/c Balance sheet along with form no. 10CCB for the unit for which deduction has been claimed u/s 80IA.
b. Please justify the deduction u/s 80IA along with relevant supporting documents.
c. Details of project with full address undergone or completed by 31-3-2009.
d. Date of completion of project.

In response to this, following were submitted by Assessee Company:

"The assessee has claimed deduction u/s80IA on the following ground:

a. As far as copy of P&L a/c and balance sheet of the company is concerned the same has already been attached in the submission. A copy of 10CCB in support of the same is enclosed.
b. The assessee has claimed deduction u/s80IA because:
   i. The Company is not formed by splitting up or reconstruction. It is a business already in existence.
   ii. It is not formed by the transfer to a new business of machinery.
   iii. It is not using any machinery or plant which was used outside Inditva and imported into Inditva.
   iv. It is entered into an agreement with the State Government for developing and maintaining infrastructure facilities like bridges etc. and the same can be duly verified from the TDS Certificate.
   v. The assessee is involved in the operation and maintenance of infrastructure on an on-going basis.

c. The details of the project undertaken by the assessee can be verified from the TDS certificate duly submitted to your honour.
d. All the details of the projects undergone or completed during the year are already annexed to this submission.

On-going to the facts of the case and submissions of the assessee, the following is noted-

i. The company is engaged in developing infrastructure facilities as explained in the explanation to the Section 80IA(4) of the Income Tax Act, 1961. It is constructing roads and bridges which is included in the definition of Infrastructural facility.
ii. It has started operation in the year 2001-2002 and is eligible for deduction under Section 80IA for a period of 10 years out of 20 years from the year in which the undertaking started developing or maintaining infrastructural facility.
iii. The company is engaged in construction of bridges, roads, canals and these two are those activities which are eligible for deduction under Section 80IA and there is no need to maintain any separate set of books of accounts.
iv. The necessary certificates in Form No.10CCB have been produced.
v. The Assessee Company claimed deduction for the A.Y 2011-12, which shall be available for 100% deduction.

6. In the light of the above discussion, the return income of the assessee is accepted, which is NIL in this case due to claim of deduction u/s. 80IA of I.T Act, 1961.

Total income of the assessee for A.Y.2011-12 is assessed at Rs. NIL as per return u/s 143(3) of ITA, 1961.

SD/-

DY. COMMISSIONER OF INCOME TAX,

MANKI

Annexure 2

GOVERNMENT OF INDITVA.

OFFICE OF THE COMMISSIONER OF INCOME TAX, MANKI

1	Name and address of the assessee	:	M/s. Senerix Pvt Ltd, Bhagwan Singh Road, Kanchiwadi, Manki.
2.	PAN	:	XX12568Y
3.	Assessment. Year	:	2011-12
4.	Status	:	Company
5.	Date of order	:	23/01/2015

ORDER UNDER SECTION 263 OF THE INCOME TAX ACT, 1961

1. In the case of M/s. Senerix Pvt. Ltd. for the A.Y. 2011-12 order u/s.143(3) of the I.T. Act, 1961 was passed on 31/12/2012. The assessee company is engaged in the business of civil construction. From the perusal of the assessment record, it is observed that the assessee company had claimed deduction u/s.80IA of the income-tax Act, 1961 amounting to Rs. 90,00,000/-

2. The deduction u/s.80IA of the I.T. Act, 1961 is not automatically available to the assessee merely on the basis that it is carrying on construction of infrastructure facilities. The deduction can be available only if all the conditions mentioned in Section 80IA (4) of the I.T. Act, 1961 relating to "developing" or "operating or maintaining" or "developing, operating or maintaining" any infrastructural facilities are fully satisfied. From the assessment record, it was observed that the Assessing Officer had not made any basic inquiry regarding the nature of the construction activity carried out by the assessee company. The contract agreements were not called for and examined by the Assessing officer in the light of the aforementioned section. Besides, regarding the issue whether the assessee had entered into an agreement with the central Government or State Government or Local Authority or any other Statutory body for (i) developing or (ii) operating or maintaining or (iii) developing, operating or maintaining any infrastructural facility, the assessee in its letter had merely stated that the

details of project undertaken by the assessee can be verified from the TDS certificate. The nature of the contracts cannot be ascertained by merely verifying the TDS certificates. The contract has to be examined thoroughly to judge the nature of activity performed by the assessee company. Further, it was also seen that no TDS Certificates were available in the assessment record.

3. A notice u/s. 263 of the I.T. Act, 1961 was issued for the A.Y. 2011-12 on 17/12/2014, fixing the date of hearing on 07/01/2015, Shri Madan, of the assessee company appeared and requested for adjournment for one week to file the comprehensive reply with supporting evidences. The case was accordingly adjourned to 15/01/2015. On the date fixed for hearing on 15/01/2015, Shri Madan appeared and submitted a written statement.

4. On-going through the written submission dated 15/01/2015 of assessee, it seen that the assessee has raised the following points:

   (i) That the assessing officer had examined the issue of grant of deduction u/s.80IA of the I.T. Act, 1961 after conducting due enquiries and application of mind. In this connection, it was stated in the written submission that the contract agreement was also examined by the assessing officer.

   (ii) That due to a change of opinion the proceedings u/s.263 of the I.T. Act, 1961 were initiated.

5. Thorough examination of the records in this case reveals that both the above contentions of the assessee are contrary to the facts on record. It is clear that the AO had not made the most basic of the enquiries regarding the nature of business activities carried out by the assessee company and whether the business activities of the assessee company enables it to claim deduction u/s. 80IA of the I.T. Act, 1961. The AO had not even asked the assessee to submit the copies of the agreement pertaining to these contracts which are vital to ascertain whether the provisions of Section 80IA(4) of the Act applied to the assessee company and whether it is satisfying the various conditions laid down in Section 80IA(4) of the Act, as stated in the notice. The deduction u/s.80IA(4) is not automatically available to the assessee if it is carrying on a construction of infrastructural facilities but it is available only if it is either “developing” or “operating or maintaining” or “developing, operating or maintain” any infrastructural facility.

6. The AO has allowed the deduction u/s 80IA of the I.T. Act, 1961 without examining the details, without verifying the conditions and without obtaining the necessary documents, such as the agreements with the Government so as to ascertain whether the assessee was mere contractor or a developer in the real sense. The AO had passed the order in a perfunctory manner and without application of mind merely on the basis of the claim of the assessee which are unsupported with required evidences and on the basis of irrelevant factors, such as, TDS Certificates.

7. Hence, the allowance of deduction u/s 80IA of the Act amounting to Rs. 90,00,000/- had been made without supporting evidences, without examination of facts and circumstances which makes the order erroneous and prejudicial to the interest of the revenue. Therefore, the assessment order u/s143(3) of the I.T. Act, 1961 A.Y. 2011-12 is being set aside on this issue with the direction to the AO to pass the assessment order afresh after verifying whether all the conditions laid down in sec. 80IA(4) of the Act have been satisfied by the assessee company after giving due opportunity to the assessee company of being heard, with a direction to examine the terms and conditions of every contract entered by the assessee to find out whether the assessee had worked simply as a contractor or as a developer of infrastructure facility as a whole. Minute examination of terms and conditions of each contract is required to be undertaken.

