

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “ A ” BENCH – AHMEDABAD

Before Shri S. S. Godara, JM, & Shri Manish Borad, AM.

ITA No.1464 /Ahd/2012
Asst. Year: 2009-10

ACIT, Circle-8, Ahmedabad.	Vs.	Zydus Intrastructure Pvt. Ltd., 8 th floor, Zydus Tower, Satellite Cross Road, Ahmedabad.
Appellant		Respondent
PAN AAACZ 0629H		

Appellant by	Shri K. Madhusudan, Sr.DR
Respondent by	Shru Mukesh M. Patel, AR

Date of hearing: 24/6/2016
Date of pronouncement: 21/7/2016

O R D E R

PER Manish Borad, Accountant Member.

This appeal of Revenue for Asst. Year 2009-10 is directed against the order of Id. CIT(A)-XIV, Ahmedabad dated 30.4.2012 in appeal No.CIT(A) XIV/Jt.CIT, R-8, 224/2011-12 passed against order u/s 143(3) of the IT Act, 1961 (in short the Act) framed on 23/12/2011 by Jt. CIT, Range-8, Ahmedabad. Revenue has raised following grounds :-

1. The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the

addition of Rs.84,841/- made by the Assessing Officer u/s.41 of the Act.

2. The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in directing the Assessing Officer to allow the depreciation on application software license @ 60%
- 3(a) Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in directing the Assessing Officer to allow the deduction u/s.80IAB of the Act on the income derived from activities of operation and maintenance. :
- (b) The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in directing the Assessing Officer to allow the deduction u/s.80IAB of the Act on the income received from sale of scrap and professional fees.
- (c) The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in directing to allow the deduction u/s.80IAB of the Act on the prior period income.
4. On the facts and in the circumstances of the case, the Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad ought to have upheld the order of the Assessing Officer.
5. It is therefore, prayed that the order of the Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad may be set-a-side and that of the order of the Assessing Officer be restored.

2. Briefly stated facts of the case are that the assessee is a private limited company engaged in the business of development, operation and maintenance of Pharma Special Economic Zone (SEZ). Return of income for Asst. Year 2009-10 was filed on 16.09.2009 disclosing income at Rs.73,88,600/-. Case was selected for scrutiny assessment. During the course of assessment

proceedings Id. Assessing Officer observed that assessee has credited the profit and loss account by income on account of operation and maintenance of SEZ which was included in the deduction u/s 80IAB of the Act. However, Id. Assessing Officer was of the view that such income from operation and maintenance is not eligible for deduction u/s 80IAB and added it back to the income of the assessee. Along with this addition Id. Assessing Officer also disallowed Rs.22,000/- u/s 14A of the Act, Rs.84,841/- u/s 41(1) of the Act and disallowing software expenses at Rs. 80,959/-. Id. Assessing Officer also denied deduction u/s 80IAB of the Act for Rs.23,09,372/- being prior period income received in relation to raw-water charges. In total addition of Rs.1,55,54,473/- was made and income of the assessee was assessed at Rs.2,29,43,074/-.

3. Assessee went in appeal before Id. CIT(A) and the same was partly allowed with major relief given by Id. CIT(A).

4. Now Revenue is in appeal before the Tribunal.

5. Ground No.1 of Revenue's appeal is as under :-

1. The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the addition of Rs.84,841/- made by the Assessing Officer u/s.41 of the Act.

6. Ld. DR supported the order of Assessing Officer.

7. On the other hand, Ld. AR submitted that addition u/s 41 of the Act towards liability of Rs.84,841/- which in the view of Id. Assessing Officer ceased to exist as on 31.3.2009. Ld. AR further submitted that closing balance of the impugned parties, which were added u/s 41(1) of the Act, were having regular business transaction with the assessee company and payments were made to these parties in the subsequent years and as these liabilities actually existed at the close of the year, no addition was called for u/s 41(1) and Id. CIT(A) has rightly deleted the same.

8. We have heard the rival contentions and perused the material on record. Revenue has challenged the order of Id. CIT(A) for deletion of the addition made u/s 41(1) of the Act for cessation of liability. We observe that Id. CIT(A) has deleted the addition u/s 41(1) of the Act of Rs.84,841/- by observing as under :-

3.3 Decision

I have carefully perused the assessment order and the submissions given by the appellant. During the course of assessment proceedings, the appellant could not furnish the confirmations from certain creditors and the A. O. treated the liability as ceased and applied the provisions of section 41 (I) of the Act. The appellant has submitted that the confirmation could not be submitted during the assessment proceedings as the same was awaited. However, the appellant has actually made the payment to said party in the subsequent year and the proof of such payment was also enclosed and produced before the A. O. After consideration of all facts, I am in agreement with the submission of the appellant that the payment has been made in the subsequent year. The A. O. also has not given any specific finding regarding the fact that the liability has ceased to exist. He has applied the provisions by generally mentioning the provisions of section 41 (1) and only on the reason that the confirmation was not submitted. Unless, it is established by the A. O. that the liability has ceased to exist and has ceased with no chance of revival, the provisions of section 41(1) cannot be applied, as the -appellant has not still written back the

liability and on the contrary the payment has been made in the subsequent year,

In view of above discussion, the addition made by the A. O. is directed to be deleted. The ground of appeal is accordingly allowed.

We find that Id. AR has referred to the fact that the impugned creditors were having regular business transactions in subsequent years also and the actual payments were made to these parties in the subsequent years and the very foundation called for an addition u/s 41(1) of the Act gets demolished if an assessee proves that the impugned liabilities were paid off.

9. From going through the observation of Id. CIT(A) and also the fact that the impugned creditors were paid in subsequent years, we find no reason to interfere with the order of Id. CIT(A), we uphold the same. This ground of Revenue is dismissed.

10. Ground No.2 of Revenue's appeal is as under -

2. The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in directing the Assessing Officer to allow the depreciation on application software license @ 60%

11. Ld. DR supported the order of Id. Assessing Officer.

12. Ld. AR submitted that assessee claimed expenditure of Rs.2,47,249/- on account of computer software as revenue expenditure, but Id. Assessing Officer while scrutinizing these expenses was of the view that expenditure of Rs.59,999/-incurred on

purchase of software was basically a license fees and are capital in nature subject to 25% depreciation (applicable for intangible asset) and after allowing Rs.11,040/- on the cost of software of Rs.91,999/- made an addition of Rs.80,959/-.

13. When the matter travelled before Id. CIT(A) it was held that the software license expenditure which are valid for long term but are part and parcel of the computer system and are eligible for 60% depreciation and assessee has accepted the decision of Id. CIT(A) and has not challenged it before the Tribunal.

14. We have heard the rival contentions and perused the material on record. The issue raised in this ground by Revenue is against the action of Id. CIT(A) for disallowing depreciation on software @ 60% in place of 25% which are applicable for intangible asset. We observe that Id. Assessing Officer has treated the expenditure of Rs.91,999/- towards purchase of software license as capital asset under the block of intangible assets eligible for depreciation @ 25% whereas Id. CIT(A) has also treated the expenditure of Rs.91,999/- as capital expenditure but has categorized it along with computers and directed the Assessing Officer to allow depreciation @ 60% by observing as under :-

4.3 Decision:

I have careful/ perused the assessment order and the submissions given by the appellant. The appellant has submitted that since the software involves rapid obsolescence, the claim of revenue expenditure-should be allowed. I am not inclined to agree with the submission of the appellant. The appellant has bought software licenses which are valid for long term and the expenditure incurred thereon is, therefore, not in the nature of

revenue. Therefore; the plea of the appellant that expenditure is in the nature of revenue is dismissed.

However, the treatment of the software by the A. O. as intangible asset and allowing interest @ 25% is not justified as the computer software has been grouped as eligible to rate of depreciation @ 60% and, therefore, A. O. should have allowed the depreciation @ 60% in place of 25% at/owed by him. The appellant has also disputed the finding of the A. O. that the software were used for less than 180 days. The A. O. is directed to verify the claim from the facts available on record and allow the depreciation accordingly as per the provisions of the Act, The grounds of appeal are accordingly partly allowed.

15. It is almost a settled issue that software application which are having validity for long term period are basically system software on which computer hardware runs and it is impossible to use computer without having such software installed on it and, therefore, such licensed software are subject to depreciation @ 60% and Id. CIT(A) has done so. We find no reason to interfere with the order of Id. CIT(A) on this issue. This ground of Revenue is dismissed.