8. The AO is also directed to go through the case of Sugam Construction (P) Ltd ([2013] 30 Taxman.com 331 [Ahmedabad – Trib.]) where the tribunal has drawn a distinction between a developer and a contractor in the following manner:

> "*In the light of the above discussion and the view expressed by the honorable courts , a conclusion can be drawn that there is a distinction between a "developer" and a "contractor".(i) That in a case of a civil contractor, its duty is only of civil construction.(ii) That after the civil construction is over, he is paid for the job of civil construction as per the bills rails.(iii) That at that point of time, his contract is over and the agreement ends.(iv) That after the completion or at the end of the agreement, a civil contractor hand over the site to the owner.(v) That the civil contractor constructs as per the specifications given.(vi) That the Contractor does not involve much of his own money but raises bill of his civil*

construction work time-to-time to collect the expenditure incurred.(vii) That the contractor has no domain over the land or the site. (viii) That the access to the site is restricted and limited from commercial angle.

That on the basis of the project he cannot raise the funds from the private financial institutions. (x) That "a contractor" is not responsible for the development of the project but his responsibility is limited to the job-assign to him. (xi) That "a contractor's" duties and responsibilities can only be examined on the basis of the terms and conditions of the contract agreement.

Now we shall examine about a "developer". From the above reading we have also gathered (a) That a developer is a person who undertakes the responsibility to develop a project.(b) That the developer is therefore not a civil contractor simpliciter. (c) That if we apply the commercial aspect, then a developer has to execute both managerial as well as financial responsibility. (d) That the role of the developer, according to us, is larger than that of the contractor. (e) That when a person is acting as a developer, then he is under obligation to design the project, it is another aspect that such designs has to be approved by the owner of the project, that is the government in the present case. (f) That is has not only to execute the construction work in the capacity of the contractor but also he is assigned with the duty to develop, maintain and operate such project. (g) That to a certain whether a civil construction work is assigned on development basis or a contract basis can only be decided on the basis of terms and conditions of the agreement. Only on the basis of the terms and conditions it can be ascertained about the nature of the contract assigned that whether it is a "Work contract" or "development contract". (h) That in "a development contract" responsibility fully assigned to the developer for execution and completion of work. (i) That although the ownership of the site or the ownership over the land remains with owner but during the period of development agreement the developer exercise complete domain over the land or the project.(j) That a developer is not expected to raise bills at every step of construction but he is expected to charge the cost of construction plus mark-up of his profit from the assignee of the contract.(k) That a developer is therefore expected to arrange finances and also to undertake

risk.(l) That in contrast to the rights of "a contractor" or "developer" is authorized to raise funds either by private placements or by financial institutions on the basis of the project. These are few broad qualities of a developer through which the character of the developer can be defined."

9. Further, the decisions given in the case of Sanee Infrastructure Pvt. Ltd. [(138 ITD 433(Indore)/ 23 Taxman.com 345 (Indore)] & GVPR Engineers Ltd {[2012] 21 Taxman.com 25 Hyd.)} should also be gone through.

SD/-

COMMISSIONER OF INCOME TAX,

MANKI

Annexure 3

INCOME TAX DEPARTMENT

Date of Order: 30/11/2015

Assessment Order

1. The assessee filed return of income on 15/10/2011 declaring the total income. The return was processed u/s 143(1) of the I.T. Act, 1961. The case was selected for Scrutiny under CASS. Accordingly, the notice under Section 143(2) was issued and duly served upon.
2. In response to the said notice, Shri Madan, being the authorized representative of the assessee appeared from time to time and furnished books of accounts, bank statements and other documents as called for. The same were duly examined and placed on record.
3. During the course of assessment proceedings, the assessee vide notice u/s 142(1) along with the detailed questionnaire, was asked to furnish details of nature of business and business activities, associated business concerns, & directors/partners; details of loans, advances and deposits given, all bank accounts, secured loans, top ten sundry creditors, & unsecured loans/ deposits taken during the relevant financial year, details of income tax assessments for the earlier three years, gross profit and net profit margin and details of tax free income, if any; details along with supporting documentary evidence regarding TDS made and deposited into Government account and all statutory payments covered u/s 43B of the Act; details of acquisition of fixed assets & payments made to person covered u/s 40A(2)(b) along with copies of Balance Sheet, Profit and Loss account, Audit Report, ITR Copy, Computation of income and details brought forwards Losses, if any.

   The assessee further vide notice u/s 142(1) dated 15.09.2016 was asked as to why must not the exemption claimed u/s 80IA(4) of the I.T. Act, 1961 be disallowed and added back to the total income of the assessee as the same is available to a developer & not Contractor.
4. The Assessee vide submissions dated 17/06/2015 and dated 29/11/2016 submitted the details as called for. The same has been examined and placed on record.
5. Ongoing through the facts of the case and submission of the assessee following are noted:

   The assessee has claimed deduction u/s 80 –I.A (04) in respect of various contracts awarded by the State Government for construction of new roads, Construction of B.E.C

bridge, improvement / up – gradation of existing road, road Construction under Pradhan Mantri Gramin Sadak Yojna, Construction of new lanes *i. e. converting existing single lane to double lane roads, etc.*

It is appropriate to reproduce hereunder Section 80IA. of the "Act" providing deduction in respect of profits and gains from industrial undertaking or enterprises engaged in infrastructure development which roads as follows:

80 I. A. (1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in Sub Section(04) (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.

(02)……

(02. A)……

(03)…….

(04) This Section applies to _____

(i) Any Enterprise carrying on the business of (i) developing or (ii) Operating and Maintaining or, (iii).developing, operating and maintaining any infrastructure facility which fulfils all the following conditions, namely:

a. It is owned by a company registered in Inditva or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act:-
b. It has entered into an agreement with the Central Government or a State Government or local authority or any other statutory body for i. Developing or, ii. Operating and Maintaining or, iii. Developing Operating or Maintaining a new infrastructure facility;

c. It has started or starts Operating and Maintaining the infrastructure facility on or after the 1st day of April, 1995.

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

Explanation:- For the purposes of this clause, " infrastructure facility " means:

a. A road including toll road, a bridge or a rail system;
b. A highway project including housing or other activities being an integral part of the highway project;
c. A Water supply project Water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;
d. A port, airport, inland Waterway, inland port or navigational channel in the sea;

(5)…….

(13)……..

****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 (04) which is in the nature of a work contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in Sub – Section (01).

***** It introduced by Finance (No.:02) Act, 2009 w. e. f. 01/04/2000.

In view of the above observation, the assessee was asked to submit the exemptions claimed u/s 80 I. A. (4) of the I. T. Act, 1961 as the same is available to a developer & not a Contractor.

6. In reply to the query raised above, the submission of the assessee is reproduced below:-

"That the assessee is in receipt of the aforementioned notices issued by your honour. At the outset the assessee begs an apology for delay in responding to the questionnaire issued. The assessee agrees that the deductions under 80 I. A. (04) of the I. T. Act, 1961, is applicable only to a Developer under the contractor and not merely to the persons executing the work contract.

The assessee is in this business for a very long time and the assessee has claimed deductions under section 80 I. A. (04) of the ITA, 196, only when he was accorded the permission to take part in the open bids offered to the international developer in raising of the infrastructure facilities for fulfilling this term to be a developer. Apart from having a sound financial background they have to have a thorough team of professionals including the Engineers who participate in preparation of drawings which are approved by the allotter of the work. During the course of their work, the premises is handed over to these persons who execute the work by procuring the raw materials from them, which are suited to the specifications which are ideally suitable but definitely approved by the Government Department.