16. Ground No.3 of Revenue's appeal is as under :-

- 3(a) Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in directing the Assessing Officer to allow the deduction u/s.80IAB of the Act on the income derived from activities of operation and maintenance. :
- (b) The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in directing the Assessing Officer to allow the deduction u/s.80IAB of the Act on the income received from sale of scrap and professional fees.
- (c) The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in directing to allow the deduction u/s.80IAB of the Act on the prior period income.

17. In the return of income filed, assessee claimed deduction u/s 80IAB of the Act at Rs.11.76 crores. In the course of examination of the claim of deduction u/s 80IAB of the Act, Id. Assessing Officer observed that in the profit and loss account assessee has shown income from sales, maintenance and operation, raw-water charges income, prior period raw-water charges income, operation and maintenance charges which were claimed by assessee to be eligible for deduction u/s 80IAB of the Act whereas Id. Assessing Officer was of the confirmed view that assessee was not eligible for deduction u/s 80IAB for income earned in operating and maintenance of SEZ. In view of this observation Id. Assessing Officer denied deduction u/s 80IAB of the Act for Rs.1,53,66,673/- on account of following :-

i) Income from operation & maintenance inclusive of prior period raw-water charges.	1,52,00,000/-
ii) Sale of scrap	91,000/-
iii) Plan approval fees	16,535/-
iv) Interest income	59,138/-

18. When assessee went in appeal before Id. CIT(A) no ground was raised against disallowance of deduction u/s 80IAB on the interest income of Rs.59,138/- and for the remaining disallowance of deduction whole of the assessee's claim was allowed by Id. CIT(A).

19. Aggrieved Revenue is now in appeal before the Tribunal.

20. Ld. DR supported the order of Assessing Officer.

21. Ld. AR submitted as under -

1.0 Tax Incentives for SEZ - A Historical Overview, which prima-facie explains the logical justification of our claim for Deduction in respect of Income from Operation & Maintenance

1.1 Prior to the introduction of Sec. 80-IAB, which came to be inserted in the Income-tax Act, 1961, by the Special Economic Zones Act, 2005, w.e.f. 10-02-2006, similar deduction for SEZs was allowed under the provisions of Sec. 80-IA(4)(iii) of the Income-tax Act. As per the same, the benefit of the deduction u/s. 80-IA(1) was allowed in respect of *"the profits and gains derived by an undertaking which develops, develops and operates or maintains and operates an industrial park or special economic zone"* notified by the Central Government during the period 1st April 1997 to 31st March 2006.

1.2 As per Sec. 80-IA(2), the benefit of the deduction u/s. sub-section (1) was allowed to be claimed by the assessee, at his option for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or enterprise develops the industrial park or special economic zone. As per the proviso to the said sub-section, where an undertaking develops an industrial park or a special economic zone and transfers the operation and maintenance of such park or zone to another undertaking, the benefit of deduction u/s. 80-IA(1) was to be allowed to such transferee undertaking for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred.

13 It is pertinent to note that the very same incentive provisions as referred to hereinabove as per the scheme of Sec. 80-IA(4)(iii) came to be introduced in the Income-tax Act, 1961, by the Special Economic Zones Act, 2005, in the form and shape of the new Sec. 80-IAB, alongwith with a package of other provisions, further expanding the scope of deduction and incentive under the Income-tax Act for Special Economic Zones.

1.4 In the above context, there is no logical reason as to why the benefit of deduction, earlier available to an undertaking in respect of income from development, operation and maintenance, could have been intended by the Legislature to be restricted only for development income under the new scheme of deduction u/s. 80-IAB, more so when the overall ambit and scope of tax incentives for SEZ Developers and Entrepreneurs were enlarged. Infact, if there was any such legislative intention, the explanatory notes on the relevant amendment would have amply clarified the same.

1.5 It also needs to be appreciated that if the Legislature had intended to restrict the scope of deduction u/s. 80-IAB, *"only for profits and gains derived from the business of developing of SEZ,"* as highlighted in your notice, the benefit of deduction would not have been continued to be provided for the same period of 10 years out of 15 years from the notification of the SEZ, as in the case of the earlier Sec. 80-IA(4)(iii) of the Income-tax Act. The period of 10 years of

deduction, provided u/s. 80-IAB, is obviously intended to ensure that even after the completion of the Development, the income from Operation and Maintenance of the SEZ also continues to enjoy the benefit of 100% deduction.

1.6 Moreover, as per the second Proviso to Section 80-IAB, where an undertaking being a Developer of a Special Economic Zone transfers the operation and maintenance of such SEZ to another Developer, the benefit of deduction is to be allowed to the transferee Developer for the remaining period in the ten consecutive assessment years, as if the operation and maintenance were not so transferred to the transferee Developer. The language of the aforesaid provision impliedly clarifies that the benefit of deduction is also available in respect of operation and maintenance income. If this were not so, there was no logical meaning or purpose to provide that when a Developer transfers the operation and maintenance of such SEZ to another Developer, the benefit of deduction is to be allowed to the transferee Developer as well, for the remaining period in the ten consecutive assessment years, as if the operation and maintenance were not so transferred to the transferee Developer.

2.0 Introduction of the term 'Developer' as defined in the SEZ Act and the important meaning & context of the same

2.1 Whereas the earlier provisions of Sec.80-IA applied to an assessee being "*any undertaking which develops, develops and operates or maintains and operates an industrial park or special economic zone,*" the provisions of Sec. 80-IAB have been made applicable to an assessee, being a 'Developer.' As per Explanation to Sec. 80-IAB, "*Developer shall have the meaning as assigned under clause (g) of Sec. 2 of the Special Economic Zones Act.*" Sec. 2(g) of the SEZ Act has defined the term developer as under:

Sec. 2(g) - "Developer" means a person who, or a State Government which, has been granted a letter of approval under sub-section (10) of Sec. 3 and includes an authority and a Co-Developer.

2.2 Under Sec. 3(10), it has been provided that the Central Government shall on receipt of communication by the Board, grant a letter of approval on such terms and conditions and obligations and entitlements as may be approved by the Board to the Developer, being the person or the State Government concerned.

2.3 In this context, we wish to invite your kind attention to the Letter of Approval bearing no. F.2/44/2005-EPZ, dated 21st June, 2006, issued by the Central Government in favour of Zydus Infrastructure Private Ltd. as the Developer, a copy of which is enclosed herewith for ready reference marked as Annexure-A. The very first condition under which the approval is granted states that "*the Developer shall develop, operate and maintain the Special Economic Zone in terms of the Special Economic Zones Act, 2005 and the Rules made there under.*" Thus, development, operation and maintenance of the Special Economic

Zone are an integral part of the terms and conditions and obligations and entitlements granted to the Developer under the Letter of Approval.

3.0 Scope of Exemption from MAT & DPT to SEZ Developer - a clear pointer to the scope of Deduction u/s 80-IAB

3.1 In the above context, it is also meaningful and relevant to examine the provisions of Sec. 115JB(6) in relation to exemption from Minimum Alternate Tax (MAT) and Sec. 115O(6) in relation to exemption from Dividend Distribution Tax (DDTO, which came to be simultaneously introduced by the Special Economic Zones Act, 2005, w.e.f. from 10-02-2006.

3.2 Under Sec. 115JB(6) it has been provided that the provisions of this section viz. MAT shall not apply to the income accrued or arising on or after 1st April, 2005 from any business carried on or services rendered by an Entrepreneur or a Developer in a Unit or Special Economic Zone, as the case may be. Thus, the exemption from MAT is applicable in the case of a Developer as referred to u/s. 80-IAB in respect of all income accruing or arising from any business carried on or services rendered, which would very much cover not only income from development of SEZ, but also income on account of operation and maintenance of SEZ also. When the relevant benefit of exemption in respect of income from operation and maintenance is granted under MAT, there is no logical basis or justification for not granting similar benefit of deduction u/s. 80-IAB.

3.3 It is also pertinent to note that the benefit of exemption from tax on distributed profits u/s. 115O(6) came to be introduced for the first time, under The package of income-tax incentives as inserted by the SEZ Act, 2005. This exemption in respect of dividends declared, distributed or paid on or after 1st April, 2005 was intended to be granted to both the undertaking or enterprise as covered under the earlier provisions of Sec. 80-IA(4)(iii) (as notified prior to 31st March, 2006), as well as the Developer referred to under the new provisions of Sec. 80-IAB (as notified on or after 1st April, 2005). Therefore, the provisions of Sec. 115O(6) have referred to both the categories viz. "any undertaking or enterprise engaged in developing or developing and operating or developing, operating and maintaining a Special Economic Zone," or "Developer," for purposes of availing the benefit of exemption from DOT. It would be indeed naive to interpret this provision so as to mean that since Sec. 80-IAB does not carry the same terminology as in Sec.115O(6), Sec.80-IAB has not intended to grant the benefit of deduction in respect of income from operation and maintenance.