The handing over the Project is only after when the security money so retained by the Government is returned back to them after a span of two years and till then they not only bill but also maintain the infrastructure facilities made by them. This has been clarified by the Hon'ble Orissa Tribunal at length in the matter as discussed in the earlier submission wherein it is very clearly stated in the matter of A. R. S. S. infrastructure Projects Ltd. Vs. A. C. I. T. [2013 T. I. O. L. 603 (Cuttack)].

Your honour, Section 80 I. A. (04) of the income tax Act, 1961 was in the Statute Book earlier also. The assessee invoked the provisions of Section 80 I. A. (04) only after his credentials improved with the experience and manpower that they had. They proceeded with law and when they were eligible to the called as operators in that modality this provision was invoked by them before your honour. There is investment, there is ownership, there is responsibility and there is warranty to what they have done, it covers all the significant portion of the built, operate and then transfer."

7. **The above reply of the assessee is not tenable due to the following reasons :**

8. In his submission the assessee was silent on the provision of section 80 I. A. (04) (a) which states that this section applies to :

   (i) any enterprise carrying on the business of (i) developing or, (ii) operating and maintaining or, (iii) developing, operating and maintaining any infrastructure facility which fulfils all the following conditions, namely:- **" It is owned by a company registered in Inditva or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act "** From the copies of agreement entered into by the assessee with the State Government / statutory authorities, it is amply clear that the assessee by merely executing work religiously in accordance with the given specifications subject to the terms and conditions of the agreement and control of the authority (Government) cannot place itself in the capacity of owner of the works hence executed by him. Even if the assessee had to make some investment, for the time being, in the shape of purchase of some raw material or incurring of labor etc., which is recouped from time to time by furnishing bills, the assessee cannot claim itself as owner of the work done by its. The assessee is a mere contractor whose tender has been accepted by the competent authorities for carrying out the specified job, the property in respect of which vests with such Government or local authority. It is, therefore, clear that since the work done by the assessee is not owned by it, it does not satisfy sub – cl (a) of Section 80IA (4)(i)"

   The case of B. T. Patil & Sons Belgaum Construction Pvt. Ltd. was cited, according to which infrastructure facility should be owned by the company so as to be entitled for deduction under the relevant section.

   Considering the nature of work executed by the assessee, it was clear that the assessee had acted only as a "contractor" and not as a "developer". There was no financial risk of the assessee, since the assessee has furnished the "work bill" time to time and received the payment from the Government. The Government has granted him work to be executed which was a part of a large project and not the entire project as such. Hence the assessee has not developed an Infrastructure project as a whole. The assessee has not conceptualized the project. The project was planned by the Government. The assessee was asked to complete only a part of the project that too on contract basis. Neither there was "risk" nor reward for the assessee. The assessee has simply tendered the bills of the

work executed and has received the payment. Attention is drawn to "Notes on Accounts.' wherein as per the "Revenue Recognition" the income was accounted on the basis of the certification by the Government Department. The escalation claimed and arbitration award was accounted on the basis of the receipt. On the account of escalation of the price, the assessee has accordingly claimed as per the bills, therefore, there was no risk involved for the assessee.

9. **Distinction between 'developer' and a 'contractor'**

There is a distinction between "developer" and a "contractor". (1) That in a case of civil contractor, its duty is only of civil construction. (ii) That after the civil construction is over; he is paid for the job of civil construction as per the bills raised. (iii) That at that point of time, his contract is over and the agreement ends (iv) That after the completion or at the end of the agreement, a civil contractor hands over the site to the owner. (v) That a civil contractor constructs as per the specifications given. (vi)That a contractor does not involve much of his own money but raises bill of his civil construction work time-to-time to collect the expenditure incurred. (vii) That a contractor has no domain over the land or the site. (viii) That his access to the site is restricted and limited from commercial angle. (ix) That on the basis of the project he cannot raise the funds from the private financial institutions. (x) That 'a contractor' is not responsible for the development of the project but his responsibility is limited to the job-assigned to him. (xi) That a "contractor's" duties and responsibilities can only be examined on the basis of the terms and conditions of the contract agreement.

As regards 'developer' it is gathered (a) that a developer is a person who undertakes the responsibility to develop a project. (b) That a developer is therefore not a civil contractor (c) That if the commercial aspect is applied then a developer has to execute both managerial as well as financial responsibility. (d) That the role of a developer, is larger than that of a contractor. (e) That when a person is acting as a developer, then he is under obligation to design the project, it is another aspect that such design has to be approved by the owner of the project, i.e the Government in the present case. (f) That he has not only to execute the construction work in the capacity of a contractor but also he is assigned with the duty to develop, maintain and operate such project. (g) That to ascertain whether a civil construction work is assigned on development basis or contract basis can

only be decided on the basis of the terms and conditions of the agreement. Only on the basis of the terms and conditions it can be ascertained about the nature of the contract assigned whether it is a 'work contract' or a 'development contract'. (h) That in a 'development contract' responsibility is fully assigned to the developer for execution (i) That although the ownership of the Site or the ownership over the land remains with the owner but during the period of development agreement the developer exercises complete domain over the land of the project, (j) That a developer is not expected to raise bills at every step of construction but he is expected to charge the cost of construction plus mark –up of his profit (from the assignee of the contract.(k) That a developer is therefore expected to arrange finances and also to undertake risk. (l) That in contrast to the rights of a 'contactors' a 'developer' is authorized to raise funds either by private placement or by financial institutions on the basis of the project. These are few broad qualities of a developer through which the character of a developer can be defined.

Now coming to the point whether the assessee can be called as a "developer" within the meaning of Section 80IA(4) of the I.T. Act, the word "developer" and "constructor" have not been defined in Section 80IA or anywhere in the Act. These words are also not defined in General Clauses Act, 1897. Therefore, one has to go by the dictionary meaning. According to Oxford Learners Dictionary "developer" means a person or a company that designs or creates new products whereas a contractor is a person or a company that has a contract to do work or provides service or goods to another. The new shorter Oxford Dictionary defines the word contractor as person who enters a contract or agreement. Now, precisely, a person that undertakes work by contract especially for building to a specified plan is a contractor. From the above, it is very clear that a developer is a person who designs and creates new products. He is the one who conceives the project. He may execute the entire project by himself or some part of it to others. On the contrary, a contractor is a person who is assigned to do a particular work to be completed on behalf of the developer. A contractor's duty is to translate such design into reality. There may be overlapping the work of developer and contractor. A developer, who assigns the job to a person, becomes contractor.

10. **The Nature of business, Method of construction & Eligibility of Section 80IA. Is reproduced as below:**

(i) Nature of the business: The assessee is engaged in civil construction work. During the relevant assessment year ,assessee execute several contract including construction of B.E.C. Bridge, rehabilitation of deep dy. System, improvement/up-gradation of road, road construction under Pradhan Mantri Gramin SadakYojna etc.

(ii) Method of construction: The assessee first obtains a contract from the concerned department of State Govt. The project has been fully financed by the Government and the appellant- was getting regular payment in accordance with the progress of work. The contract documents also provides for limited liability on the appellant which would be restricted to certain amount depending on the breach of contract The assessee was to carry out the construction work as per the requirements of State Government and cannot deviate even an inch from the plan assigned to it by the State Government and throughout the construction period by, various officials of Govt./concerned department will be continuously inspect and monitoring the project till its completion.

(iii) Eligibility of section 80IA: After going through the agreements with the concerned department of the State Government, it is found that assessee was carrying out 3 types of work: -Construction of B.E.C. Bridge, improvement/ up gradation of road & Road construction under Pradhan Mantri Gramin Sadak Yojna.

The relevant paragraph from the Finance Act, 1995 to explain the purpose of the rebate granted as follows:-

"Applying commercial principles in the operation of infrastructure facilities can provide both managerial and financial efficiency. In view of this, a ten-year concession including a five - year tax holiday has been allowed for any enterprise which develops, maintains and operates any new infrastructure facility such as road, highways, expressways, bridges, airports, ports and rail systems or any other public facility of similar nature as may be notified by the Board to BOT or BOOT or similar other basis (where there is an ultimate transfer of the facility to a Government or public authority). The enterprise has to enter into an agreement with the Central or State Government or a local authority or any other statutory authority for this purpose. The period within which the infrastructure

facility has to be transferred needs to be stipulated in the agreement between the undertaking and the Government concerned. The enterprise has to be owned by a company registered in Inditva or a consortium of such companies. The tax holiday will be in respect of income derived from the use of the infrastructure facilities developed by them."

The assessee is entitled for deduction upon satisfaction of the conditions mentioned in section 80IA(4) of I.T. Act, which are enumerated in sub-clauses (a), (b) & (c) of the Act Insertion of Explanation to section 80IA, which provide that nothing contained in section 80IA shall apply in relation to a business referred to in sub-section(41) which in the nature of "work-contract". One of the important ingredients for entitlement of deduction u/s.80IA is the financial investment and financial risk of an enterprise. Where a person makes investment and he executes the development work, carries out the civil construction work, then is he eligible for tax benefit u/s.80IA. The first condition to be satisfied is that an enterprise should be a developer of the infrastructure facility. To emphasize the meaning of word 'developer', Radhe Developers v, Union of India (2008) 23 SOT 420 ,is also significant, although the issue in the said appeal before the ITAT Bench was related to the deduction, yet the observations defining the term 'developer' were relevant for the present appeal.

After an elaborate discussion of B.T. Patil & Sons Belagum Construction (P.) Ltd., Ld. CIT(A) has summarized the term "developer" and according to him, it has following characteristics:

"In view of the above discussion, we can say that a developer has following characteristic;

(i) He conceives the project that means the basic study about the project, economic benefits arising out of the project, the evaluation of the funds required to construct the project etc. is done by him (ii) The financial investment in the project is made by him. (iii) The financial risk is borne by him. That means in case due to some reason the project does not click or the expected financial returns are not received the loss or the profit in case the project belongs to him, (iv) He may or may not execute the project himself. (v) He has the dominant control over the work that is being carried on and for changing any

specification of the project he need not take anybody's permission. He has all the authority and control about the execution of the project.

The 'contractor' is a person who undertakes to produce a given result for any establishment by employing building workers. He executes the job assigned to him as per the specified parameters and specifications. After the completion of the project, the principal checks whether the job has been carried out as per the desired specifications and then the payment is made to the contractor in accordance with the terms and conditions.

Therefore, it can be seen from the above that there is a vast difference between the contractor and a developer. The most important difference is that a developer conceives the project whereas the contractor executes it. The other difference is that of financial risk. The developer bears the financial risk and makes the investment whereas the contractor does not make the investment and take any financial risk; he gets the payment for the work done by him and is not concerned about anything else. The developer can modify the project as per his desire whereas the contractor has to stick to the specifications given to him.'

11. Resultantly, the claims of the assessee were dismissed in the following manner:

The claims of the appellant are examined with reference to the terms and conditions of the various contracts taken by it. The contracts have been discussed in the preceding paragraphs. It is apparent from the discussion of all the contract that-

[i] The investment is not made by the appellant. It is made by the government body and the project has been fully financed by the government and the appellant was getting regular payment in accordance with the progress of work. The investment in the projects was very limited and was similar to the investment made by any contractor in executing the contract. For claiming that the investments in the project has been made by the appellant, total funds invested by it or major portion of the investment should belong to the appellant. In the projects that have been executed by the appellant, the investment has been made by the appellant only in the initial stage that too has been reimbursed when the construction work started and in some of the cases, the appellant has been received the mobilization advance which enabled him to start the project without any initial investment.

[ii] That the design and planning for development of infrastructure project was not of the appellant. The plan of particular project was made to invite the tender for construction.

[iii]The claim of the appellant that financial risk belongs to the appellant is also not properly placed. There is no financial risk that is taken by the appellant. The conditions of the contract clearly show that it will get regular payment in accordance with the progress of construction. The risk involved was normal risk which is there for any contractor in executing any normal contract. The appellant has never taken the financial risk which is equal to the cast of the project. The contract documents also provides for limited liability on the appellant which would be restricted to certain amount depending on the breach of contract. For claiming that the financial risk is there the appellant would own and develop the project and then transfer it to the concerned authority.

[iv]The appellant has not developed and created the facility. It has also only executed the work assigned to him which was part of the infrastructural facility being planned by the government authority. The plan of the project was not made by the appellant.

Therefore, the claim of the appellant that it has developed and created the infrastructure facility is not acceptable.

In the light of the above discussion, the exemption claimed by the assessee u/s 80IA (4) of the I.T. Act. 1961 is being disallowed.

SD/-

DY. COMMISSIONER OF INCOME TAX,

MANKI

Annexure 4

OFFICE OF THE COMMISSIONER OF INCOME-TAX (APPEALS)

MANKI (KUNDERKHAND)

1	Date of the order	:	04.01.2016
2	Name of the Appellant	:	M/s. Senerix Pvt Ltd, Bhagwan Singh Road, Kanchiwadi, Manki.
3.	PAN	:	XX12568Y
4.	Assessment. Year	:	2011-12
5.	Status	:	Company
6.	Present for Appellant	:	Shri Madan

ORDER UNDER SECTION 250 OF THE INCOME-TAX ACT, 1961

1. Present appeals have been filed against the orders u/s. 143(3) of the Income Tax Act, 1961 passed by the Dy. Commissioners of Income-tax, Circle-1, Manki. Since, the issues involved in both the appeals are identical, for the sake of convenience; they are being disposed off through a common order.
2. Brief facts of the case are that the appellant company is earning income from execution of civil contracts. The appellant company filed its return of income for Assessment Year-2011-12 on 01.10.2011 declaring income at NIL. The returns were processed u/s.143 (1) of the Income Tax Act, 1961. The cases were selected for scrutiny under CASS, accordingly, the notices under section 143(2) were issued. The appellant company had claimed deduction u/s. 80-IA with respect to the projects it was executing. On examination of the facts and application of the legal provisions, the claim of the appellant company was denied. Income for Assessment Year-2011-12 was assessed at Rs.90,00,000/-.
3. All the grounds, which were argued upon by the appellant company in the appellant proceedings relate to the sole issue of denial of claim of deduction u/s.80-IA.

4. Sri Madan, FCS and authorized Representative attended on behalf of the appellant. He made oral and written submissions.
5. As stated above the main issue to be decided is whether the appellant company's claim of deduction u/s.80-IA is legally tenable. In this regard the appellant company has argued that it had fulfilled all conditions required under Sub Section (4) of 80-IA

   [5.1] The appellant company argued that all the agreements were duly executed by the government agencies with the appellant company which was evident from copies of agreements filed before the Ld. Assessing Officer. The nature of agreements clarified that these were made for the development of infrastructure facilities and were covered under section 80-IA.