4.0 Audit Report in Form 10CCB refers to allowing deduction in respect of income from Development, Operation and Maintenance of SEZ

4.1 Section 80-IAB(3) prescribes that, *"the provisions of sub-section (5) and sub-sections (7) to (12) of Sec. 80-IA shall apply to the Special Economic Zones for the purpose of allowing deductions under sub-section (1)."*

4.2 Section 80-IA(7) lays down the condition that the deduction to the eligible undertaking shall not be admissible unless its accounts for the relevant year have been duly audited and Audit Report in the prescribed Form No. 10CCB is furnished. In this connection we wish to invite your kind attention to the Audit Report in Form No. 10CCB filed in our own case, wherein under Column 16, the relevant details in respect of "Development, Operation, Maintenance of Industrial Park/SEZ have been referred to and under Column 29, the profits and gains derived by the undertaking/enterprise from the eligible business has been duly certified. It is pertinent to point out that Form No. 10CCB was introduced by the I.T. (Third Amendment) Rules, 2005, with effect from 04-02-2005.

4.3 The very fact that even after the insertion of Sec. 80-IAB with effect from 10-02-2006, no change has been made in the format of the prescribed Form No. 10CCB, is a clear pointer and support to the logical contention presented by us hereinabove, that there is in effect no change in the basic scheme of granting of deduction to a notified SEZ under the provisions of Sec. 80-IAB, with reference to the earlier provisions under Sec. 80-IA(4)(iii), applicable to SEZs notified upto 31st March, 2006. The fact that Form No. 10CCB continues to refer to 'Development, Operation & Maintenance of SEZ' and determination of Profits and Gains derived from the eligible business on the basis of the above, supports the continuing legislative intention to grant deduction of income in respect of 'Development, Operation & Maintenance of SEZ,' as correctly claimed by us.

5.0 Judicial Pronouncements that support the 'Rule of Liberal interpretation,' which needs to be applied in the instant case

5.1 Object of all the rules of interpretation is to give effect to the object of the enactment having regard to the language used.

In the case of *C.W.S. (India) Ltd. vs. CIT 208 ITR 649 (SC)*, the Hon'ble Supreme Court was pleased to hold as under:

"While we agree that literary construction may be the general rule in construing taxing enactments, it does not mean that it should be adopted (sic) if it leads to a discriminatory or incongruous result. Interpretation of statutes cannot be a mechanical exercise. Object of all the rules of interpretation is to give effect to the object of the enactment having regard to the language used.

In this connection, we may refer to the well-recognized rule of interpretation of statutes that where a literal interpretation leads to absurd or unintended result, the language of the statute can be modified to accord with the intention of Parliament and to avoid absurdity. The following passage from Maxwell's 'Interpretation of Statutes' (12th Edn.) may usefully be quoted:

"1. MODIFICATION OF THE LANGUAGE TO MEET THE INTENTION.

Where the language of the statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the Legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Lord Reid has said that he prefers to see a mistake on the part of the draftsman in doing his revision rather than a deliberate attempt to introduce an irrational rule: 'the canons of construction are not so rigid as to prevent a realistic solution'." (p. 228)

We are, therefore, of the opinion that the Full Bench of the Kerala High Court was right in taking the view it did on this aspect and we agree with it."

5.2 "A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally"....

In the case of Bajaj Tempo Ltd. vs. CIT 196 ITR 188 (SC), the Hon'ble Supreme Court relying stressed on the need for incentive provisions to be construed liberally:

"A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally! In Broach Distt. Cooperative Cotton Sales Ginning & Pressing Society Ltd. vs. CIT [1989] 177 ITR 418 (SC), the assessee a co-operative society claimed that the receipts from the ginning and pressing activities were exempt under section 81 of the Income-tax Act, 1961. The question for interpretation was whether the co-operative society which carried on the business of ginning and pressing was a society engaged in 'marketing' of the agricultural produce of its members. The Court held that object of section 81(1) was to encourage and promote the growth of cooperative societies and, consequently, a liberal construction must be given to the operation of that provision. And since ginning and pressing was incidental or ancillary to the activities mentioned in section 81(1) the assessee was entitled to exemption and the proviso did not stand in the way.

In CIT v. Strawboard Mfg. Co. Ltd. [1989] 177 ITR 431 (SC), it was held that the law providing for concession for tax purposes to encourage industrial activity should be liberally construed. The question before the Court was whether Straw Board could be said to fall within the expression 'paper and pulp' mentioned in the Schedule relevant to the respective assessment years. The Court held that since words 'paper and pulp' were mentioned in the Schedule, the intention was to refer to the paper and pulp industry and since Straw Board Industry could be described as forming part of the paper and pulp industry, it was entitled to benefit.

The section, read as a whole, was a provision directed towards encouraging industrialization by permitting an assessee setting up a new undertaking to claim benefit of not paying tax to the extent of six per cent in a year on the capital employed.

Since a provision intended for promoting economic growth has to be interpreted liberally, the restriction on it, too, has to be construed so as to advance the objective of the section and not to frustrate it."

22. We have heard the rival contentions and perused the material on record. Revenue is aggrieved, for deletion of disallowance of Rs.1,54,07,535/- made by Id. Assessing Officer. We observe that Id. CIT(A) has exhaustively dealt with this issue before allowing the appeal by observing as under :-

5.3 Decision:

I have carefully perused the assessment order and the submissions given by the appellant. The A. O. has disallowed the claim of income of the appellant by operation and maintenance of the SEZ as the section 80IAB mentions only the word 'developing'¹. The appellant has submitted that the claim is in accordance with the provisions of section 80IAB and should therefore be allowed. In order to clearly understand the controversy, various provisions which are relevant are quoted hereunder: Section 80IAB of the I. T. Act.

" (j) Where the gross total income of an assessee, being a Developer, includes any profits and gains derived by an undertaking or an enterprise from any business of developing a Special Economic Zone, notified on or after the 1st day of April, 2005 under the Special Economic Zones Act, 2005, /here 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 one hundred per cent of the profits and gains derived from such business for ten consecutive assessment years"

The word 'developer'¹ has further been defined in Explanation to Section 80IAB which reads as under:

"Developer shall have the meaning as assigned under clause (g) of Sec. 2 of the Special Economic Zones Act."

Further, section 2(g) of the SEZ Act has defined the term developer as under:

Sec. 2(g) - "Developer" means a person who, or a State Government which, has been granted a letter of approval under sub-section (10) of Sec. 3 and includes an authority and a Co-Developer.

Section 3(10) of the SEZ Act provides that the Central Government shall on receipt of communication by the Board, grant a letter of approval on such 'terms and conditions' and obligations and entitlements as may be approved by the Board to the Developer, being the person; the State Government concerned.

A combined reading of the provisions of section 80IAB of the Income Tax Act with Section 2(g) and Section 3(10) of the Special Economic Zone Act show that a person would be considered as a developer in accordance with the grant of letter of approval on the basis of terms and conditions and obligation and entitlement as may be approved by the Board who is approving the setting up of the SEZ. Therefore, if the approval has been granted for developing, operating and maintaining the SEZ, the term 'developer' would include operation and maintenance also.

Further an examination of the letter of approval bearing no. F.2/44/2005-EPZ, dated 21st June, 2006, issued by the Central Government in favour of the appellant as the Developer show that the very first condition under which the approval is granted states that "the Developer shall develop, operate and maintain the Special Economic Zone in terms of the Special Economic Zones Act, 2005 and the Rules made there under." Thus, it is clear from the letter of approval that development, operation and maintenance of the Special Economic Zone are an integral part of the terms and conditions and obligations and entitlements granted to the Developer. Therefore, in view of the preceding discussion, the word 'developer' also include the activities of operation and maintenance of the SEZ in the case of the appellant.

The interpretation by the A. O. that operation and maintenance are different to that of development and legislature were fully aware of this fact and, therefore, the words 'operation and maintenance' have not been intentionally omitted is not justified. A harmonious interpretation of the provisions of various Acts, as discussed above, clearly show that in the case of the appellant, the deduction is available for operation and maintenance also in accordance with the terms and approval.