   [5.2] The appellant contrasted provisions of sections 80-IA and 80-IB. It stated that bare reading of section 80-IB, shows that deductions are in respect of profits and gains from certain industrial undertaking, other than infrastructure development undertakings. Explanation of Sub Section (b) of Sub Section (10) of 80-IB states that "nothing contained in this sub section would apply to any undertaking which execute the housing project as work contract awarded by any person including the Central or the State Government."

   [5.3] However, according to the appellant company, this is not what is intended in Section 80-IA because the infrastructure development cannot be done by the Government itself unless and until they provide the contract to persons who are qualified persons having experience by way of bids. These bids are open bids and only after due negotiations, these works are allotted to them, which is supervised constantly by the Government agencies. The purpose behind this is to create an infrastructure which would be beneficial to the state for which this deduction is being granted. The appellant company was of the view that the nature of work as evidenced by these agreements had to be termed as infrastructure development projects which is independent and not covered under explanation regarding works contract provided by Sec.80-IA.

   [5.4] The Ld. Assessing Officer rejected the claim of the appellant company. It was held that on perusal of agreements it was found that the entire project had been fully financed by the government and the appellant was getting regular payments in accordance with the progress of work. The contract documents also provided for limited

liability on the appellant which would be restricted to certain amounts depending on the breach of contract. The appellant company was to carry out the construction work as per the requirements of State Government and through the construction period, various officials of State Govt. concerned department continuously inspected and monitored the project till completion.

[5.5] The Ld. Assessing Officer also invoked provisions of section 80-IA(4)(a) which states that " *it is owned by a company registered in Inditva or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or state Act*". From the copies of agreement entered into by the appellant company with the State Government/Statutory Authorities, the Ld. Assessing officer held that it was clear that only the concerned authority, and not the appellant company, was the owner of property while the appellant was a mere contractor whose tender had been accepted by the competent authorities for carrying out the specified job. The property in respect of all such works vested with such Government or local authority. Therefore, the appellant company did not satisfy sub-cl. (a) of s.80-IA(4)(i).

[5.6] The Ld. Assessing Officer contrasted the words 'contractor' and 'developer'. With regard to the issue whether the appellant company could be called as a 'developer' within the meaning of Section 80-IA(4) of the Income Tax Act, 1961, he Ld. Assessing Officer held that the word "developer" and "contractor" had not been defined in Section 80-IA or anywhere in the Act. These words were also not defined in General Clause Act. Therefore, one had to go by the dictionary meaning. According to Oxford Learners Dictionary "Developer" is a person or a company that has a contract to do work or provide service or goods to another. The New Shorter Oxford Dictionary defines the word "Contractor" as person that undertakes work by contract especially for building to a specified plan. From the above, it was very clear that a developer is a person who designs and creates new products. He is the one who conceives the project. He may execute the entire project by himself or some parts of it to others. On the contrary, a contractor is a person who is assigned to do a particular work to be completed on behalf of the developer. A contractor's duty is to translate such designs into reality. There may be some portions overlapping the work of developer and contractor.

[5.7] The Ld. Assessing Officer also made an analysis of the nature of business carried on by the appellant company and the method of execution of contract. The Ld. Assessing Officer has stated the following:-

1. Nature of the business:-

The appellant was engaged in civil construction work during relevant assessment year. The appellant company executed several contracts including construction of B.E.C Bridge, improvement/up-gradation of roads, road construction under Pradhan Mantri Gramin Sadak Yojna etc.

2. Method of construction:-

The appellant company obtained contract from the concerned department of the State Govt. The projects were fully financed by the government and the appellant were getting regular payment in accordance with the progress of work. The contract documents provided for limited liability on the appellant company which would be restricted to certain amount demanded on the breach of contract. The assessee was to carry out the construction work as per the requirements of State Government and could not deviate even an inch from the plan assigned to it and throughout the construction period, various officials of State Govt./concerned department continuously inspected and monitored the project till completion.

[5.8] After going through the agreements with the concerned department of the State Government the Ld. Assessing Officer found that the appellant company was carrying out 3 types of work:-

- Construction of B.E.C. Bridge
- Improvement/up gradation of road
- Road construction under Pradhan mantra Gramin Sadak Yojna.

[5.9] The Ld. Assessing officer placed reliance on the Finance Act of 1995. The relevant paragraph quoted reads:-

"*Applying commercial principles in the operation of infrastructure facilities can provide both managerial and financial efficiency. In view of this, a ten-year*

concession including a five-year tax holiday has been allowed for any enterprise which develops, maintains and operates any new infrastructure facility such as road, highways, expressways, bridges, airports, ports and rail systems or any other public facility of similar nature as may be notified by the Board to BOT or BOOT or similar other basis (where there is an ultimate transfer by the facility to a Government or public authority). The enterprise has to enter into an agreement with the Central or State Government or a local authority or any other statutory authority for this purpose. The period within which the infrastructure facility has to transfer, needs to be stipulated in the agreement between the undertaking and the government concerned. The enterprise has to be owned by a company registered in Inditva or a consortium of such companies. The tax holiday will be in respect of income derived from the use of the infrastructure facilities developed by them."

[5.10] The Ld. AO, based on this analysis held that the appellant was a contractor and not a developer and therefore not eligible for deduction u/s80-IA.

[5.11] I have considered the submissions made by the appellant company and have also perused the assessment order. Before the legal aspects of the claim are examined it would be worthwhile to reproduce the bare provisions which would need to be kept in mind for deciding the issue:-

"80-IA. (1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there, shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

(2)…….

(2A)……..

(3)……...

(4)This Section applies to-

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

(a) It is owned by a company registered in Inditva or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act;

(b) It has entered into an agreement with the Central Government or a State Government or a local Authority or any other statutory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility;

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

Providing 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 the clause applies and the deduction from profits and gains would be available to such transferee enterprise for the unexpired period during which the transferor enterprise would have been entitled to the deduction, if the transfer had not taken place.

Explanation- For the purpose 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 port or navigational channel in the sea;

(5)……..

(13)……..

*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).

*It introduced by Finance (No. 2) Act, 2009 w.e.f. 01.04.2000.

[5.12] Facts which need to be taken note of are that for the assessment year-2011-12. The total receipts of the appellant company were received from the execution of 22 different contracts.

[5.13] after examining the contracts the Ld. AO has recorded that:-

a. The projects had been fully financed by the government and the appellant company was getting regular payment in accordance with the progress of work.
b. The appellant company was regularly submitting bills to the Government Authorities for various portions of the work done by it and expenses incurred and was being reimbursed by the government from time to time.
c. A developer invests the money till the work is substantially or fully executed while a contractor gets reimbursed for the various expenses incurred by him at regular intervals on the submissions of bills submitted by him, in respect of the work done by him. The appellant company did not produce any documentary evidence on record to prove its claim that it was a developer.
d. For the execution of the contracts there was low financial risks for the appellant company.
e. The appellant company was assured of returns from time to time on the submission of bills for the work done.
f. The risk involved were normal risked which was true for any contractor in executing any normal contract. The appellant company never took the financial risk which was equal to the cost of the project.
g. A developer bears the entrepreneurial risk where as a contractor undertakes only business risk. The appellant company did not adduce any evidence to show that it had taken entrepreneurial risks.

h. Design planning for development of infrastructure project was not that of the appellant company.

i. The copies of contract documents submitted by the appellant company and examined by the Ld. AO did not reveal that it was mandated to participate in the preparation of the drawings. The evidences submitted at best could be construed as extension of some kind of assistance but the appellant company definitely was not the conceiver of the plans and had no final control over it. Further, the appellant company did not submit any documentary evidence to prove otherwise.