The observations of the A. O. that the second proviso to section 80IAB where the Act provides for deduction in respect of profits and gains derived from operation and maintenance activities in the hands of transferee developers, if any developer after developing a SEZ transfers the operation and maintenance of such SEZ to another developer is also, in my opinion, not

justified. The activity of development, operation and maintenance are continuous in nature. Once a person takes up the work of development of a facility and starts allotting or selling plots in the SEZ, it is not possible that all the plots will be sold simultaneously and further it is also not possible that all the persons who have purchased plots will start functioning after complete sell out of the SEZ. It is therefore most likely that the activity of development, operation and maintenance will go on simultaneously. It is a different fact that once all the plots are developed and sold, the operation and maintenance can be transferred to some other party and for this purpose, the proviso to section 80IAB has been incorporated. In the case of the appellant, the approval given is for all the activities.

If would not be out of place to mention here that the provisions of section 80IA(4) initially had the words developing, maintaining and operating or developing, maintaining and operating. However, once the difficulty or anomaly in implementation of the language was observed, the provisions were subsequently amended from 01/04/2001 and the words or were introduced to take the work of development or development and operation or development operation and maintenance for entitlement of deduction.

In view of the preceding discussion, I am of the considered opinion that the appellant is entitled for deduction u/s. 80IAB for the income earned from operation and maintenance, as the activities are covered by the letter of approval and accordingly make the appellant entitled for deduction.

23. Now coming to the main issue about the allowability of deduction u/s 80IAB for the income earned from operation and maintenance, we find that provisions of section 80IAB is self-explanatory which reads as under :-

[Deductions in respect of profits and gains by an undertaking or enterprise engaged in development of Special Economic Zone.

80-IAB. (1) Where the gross total income of an assessee, being a Developer, includes any profits and gains derived by an undertaking or an enterprise from any business of developing a Special Economic Zone, notified on or after the 1st day of April, 2005 under the Special Economic Zones Act, 2005, 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 one hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which a Special Economic Zone has been notified by the Central Government :

Provided that where in computing the total income of any undertaking, being a Developer for any assessment year, its profits and gains had not been included by application of the provisions of sub-section (13) of [section 80-IA](#), the undertaking being the Developer shall be entitled to deduction referred to in this section only for the unexpired period of ten consecutive assessment years and thereafter it shall be eligible for deduction from income as provided in sub-section (1) or sub-section (2), as the case may be :

Provided further that in a case where an undertaking, being a Developer who develops a Special Economic Zone on or after the 1st day of April, 2005 and transfers the operation and maintenance of such Special Economic Zone to another Developer (hereafter in this section referred to as the transferee Developer), the deduction under sub-section (1) shall be allowed to such transferee Developer for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee Developer.

(3) The provisions of sub-section (5) and sub-sections (7) to (12) of section 80-IA shall apply to the Special Economic Zones for the purpose of allowing deductions under sub-section (1).

Explanation.—For the purposes of this section, “Developer” and “Special Economic Zone” shall have the same meanings respectively as assigned to them in clauses (g) and (za) of section 2 of the Special Economic Zones Act, 2005.]

24. From going through the proviso (2) of section 80IAB of the Act as referred above, which says that if the work of operation and maintenance of SEZ is transferred from one developer to another then the deduction allowable in sub-sec.(1) of sec.80IAB will be allowed to transferee developer for the remaining period of the remaining of consecutive 10 years. This proviso gives a very clear picture that when the transferee is eligible for deduction u/s 80IAB for the income from operation and maintenance of SEZ then certainly

transferor i.e. developer is eligible for deduction u/s 80IAB from operation and maintenance.

25. Further from going through the letter issued by Government of India Ministry of Commerce & Industries dated 21st June, 2006 to the assessee for setting up of a sector specific Special Economic Zone for Pharmaceuticals at Ahmedabad, we find that in clause (ii) under the main clause (III) referring to general condition it reads that operation and maintenance of the facilities will be met as per the standard in the specific manner and proposition of the user.

26. In view of our above discussion as well as observation made by Id. CIT(A), we are of the view that assessee being a developer of SEZ is eligible for deduction u/s 80IAB for income earned from operation and maintenance of SEZ. In the result ground no.3(a) of Revenue is dismissed.

27. Now we take ground no.3(b) of Revenue's appeal –wherein Revenue is aggrieved with the order of Id. CIT(A) directing the Assessing Officer to allow deduction u/s 80IAB on the income received from sale of scrap and professional fees. During the year under appeal, the respondent has shown miscellaneous income from sale of scrap at Rs.91,000/- and plan approval fees of Rs.16,535/- earned in the regular course of business. During assessment proceedings these income were not considered as eligible for deduction u/s 80IAB of the Act by Id. Assessing Officer.