j. The appellant company had no independence in the manner in which the work had to be done. It did not have dominant control over the work. Further, the appellant company did not submit any documentary evidence to prove otherwise.

k. The evidence submitted also proved that any alteration of the plans had to be approved by the government authorities.

l. In respect or work to be executed as a "developer", the government generally hands over the possession of the premises. No premises were handed over to the appellant company. It was merely given a right of entry over the land and was entrusted the job to conduct of the job the assessee existed the premises. Further, the appellant company did not submit any documentary evidence to prove otherwise.

m. The Ld. AO also observed that any loss to the public or to the Government caused in the process of development is generally the responsibility of the developer. This was not observed from the agreements signed by the appellant company with the Government. Further, the appellant company did not submit any documentary evidence to prove otherwise.

n. As regards the plea of the appellant company that it had also to maintain the projects for some time before handing back to the government the Ld. AO observed, after examining the contracts, that these were part of the terms of the contract. The terms of the contract did not show that these were maintenance contract as envisaged u/s80-IA of the Income-tax Act, 1961. Further, the Ld. AO noted that the appellant company did not submit any documentary evidence to prove otherwise. This amount of security deposit was only a warranty to ensure that the contracts were executed in

the proper manner. Further, the assessee did not submit any documentary evidence to prove otherwise.

o. The appellant company did not produce any material to reveal that its nature of business had undergone a radical change so as to alter its status from a contractor to a developer, The nature of business of the appellant company during the assessment years was the same that it had been doing since past many years as a contractor only.

[5.14] three important aspects to be seen in this regard are whether the appellant company was: (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility. The provisions of section 80-IA(4), when introduced afresh by the Finance Act, 1999, the provisions under section 80-IA(4A) were deleted from the Act. The deduction available for any enterprise earlier under section 80-IA(4A) was also made available under section 80-IA(4) itself. Further, the very fact that the legislature mentioned the words (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining, clearly indicates that any enterprise which carried on any of these three activities would be eligible for deduction. It would be important to see whether the appellant company fits into any of the three categories. The first crucial term to be defined is whether the appellant as 'developing' and in that sense was it a 'developer'.

[5.15] In the context of the subsection the term 'developer' it is important to note that a developer is a person who undertakes the responsibility to develop a project. A developer is therefore not a civil contractor simpliciter. If one applies the commercial aspect, then a developer has to execute both managerial as well as financial responsibility. The role of a developer is larger than that of a contractor. When a person is acting as a developer, then he is under obligation to design the project, it is another aspect that such designs have to be approved by the owner of the project, which is the government in the present case. He has not only to execute the construction work in the capacity of the contractor but also he is assigned with the duty to develop, maintain and operate such project. To ascertain whether a civil construction work is assigned on development basis or a contract basis can only be decided on the basis of terms and conditions of the agreement. Only on the basis of the terms and conditions it can be ascertained about the nature of the contract assigned that whether it is a "Work contract" or a "development contract". In "a

development contract" responsibility is fully assigned to the developer for execution and completion of work. Though the ownership of the site or the ownership over the land remains with owner but during the period of development agreement the developer exercises complete domain over the land or the project. A developer is not expected to raise bills at every step of construction but he is expected to charge the cost of construction plus mark-up of his profit from the assignee of the contract. A developer is therefore expected to arrange finances and also to undertake risk. He is authorized to raise funds either by private placements or by financial institutions on the basis of the project. The other situation is as prescribed under section 80-IA(4) in (ii) and (iii) sub clauses. Under these situations, an enterprise carries on the business of operating and maintaining, or developing, operating and maintaining any infrastructure facility. The word 'and' has been used between 'develops' and 'begin to operate'. The word 'and' clearly brings out that both the conditions need to be cumulatively satisfied by the eligible business. The language has thus clearly indicated that the infrastructure facility should not only be developed but also operated by the assessee so as to make its income qualify for deduction. The second condition is that the deduction is available from the year when it commences and the enterprise begins to operate such infrastructure facility. Thus, the eligibility of deduction cannot be prior to the commencement of the development as also the operation of the infrastructure facility.

[5.16] In this regard it would be useful to extract the circular issue by the CBDT in respect of BOLT schemes for the Inditvan railways. For the BOLT schemes the CBDT, considering the unique position of the Inditvan Railways, had relaxed the conditions.

[5.17] In this regard reference is also drawn to the circulars issued by the CBDT from time to time. Vide these circulars; certain industrial parks were identified as notified undertakings. The underlying theme which could be found from these circulars was that mere execution of contracts would not qualify for exemption.

[5.18] The Ld. AO had made a detailed examination of the agreements that the appellant company had entered into with the government. Applying the principles enumerated above to the facts of the case as brought out from the analysis of the agreement, it is clear that the appellant company was not a 'developer'. In this regard reliance is placed on the

judgment of the Hon'ble Gujarat High Court in the case of CIT Vs. Radhe Developers, (2012) 341 ITR 483 (Guj), Sugam Constructions (P) Ltd. Vs. ITO, 2013 (2) TMI 71-ITAT Ahmedabad and GVPR Engineering Limited Vs. ACIT , 2012-LL-0229-77

[5.19] Second aspect to be seen is whether the appellant company was operating and maintaining the facility. In this regard the Ld. AO has given a clear finding that there was no element of 'operating and maintaining' in the contracts. The period for which the appellant company was to maintain the project, was to ensure that the appellant company did the work as per specifications and that the government did not have to incur expenses right away. There was no element of 'operating' involved.

[5.20] Since, the appellant company does not succeed on the first two aspects, In my opinion its claim on the third aspect i.e. developing , operating and maintaining any infrastructure facility, must also fail.

[5.21] The explanatory memorandum to The Finance Act, 2007 states that the purpose of the tax benefit has all along been to encourage investment in development of infrastructure sector and not for the persons who merely execute the civil construction work. It categorically states that the deduction under section 80-IA is available to developers who undertakes entrepreneurial and investment risk and not to the contractors, who undertake only business risk. The appellant company could not demonstrate that it had undertaken huge risks in terms of development of technical personnel, plant and machinery, technical know-how, expertise and financial resources. After the amendment section 80-IA(4) reads as (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility. While prior to amendment the 'or' between three activities was not there, after the amendment 'or' has been inserted with effect from 01.04.2002 by The Finance Act, 2001. Therefore, if the contracts involve design, development, operating and maintenance, financial involvement and defeat correction and liability period then such contracts cannot be called as simple works contract to deny under section 80-IA.

[5.22] The contracts which contain above features alone qualify for deduction under section 80-IA. The other agreements which are pure works contract are hit by the explanation to section 80-IA(13). These work are not entitled for deduction under section

80-IA. The profit from the contracts which involve design, development, operating and maintenance, financial involvement, and defeat correction and liability period alone are to be allowed deductions. The examination of the agreements does not bring out these elements.

[5.23] The appellant has relied on the judgment in the case of CIT v. VRM India Ltd. 375 ITR 414 (Del). It would be relevant to see as to what was the question of law before the Hon'ble Court. The question of law was "Whether the Income Tax Appellate Tribunal was right in view of the contracts in question that the respondent-assessee is entitled to deduction under Section 80-IB(10) of the Income Tax Act, 1961?" Before analyzing the judgment the facts noted by the ITAT would be relevant. They were:-

a. The scope of work, as stated in the NIT to be executed on turnkey basis includes planning, designing, soil testing, earth filling, civil works, including its electrification, services like street lighting, sewerage, water supply drainage, roads, horticulture, landscaping, provision of dual water supply system, rain water harvesting as also construction of community hall, shopping centre, laying HT Cables, LT network, service cables etc. and making the units complete and habitable including watch and ward for 3 (three) years from the date of recorded completion. This scope of work given in the NIT is only indicative and not exhaustive. The agency shall be responsible for execution of all items required for completing these houses in all respects to make these units habitable and ready for occupation as well as functioning of all services, making environment fit for habitation without any additional cost, complete as per direction of the engineer-in-charge.

b. The items will be maintained till these are handed over to the engineer-in-charge in good condition and are free from all defects.

c. The services will be handed over to the various bodies after its completion as per approved plans etc. as stated in the NIT also.

d. Before taking up the work, the layout plans as well as building plans, structural designs etc. are to be gotten approved from DDA/competent authority as mentioned in NIT by adhering to be time schedule laid down in the NIT.

e. The agency will also be responsible for getting the firefighting arrangements, approved from the Delhi Fire Service before execution of the water supply scheme.

[5.24] On analysis of the facts the Hon'ble High court held that "It is crystal clear from the scope of work as enumerated above and which has been undertaken by the assessee, that the assessee has worked as builder and developer of housing project as a whole and for this purpose he has undertaken work of planning, designing of layout plan and architectural/structural drawing of complete housing project as approved by the DDA. It has also carried out survey of the site, also prepared layout plan within the development controls, and has also undertaken detailed soil investigation, prepared complete structural, design and drawing for the foundations and drawing for super structure. The assessee company has also undertaken the work of planning, designing and execution of internal sanitary system, water supply system, drainage system, including all its fittings and fixtures, testing etc. As a developer, the assessee company has also undertaken necessary arrangements for supply of water through dual pipe system, planning, designing, earth filling, civil works including its electrification, infrastructure services like street lighting etc. As a developer, the assessee company has also undertaken horticulture, rain water harvesting provision of dual water supply system, rain water harvesting as also construction of community hall, shopping centre, laying HT Cables, LT network, service cables etc. Had the assessee undertaken the housing project as work contract, its scope of work was limited to civil construction work. Whereas as a developer, assessee had undertaken the work of horticulture, rain water harvesting provision of dual water supply system, rain water harvesting as also construction of community hall, shopping centre, laying HT Cables, LT network etc. Therefore, on assessing the detailed scope of work as enumerated above which was undertaken by the assessee, it can safely be concluded that on the facts of the case, the assessee has worked as a developer and not merely as a work contractor."

[5.25] These facts do not come out from the analysis of the agreements that were examined by the Ld. AO. Therefore, the judgment in the case of VRM India (supra) would not aid the appellant.

[5.26] Based on the above appreciation of facts and law, the claim of the appellant company for deduction u/s. 80-IA is not tenable. Grounds of appeal are dismissed.

6. Appeals are dismissed.

SD/-

COMMISSIONER OF INCOME TAX(A),

MANKI

Annexure 5

IN THE INCOME TAX APPELLATE TRIBUNAL, MANKI

ASSESSMENT YEAR: 2011-12

M/s. Senerix Pvt Ltd, Bhagwan Singh Road, Kanchiwadi, Manki.	v/s	CIT, Manki
PAN: XX12568Y		
(Appellant)	..	Respondent

Appellant by :	Shri Madan
Respondent by:	Shri Gupta

Date of hearing: 09-03-2016

Date of pronouncement: 10-3-2016

ORDER

1. This is an appeal filed by the assessee arising from the order of the Ld. CIT, Manki, dated 23-01-2015 under section 263 of the Act on the following grounds:
    i. For that the CIT was not right in setting aside the order of the assessing officer by providing a direction under section 263, when the assessing officer has already applied his mind on the issue of deduction granted under section 80IA(4).
    ii. For that when no proceeding under section 263 can sustain for the change of opinion when the due enquiries were already conducted by the Assessing Officer before granting the deduction, the Ld. CIT was not right in setting aside the order of the Assessing Officer.
    iii. For that no proceedings under section 263 can survive by the assessment as the view has already been taken by the assessing officer, the Ld. CIT was not right in setting aside the order of the Assessing officer.

2. The crux of the grounds raised by the assessee relates to setting aside of the assessment order under section 143(3) with regard to issue of deduction granted u/s 80IA(4) of the Act.
3. Brief facts of this case are that the assessee is engaged in the business of civil construction. For the assessment year 2011-12, the Assessing officer passed the assessment order under section 143(3) of the Act, wherein claim of deduction of Rs. 90,00,00/- u/s.80IA was allowed by the Assessing officer. Subsequently, the case was reviewed by the CIT vide his order dated 23.1.2015 under section 263. The Ld. CIT held that the deduction u/s.80IA of the Act are not automatically available to the assessee merely on the basis that it is carrying on construction of infrastructure facilities. The said deduction can be available only if all the conditions mentioned in section 80IA(4) of the Act relating to "developing" or "operating or maintaining" or "developing, operating or maintaining" any infrastructural facilities are fully satisfied. He observed that the assessee has not made any enquiries regarding the nature of construction actively carried out by the assessee, as is evident from the assessment order. The contract agreements were not called for and examined by the assessing officer. Regarding the issue of whether the assessee had entered into an agreement with any Central Government, State Government, or Local authority or any other authority for "developing" or "operating or maintaining" or "developing, operating or maintaining" any infrastructural facilities, the assessee had merely stated that the details of project undertaken by the assessee can be verified from the TDS certificate. Ld. CIT observed that the nature of contracts cannot be ascertained by merely verifying the TDS certificate. In view of above backdrop, the Ld. CIT issued notice u/s.263 to the assessee to clarify the position. In response to this notice, the assessee has stated that the assessing officer has examined the issue of grant of deduction u/s 80IA of the Act after conducting due enquiries and application of mind and due to change of opinion, proceeding under section 263 were initiated.
4. Ld. CIT in his order mentioned that the contentions of the assessee are contrary to the facts on record. It is clear that the Assessing Officer has not made any enquiries regarding the nature of business activities and whether the business activities carried out by the assessee enables it to claim deduction u/s. 80IA of the Act. The Assessing Officer had not even asked to furnish copies of agreement pertaining to these contracts, which are vital to

ascertain whether the provisions of section 80IA(4) of the act applied to the assessee company and whether it is satisfying the various conditions laid down in Section 80IA(4) of the Act. Ld. CIT(A) allowed the deduction u/s.80IA(4) without examining the details, without verifying the conditions and without obtaining the necessary documents, such as agreements with the government so as to ascertain whether the assessee was a mere contractor or a developer in the real sense. In view of above, Ld. CIT was of the view that the deduction u/s.80IA (4) of the Act of Rs.90, 00,000/- had been made without supporting evidences, without examination of facts and circumstances, which makes the order erroneous and prejudicial to the interests of the revenue. Accordingly, he set aside the assessment order passed under section 143(3) of the Act and directed the A.O to pass the assessment order afresh after verifying whether all the conditions laid down u/s.80IA(4) of the Act have been satisfied by the assessee company, after giving due opportunity to the assessee being heard. Hence, the assessee is in appeal before the tribunal.

5. Ld. A.R. reiterated the submissions made before the Ld. CIT. He stated that the Assessing Officer is fully justified in allowing the claim of deduction u/s. 80IA(4) of the Act as he had done reasonable enquiry and applied his mind before passing the assessment order. He submitted that the TDS certificate was furnished before the Assessing officer.
6. On the other hand, Ld. D.R. supported the action of the Ld. CIT.
7. We have considered the rival submissions and perused the record of the case. Before us, Ld. D.R. produced the original assessment records and we find that no TDS certificate as claimed by the assessee is mentioned anywhere. We further observed that the Ld. CIT has specifically mentioned that the contention of the assessee is contrary to the facts on record. The AO has not even asked the assessee to submit copies of various agreements pertaining to contracts, which are vital to ascertain that the provisions of section 80IA(4) applies to the assessee or not. The deduction once allowed by a statue, its advantage has to be given to the assessee subject to fulfilment of conditions laid therein. A simple glance at the assessment order would itself show that practically no enquiry has been made and no reply has been given by the assessee. Further, the reading of assessment order shows that it is a case where granting deduction, u/s 80IA of the Act is in question.

The AO should have at bare minimum asked the assessee how assessee is eligible for deduction and how the assessee has carried out the business activities. None of these questions have been raised, therefore, it is a clear case of failure to make enquiry. The AO is not only an adjudicator of a dispute between revenue and the assessee but he also has to play a role of investigator on behalf of the Revenue. It is also true that sometimes he may make enquiries and he may be satisfied with the replies of the assessee and such satisfactions may not be reflected in the assessment order. Therefore, in the light of non-enquiry itself, the assessment order is erroneous and prejudicial to the interest of revenue. The AO passed the order without application of mind. In the view of above, we are of the considered view that Ld. CIT is fully justified in setting aside the assessment order and directing the AO to pass the assessment order afresh. We accordingly concur with the order under section 263 of the Act.

8. In the result, appeal filed by the assessee is dismissed.

Order pronounced in the open court on 10/3/2016.

Sd/- **Sd/-**

ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Annexure 6

IN THE INCOME TAX APPELLATE TRIBUNAL,

MANKI BENCH, MANKI

ASSESSMENT YEAR: 2011-12

M/s. Senerix Pvt Ltd, Bhagwan Singh Road, Kanchiwadi, Manki.	v/s	DCIT, Circle-1, Manki
PAN: XX12568Y		
(Appellant)	:	(Respondent)

Assessee by: Shri Madan, AR

Revenue by: Shri Gupta, DR

Date of Hearing: 11/09/2017

Date of pronouncement: 13/09/2017

ORDER

1. These are appeals filed by the assessee against the common order of CIT(A)-Manki, dated 4.1.2016, for the assessment years 2011-12.
2. The only issue involved in both the appeals is that the Ld CIT(A) referred in confirming the action of the AO in disallowing deductionu/s. 80IA(4) of the Act to the assessee-of Rs.90,00,000/- for the assessment year 2011-12.
3. The brief facts of the case are that the assessee company is earning income from execution of civil contracts. The assessee filed its return of income for assessment year 2011-12 on 1.10.2011 declaring Nil income. The AO observed that the assessee company has claimed deduction u/s. 80IA(4) of the Act with respect to projects it was executing. The Assessing officer denied the claim of deduction u/s. 80IA(4) of the Act for the assessment year 2011-12 of Rs.90,00,000/- . The reasons for disallowing the claim for deduction u/s. 80IA(4) of the Act to the assessee was that the assessee has not executed those projects as a developer but as a contractor.

4. On appeal, the CIT(A) confirmed the action of AO.
5. Before us, Ld. A.R. of the assessee filed copy of the assessment order for assessment year 2008-09, which was the first assessment year in the case of the assessee for allowing deduction u/s.80IA(4) of the Act to the assessee. He submitted that the AO in an assessment made u/s.143(3) of the Act order dated 27.12.2010 after examining the facts of the case of the assessee held as under:

   "In the light of the above discussion, since the disallowances have been made on technical ground i.e. non-compliance of TDS provisions and that the profit claimed by the company is eligible for deduction; the effect on the total income of the assessee is not applicable in this case. Therefore, the return income of the assessee is accepted, which is Nil in this case due to claim of deduction u/s. 80IA of the I.T. Act, 1961."
6. He submitted that though the principles of *res-judicata* are applicable to income tax proceedings but it has been held by the Hon'ble Supreme Court in the case of Radhasoami Satsang vs. CIT, 193 ITR 321 (SC) and CIT Vs. Excel Industries Ltd, 358 ITR 295(SC) that consistency should be maintained in Income tax proceedings.
7. On the other hand, Ld. D.R. relied on orders of lower authorities.
8. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. It is the contention of Ld. A.R. of the assessee that the projects carried on by the assessee are identical during the year under consideration and there is no change in facts and, therefore, without pointing out any change in facts, the AO is not justified in disallowing the claim of deduction u/s. 80IA(4) of the Act to the assessee. He has placed reliance on the decision of Hon'ble Supreme Court in the case of Radhasoami Satsang vs. CIT, 193 ITR 321 (SC) and CIT Vs. Excel Industries Ltd, 358 ITR 295(SC), wherein, it was held as under:

   "In the absence of any material change justifying the department to take a different view from the department or to take a different view from that taken in earlier proceedings, the question of exemption of the assessee-appellant should have been reopened. Strictly, speaking, res-judicata does not apply to income tax proceedings. Though each assessment year being a unit what was decided in one year might not apply in the following year; but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties

have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

9. Further, the Hon'ble Supreme Court in the case of CIT Vs. Excel Industries Ltd (supra) has held as under:

   "That a consistent view had been taken in favour of the assessee on the questions raised, starting with the assessment year 1992-93, that the benefits under the advance licences or under the duty entitlement pass book did not represent the real income of the assessee. There was no reason for the court to take a different view unless there were very convincing reasons, which there were not.

10. Therefore, respectfully following the above decisions of Hon'ble Supreme Court and keeping in view that no change in facts has been brought on record by the revenue during the years under appeal, we set aside the orders of lower authorities and direct the AO to allow claim of deduction u/s. 80IA(4) of the Act of Rs.90,00,000/- for assessment year 2011-12 and allow this ground of appeal of the assessee.
11. In the result, the appeals filed by the assessee are allowed.

Order pronounced in the open court on 13/09/2017.

Sd/- Sd/-

JUDICIAL MEMBER **ACCOUNTANT MEMBER**

INSTRUCTIONS TO THE PARTICIPANTS

- The Moot Problem has been provided by O.P Jalan and Associates Consultants, LLP. Any attempt made to contact the author of the moot problem will lead to direct disqualification of the concerned team.
- The case in question is fictitious in nature and any resemblance to any person, juridical or non-juridical, living or dead, is completely accidental in nature. Any resemblance to any case sub-judice before any authority or court of law is completely unintentional.
- The laws of the Union of Inditva are in pari materia with the laws applicable to the Union of India.
- In the Written Submissions and at the Oral Hearings, the Parties are required to address the above mentioned issues. No new issue is to be introduced in the written submissions/oral rounds.
- The written submissions for the Plaintiff and Defendant are to be sent by mail at opj.moot@gmail.com, latest by 11:59 P.M on February 28, 2018, following which penalty will be imposed. For details, kindly refer to the Rules & Regulations, 2nd O.P.Jalan Memorial National Taxation Moot Court Competition, 2018.
- Any requests for Clarification may be made no later than 11:59 P.M, February 08, 2018 by email at opj.moot@gmail.com.
- The Oral Hearings are scheduled to take place on March 09, 2018 to March 11, 2018. Details regarding the time and venue will be provided in due course.