28. When the issue travelled to the first appellate authority, assessee's ground was allowed by Id. CIT(A) by observing as under-

The appellant has further claimed deduction on miscellaneous income of Rs.91,000/- from sale of scrap. It is noted that the income has been generated from sale of scrap of iron and steel which was used for infrastructure development. The appellant has relied on the decision of Hon'ble Gujarat High Court in the case of DCIT Vs. Core Healthcare Ltd. [308 ITR 263]. Considering the judgment of Hon'ble Gujarat High Court, I am of the opinion that sale of scrap of iron and steel which is generated from the activity of construction of the infrastructure facility should be treated as derived from the activity and, therefore, the appellant is entitled for deduction on the same.

The claim of deduction on professional income on account of receipt of plan approval fee collected by the appellant also has a direct nexus with the activity of the appellant business. Therefore, the appellant is also entitled for the deduction on that income.

29. We further observe that as far as disallowance of deduction towards sale of scrap of 91,000/- and professional fees of Rs.16,535/- are concerned, both are part of regular business activities which assessee is carrying on in the field of infrastructure development and they cannot be treated separately and, therefore, we are of the view that Id. CIT(A) has rightly allowed the claim of deduction u/s 80IAB on these amounts of Rs.91,000/- and Rs.16,535/-. We uphold the order of Id. CIT(A). So ground no.3(b) of Revenue is also dismissed.

30. Further we also observe that Id. Assessing Officer while making disallowance of Rs.1.52 crores also referred to the prior period income of Rs.23,09,372/- earned by the assessee from raw water charges. We also observe that Id. Assessing Officer has not raised

any objection against the allowability of deduction u/s 80IAB for the raw-water charges income earned during the year at Rs.33,01,028/-. The only reason for disallowance was that this amount pertains to the previous year and was shown as a prior period income in this year and Id. Assessing Officer was of the view that this amount was eligible for deduction in the year to which the income pertained and not in the year under appeal.

31.. On the basis of submissions made by Id. AR we understand that fixation of water charges was approved in the Developer Committee meeting held on 22nd April, 2009 in which a specific agenda relating to fixation of water charges was taken up for consideration for the first time and the charges for use of water were approved and fixed at Rs.25 kl effective from the beginning of SEZ. On the basis of this decision necessary effect was given in books of account for F.Y.2008-09 and as far as F.Y.2007-08 was concerned, the income relating to water charges was impossible to be incorporated in the account of F.Y. 2007-08 as they were already closed and finalised and, therefore, this amount of Rs.23,09,372/- was shown as a prior period income from water charges. In the given facts and circumstances, we are of the view that as the assessee being eligible u/s 80IAB of the Act for a particular block of years it will not make any impact to the Revenue if the deduction u/s 80IAB of the Act is allowed for prior period water charges also when the raw water charges in the year under appeal has not been questioned by Id. Assessing Officer for being eligible for deduction u/s 80IAB of the Act. We, therefore, find no reason to interfere with the order of Id. CIT(A)

on this issue. In the result ground no.3(c) of Revenue is also dismissed.

32. Ground Nos. 4 & 5 are of general nature, which need no adjudication.

33. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on 21 st July, 2016

Sd/-
(S. S. Godara)
Judicial Member

sd/-
(Manish Borad)
Accountant Member

Dated 21/7/2016

Mahata/-

Copy of the order forwarded to:

1.	The Appellant
2.	The Respondent
3.	The CIT concerned
4.	The CIT(A) concerned
5.	The DR, ITAT, Ahmedabad
6.	Guard File

BY ORDER

Asst. Registrar, ITAT, Ahmedabad

1. Date of dictation: 18-19/07/2016
2. Date on which the typed draft is placed before the Dictating Member: 20/07/2016 other Member:
3. Date on which approved draft comes to the Sr. P. S./P.S.:
4. Date on which the fair order is placed before the Dictating Member for pronouncement: _____
5. Date on which the fair order comes back to the Sr. P.S./P.S.:
6. Date on which the file goes to the Bench Clerk: 21/7/2016
7. Date on which the file goes to the Head Clerk:
8. The date on which the file goes to the Assistant Registrar for signature on the order:
9. Date of Despatch of the Order: