

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1687 OF 2009

WITH

INCOME TAX APPEAL NO.2121 OF 2009

WITH

INCOME TAX APPEAL NO.2291 OF 2009

WITH

INCOME TAX APPEAL NO.2663 OF 2009

WITH

INCOME TAX APPEAL NO.416 OF 2010

The Commissioner of Income Tax,

Central – III, Aaykar Bhavan,

M.K. Road, Mumbai – 400 020

..Appellant.

Versus

M/s.ABG Heavy Industries Limited,

5th Floor, Bhupati Chambers,

13, Mathew Road, Opera House,

Mumbai – 400 004

..Respondents.

Mr.Suresh Kumar for the appellant in ITXA Nos.1687, 2291 & 2663/2009.

Mr.D.A. Athavale for the appellant in ITXA No.2121/2009.

Ms.Padma Divakar for the appellant in ITXA 416/2010.

Mr.S.E. Dastur, Senior Advocate with Ms.A. Vissanji and Mr.S.P. Mehta for the respondent in all the matters.

**CORAM : Dr.D.Y. Chandrachud &
J.P. Devadhar, JJ.**

DATE : 15th February, 2010.

ORAL JUDGMENT (Per Dr.D.Y. Chandrachud, J.)

1. Admit.
2. The following substantial question of law arises in the batch of appeals filed by the Revenue under Section 260 A of the Income Tax Act, 1961 (‘Act’) :-

“Whether the assessee is entitled to the benefit of a deduction under Section 80IA of the Act and whether the Tribunal was justified in holding that the assessee had carried on the business of developing, maintaining and operating an infrastructural facility so as to entitle it to a deduction under Section 80IA ?”
3. The appeal arises out of an order of the Income Tax Appellate Tribunal for Assessment Years (A.Ys) 1997-98, 1998-99, 1999-2000, 2000-2001 and 2005-2006.
4. The assessee, in terms of the policy of the Government of India to encourage private sector participation in the development of infrastructure, bid for and was awarded a contract for leasing of Container Handling Cranes at the Jawaharlal Nehru Port Trust (‘JNPT’). In pursuance of the contract, the assessee deployed Rail Mounted Quay Side cranes, Rail Mounted Gantry cranes and Rubber Tyred Gantry Cranes (‘the cranes’) at the Container Handling Terminal of the JNPT. JNPT has a dedicated Container Handling Terminal. According to the assessee the only activities of the Terminal consist of loading, unloading and storage of containers.

5. Under contracts dated 2 September 1994 and 16 October 1995, JNPT accepted the bid submitted by the assessee for supply, installation, testing, commissioning and maintenance of the cranes. By the terms of the agreement, JNPT agreed to pay lease charges in a total sum of Rs.215.50 crores over a period of ten years. The contract envisaged two options. Under the first option, operation and maintenance was to be carried out by the assessee. Under the second option, only maintenance was to be carried out by the assessee. In the event that the assessee was not to carry out operation of the cranes, the lease charges were to be less to the extent of Rs.40,00,000/-. For instance, in the first year of operation the lease charges payable to the assessee for operation and maintenance were to be Rs. 16.35 crores, whereas if any maintenance was to be carried out by the assessee, the lease charges were to be Rs.15.95 crores. Under the contracts, JNPT reserved the right to exercise the option to request the assessee to carry out both operation and maintenance during the lease period or to carry out only maintenance while operation was done by JNPT. The contracts stipulated inter alia the submission of a Performance Guarantee Bond representing 10% of the average annual contract value computed with reference both to maintenance and operation. The assessee assumed the responsibility of making the equipment available for operation for a minimum number of days as stipulated in the contract and became liable to pay liquidated damages for non-availability of the equipment after commissioning. After the expiry of the lease period of ten years, the assessee was liable to hand over the equipment to JNPT free of cost. Under the contract, the assessee furnished an indemnity to JNPT towards damages that may be sustained to the equipment or to any property of the Port Trust or to the lives, persons or properties of others. The

assessee assumed other contractual obligations including amongst them, the liability to insure the equipment, to indemnify JNPT towards the claims of workers' compensation and for compliance with labour legislation.

6. By a letter dated 27 March 2000, JNPT clarified that the amount of Rs.40,00,000/- per annum comprised of salaries, wages and other emoluments of operators provided by JNPT; that it was the responsibility of the assessee to guarantee the availability of the equipment, to ensure that it is in operation on a "round the clock basis" and to meet the cost of repair; and that the overall responsibility for ensuring the operation of the equipment, and for guaranteeing the availability of the equipment would be that of the assessee.

7. The assessee claimed the benefit of a deduction under Section 80IA of the Act, upon which the dispute in the appeals centers. The Assessing Officer was of the view that the assessee was merely engaged in the business of supplying, installing, testing, commissioning and maintaining cranes at the Port and was not in the business of developing, maintaining and operating a Port. Consequently the assessee was held not to be in the business of developing an infrastructural facility. The Commissioner of Income Tax (Appeals) allowed the benefit of a deduction under Section 80IA of the Act to the assessee on appeal. The Tribunal in a further appeal held that the assessee was entitled to the benefit of a deduction under Section 80IA of the Act and confirmed the order of the Commissioner of Income Tax (Appeals).

8. On behalf of the Revenue, it has been submitted that: (i) Section 80IA

of the Act requires the assessee to have developed, operated and maintained an infrastructural facility in order to qualify for a deduction. The assessee is not a developer of the facility but had only supplied and installed the Container Handling Cranes at JNPT; (ii) The assessee is not operating the equipment and is, therefore, not eligible for a deduction under Section 80IA of the Act; and (iii) The equipment which has been installed is not a structure for loading and unloading at a port.

9. In order to appreciate the submissions which have been urged on behalf of the Revenue and before we refer to the submissions which have been urged on behalf of the assessee, it would at the outset be necessary to advert to the provisions of Section 80IA of the Act and the underlying purpose and object of the provision made by Parliament. Section 80IA of the Act as it was originally enacted, provided that where the gross total income of an assessee includes any profits and gains derived from any business of an industrial undertaking or a hotel or operation of a ship or developing, maintaining and operating any infrastructure facility, amongst others, there shall, in accordance with and subject to the provisions of the Section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to the percentage specified in sub-section (5) and for such number of assessment years as specified in sub-section (6). Sub-section (4A) was introduced and inserted by the Finance Act of 1995 with effect 1st April 1996. Sub-section (4A) stipulated that the Section would apply to any enterprise carrying on the business of developing, maintaining and operating any infrastructure facility which fulfils all the following conditions, namely :- (i) The enterprise must be owned by a company registered in India or by a consortium

of companies; (ii) The enterprise must have entered into an agreement with the Central or a State Government or a local authority or any other statutory body for developing, maintaining and operating a new infrastructure facility subject to the condition that such infrastructure facility shall be transferred to the Central Government, State Government, local Authority or such other statutory body, as the case may be, within the period stipulated in the agreement; and (iii) The enterprise must start operating and maintaining the infrastructure facility on or after 1st April 1995. Sub-section (12) of Section 80IA of the Act contains a statutory dictionary defining the terms used in the provision. Clause (ca) was substituted by the Finance Act of 1996, with effect from 1st April 1997 to define an infrastructural facility to mean (i) A road, highway, bridge, airport, port, rail system or any other public facility of a similar nature as may be notified by the Board in the Official Gazette; and (ii) A water supply project, irrigation project, sanitation and sewerage system.

10. As noted earlier, sub-clause (4A) of Section 80IA of the Act as it originally stood, stated that the Section applied to an enterprise carrying on the business of developing, maintaining and operating any infrastructure facility, which fulfils certain conditions. With effect from 1 April 2000, by the Finance Act of 1999, certain changes were brought about. Section 80IA and Section 80IB were substituted for Section 80IA. Sub-section (4) of Section 80IA of the Act provided that the Section shall apply to any enterprise carrying on the business of (i) developing, (ii) maintaining and operating, or (iii) developing, maintaining and operating an infrastructure facility which fulfils certain conditions. The conditions provided for the ownership of the enterprise by a Company or by a consortium of

Companies, registered in India and stipulated a requirement of an agreement with the Central and State Governments, a local authority or any other statutory body; the agreement being required to envisage the transfer of the facility after the period stipulated in the agreement. Subsequently, the requirement for the transfer of the facility to the Central or State Governments, or as the case may be to the local authority or a statutory body came to be deleted. Sub-clause (c) of Clause (i) of sub-section (4) stipulated that the enterprise must have started operating and maintaining the infrastructural facility on or after 1st April 1995. By the Finance Act of 2001, the word 'or' came to be introduced after the word developing, to clarify in effect that the agreement between the enterprise and the authority of the Central or State Government or, as the case may be a local authority or a statutory body may provide for (i) developing, or (ii) maintaining and operating, or (iii) developing, maintaining and operating a new infrastructure facility.

11. The object of Section 80IA was to provide an impetus to the growth of infrastructure in the nation. A sound infrastructure is a *sine qua non* for economic development. Absence of infrastructure poses significant barriers to growth and development. A model which relied exclusively on the provision of basic infrastructure by the State was found to be deficient. Section 80IA was an instrument of legislative policy, conceived with a view to provide an impetus to private sector participation in infrastructural projects. Consistent with the legislative object of encouraging private sector participation in the development of infrastructure, Section 80IA was enacted. Contemporaneously, with the provisions which were made by Parliament in Section 80IA of the Act, explanatory circulars

issued in an administrative capacity by the CBDT held the field. These circulars gave expression to the scope and ambit of the concession that was provided by Section 80IA of the Act. On 14th August 1995, Circular 717 was issued by the Central Board of Direct Taxes. The circular, insofar as is material provided thus :

“Five-year tax holiday for infrastructure development :

34.1 -----

34.2 Industrial modernization requires a massive expansion of, and qualitative improvement in infrastructure. Our country is very deficient in infrastructure such as expressways, highways, airports, ports and rapid urban rail transport systems. Additional resources are needed to fulfill the requirements of the country within a reasonable time frame. In many countries the BOT (build-operate-transfer) or the BOOT (build-own-operate-transfer) concepts have been utilised for developing new infrastructure.

34.3 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 roads, highways, expressways, bridges, airports, ports and rail systems or any other public facility of similar nature as may be notified by the Board on 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 India 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.

34.4 It will apply in respect of infrastructure facilities becoming operational on or after 1-4-1995.”

The circular thus amplified both the rationale for the introduction of Section 80IA of the Act and the nature and ambit of the concession that was provided by the

provision. At this stage, it would be necessary to note that the circular clarified that the benefit of a deduction was available to an enterprise, which developed, maintained and operated any new infrastructure facility, such as inter alia a Port on a Build, Operate and Transfer (BOT) basis, or a Build, Own, Operate and Transfer (BOOT) 'or similar other basis', where there was an ultimate transfer of the facility to a Government or a Public Authority. The circular also clarified the view of the CBDT that the tax holiday would be in respect of the income derived from the use of the infrastructure facilities developed by such enterprise. The infrastructure facility had to become operational on or after 1st April 1995.

12. On 3rd January 1996, Circular 733 was issued by the CBDT. The circular dealt with the question as to whether Section 80IA of the Act would be applicable to the Build, Own, Lease and Transfer (BOLT) Scheme of the Indian Railways for the development of the railway system. Answering the issue in the affirmative, the circular clarified that the concession would be applicable only to an infrastructure facility meant for development of the railway system and not to any other infrastructure facility including rolling stocks. Clearly, therefore, as far back as in January 1996, the application of Section 80IA of the Act to the development of infrastructural facilities in a BOLT project for the Indian Railways was within the contemplation of the CBDT, as a permissible source for deduction.

13. Subsequently, on 23rd June 2000, Circular 793 was issued by the CBDT, which postulated as follows :

“The Board has received various representations seeking clarification whether structures at ports for storage, loading and unloading, etc., will fall under the definition of “port” for the purposes of sections

10(23G) and 80-IA of the Income-tax Act, 1961.

2. The Board has considered the matter and it has been decided that such structures will be included in the definition of “port” for the purposes of sections 10(23G) and 80-IA of the Income-tax Act, 1961, if the following conditions are fulfilled :

(a) the concerned port authority has issued a certificate that the said structures form part of the port, and

(b) such structures have been built under BOT and BOLT schemes and there is an agreement that the same would be transferred to the said authority on the expiry of the time stipulated in the agreement.”

The importance of the circular, insofar as the subject matter of these proceedings is concerned, lies in the fact that the Board noted that it was in receipt of representations seeking a clarification on whether structures at Ports for storage, loading and unloading etc. would fall within the definition of a Port inter alia for the purposes of Section 80IA of the Act. The Board clarified that such structures would be included in the definition of ‘Port’ for the purposes of Section 80IA of the Act, subject to the fulfillment of the condition that the Port Authority must issue a certificate that the structures form a part of the Port; that such structures had been built either under a BOT or BOLT Scheme and there was an agreement for the transfer of the structure to the authority after the fulfillment of the stipulated period. The circular, therefore, clearly postulated a concession being given in respect of a particular facility at a Port namely a facility involving storage, loading and unloading.

14. On 16th December 2005, Circular 10 of 2005 was issued by the CBDT. The circular made a reference to the earlier circular dated 23rd June 2000 and clarified that the definition of the expression ‘Port’ for the purposes of Section 80IA

of the Act so as to include structures at Ports for storage, loading and unloading etc, subject to the fulfillment of the conditions already noted earlier, would apply to the A.Y. 2001-2002 and any earlier assessment year. However, from A.Y. 2002-2003 onwards, the condition requiring that the structure should have been completed under a BOT or BOLT Scheme and that there should be an agreement for transfer of the facility to the Competent Authority on the expiry of the stipulated period was deleted. In other words, the conditions which were prescribed by CBDT's Circular dated 23rd June 2000 were liberalized by the subsequent circular dated 16th December 2005. By the subsequent circular it was clarified that the conditions that were spelt out in the earlier circular dated 23rd June 2000 would continue to operate in respect of assessment years prior to and culminating with A.Y. 2001-2002. With effect from A.Y. 2002-2003 all that was necessary was a certificate issued by the Port Authority that the structure in question forms a part of the Port. Hence, the evolution of Section 80IA would show a progressive liberalisation of the legislative scheme, in the interests of aiding the growth of infrastructure. The administrative circulars issued by CBDT in implementation of Section 80IA similarly liberalised the Scheme, consistent with the Act.

15. At this stage, it would be necessary to note that on 31st May 2004, JNPT issued a certificate confirming the award of contracts to the assessee on 2nd September 1994 and 16th October 1995 for supply, installation, testing, commissioning and maintenance of Container Handling equipment on lease for a period of ten years for loading and unloading of containers at the Port and that the cranes that were to be supplied by the assessee form an integral part of the Port. JNPT clarified that the contracts have been executed under the BOLT Scheme and

in accordance with its directions, the cranes would be transferred to the Port Trust at no cost on the expiry of a period of ten years of the commencement of the contract.

16. Now, it is in the background of the evolution of the law that the controversy in the present case would have to be considered. The contention of the Revenue is that the assessee was not engaged in developing the facility at all and that under the Contract that was entered into between the assessee and JNPT all that the assessee was required to carry out was to supply and install cranes at the Port. The submission cannot be accepted. The expression 'development' has not been artificially defined for the purposes of Section 80IA of the Act and must, therefore, receive its ordinary and natural meaning. Under the terms of the contract between the assessee and JNPT, the assessee undertook an obligation for supplying, installing, testing, commissioning and maintenance of Container Handling equipment namely, the cranes in question. JNPT has a dedicated Container Handling Terminal. The case of the assessee is that the only activity at the Terminal consists of the loading, unloading and storage of containers. Under the contract, the assessee was obligated to provide the equipment in question in an operable condition. The contract envisaged two different options; the first being one under which the assessee would carry out operation and maintenance of the equipment while the second consisted of an option to JNPT to carry out operations. The terms of the contract however made it clear that it was the obligation of the assessee to make the equipment available for operation for a stipulated minimum number of days during the year and made the assessee liable to liquidated damages in the event that this was not possible. JNPT by its letter dated 27th March 2000

clarified that the difference between the two options that had been given to the assessee consisted of a payment of Rs.40,00,000/- which was to be retained by JNPT in the event that the operators were provided by the Port for operating the cranes. At the same time, JNPT clarified that it was the responsibility of the assessee to guarantee the availability of the equipment; to ensure that the equipment is in operation on a round the clock basis; to provide for repairs and to ensure the operation and availability of the equipment in accordance with the terms of the contract.

17. The obligations which have been assumed by the assessee under the terms of the contract are obligations involving the development of an infrastructure facility. Section 80IA of the Act essentially contemplated a deduction in a situation where an enterprise carried on the business of developing, maintaining and operating an infrastructure facility. A Port was defined to be included within the purview of the expression infrastructure facility. The obligations which the assessee assumed under the terms of the contract were not merely for supply and installation of the cranes, but involved a continuous obligation right from the supply of the cranes to the installation, testing, commissioning, operation and maintenance of the cranes for a term of ten years after which the cranes were to vest in JNPT free of cost. An assessee did not have to develop the entire port in order to qualify for a deduction under Section 80IA. Parliament did not legislate a condition impossible of compliance. A port is defined to be an infrastructure facility and the circular of the Board clarified that a structure for loading, unloading, storage etc. at a port would qualify for deduction under Section 80IA. The condition of a certificate from the Port Authority was fulfilled and JNPT certified that the facility provided by the

assessee was an integral part of the port. The assessee developed the facility on a BOLT basis under the contract with JNPT. On the fulfillment of the lease of ten years, there was a vesting in the JNPT free of cost.

18. Before the Tribunal, material was placed on record by the assessee to indicate the nature and extent of the activities undertaken by it in ensuring that the equipment which was supplied was fully operational. The assessee had in its employment diverse employees, including a Senior Manager, a Manager, Assistant Manager and five Deputy Managers (Operations) in addition to Assistant Engineers, Technical Officers and Operators-cum-Technicians. On considering the material on record including letters of the Port Authority, the Tribunal came to the conclusion that as a matter of fact the assessee was also engaged in activities of operating the equipment. The finding that the assessee had developed the infrastructure facility and that it was engaged in operating the cranes is, therefore, based on the material on record. The fact that the assessee was also maintaining the cranes is not disputed. There is also no merit in the submission that what the assessee constructed was not a structure for loading, unloading, storage etc. at the port. Plainly, the assessee did so.

19. On behalf of the Revenue it was sought to be urged that at the material time for A.Ys 1997-98 and 1998-99, it was necessary for the assessee to cumulatively fulfill the requirement of developing, operating and maintaining the infrastructure facility. It was urged that the assessee, even if it be held to have developed the facility, cannot be regarded as operating the facility. For the reasons already indicated, it is not possible to accept the submission. As we have already

noted the assessee had as a matter of fact developed the facility. The Tribunal has also arrived at a finding of fact that the assessee was under the contract required to operate the facility. Merely because the operators of the cranes were provided by the Port Authority did not absolve the assessee of the overall responsibility of operating the cranes, under the terms of the contract.

20. Counsel appearing on behalf of the assessee urged that the requirement that the assessee ought to have developed, maintained and operated the facility is not a condition which is to be read in the cumulative. The learned counsel submitted that the scheme under Section 80IA of the Act was to provide a concession in order to attract private investment in infrastructure. It is in this background that the CBDT issued a clarificatory circular on 14th August 1995 stating that infrastructure facilities developed on a BOT, BOOT or other similar basis were within the contemplation of the provision. Reliance was placed on the circulars dated 23rd June 2000 and 16th December 2005 as being indicative of the fact that the requirement of developing, maintaining and operating an infrastructure facility were never regarded to be cumulative. The learned counsel urged that it was in line with the Board's understanding of the provisions of Section 80IA of the Act that the Parliament eventually stepped in by amending the provisions of Section 80IA of the Act so as to clarify that in order to avail of a deduction, the assessee could (i) develop; or (ii) operate and maintain; or (iii) develop, operate and maintain the facility.

21. While dealing with this submission, we note that neither in the memo of appeal nor in the submissions before us has any effort been made to suggest on

the part of the Revenue that the circulars of the Board are not binding on the Revenue. Nor for that matter was it the submission of the Revenue that the circulars issued by the Board from time to time were in violation of or contrary to legal provisions. Plainly, right from 1996 CBDT was seized with the question, as to whether infrastructure facilities developed under a BOLT project would qualify for exemption under Section 80IA of the Act. The first circular in that regard that was issued on 23rd January 1996 specifically dealt with whether Section 80IA (4A) of the Act would be applicable to a BOLT Scheme involving an infrastructure facility for the Indian Railways. The circular clarified that an infrastructure facility set up on a BOLT basis for Railways would qualify for a deduction. That was followed by the two circulars of the Board dated 23rd June 2000 and 16th December 2005. The first of those circulars recognizes that structures for storage, loading and unloading etc. at a port built under a BOT and BOLT Scheme would qualify for a deduction. Now, there is no question of an enterprise operating a facility in a BOLT Scheme because such a Scheme contemplates that the enterprise would build, own, lease and eventually transfer the facility to the Authority for whom the facility is constructed. The subsequent circular dated 16th December 2005 once again clarified the position of CBDT that structures which have been built inter alia under a BOLT Scheme upto A.Y. 2001-2002 would qualify for a deduction under Section 80IA of the Act. In fact from A.Y. 2002-2003, the process was further liberalized, consistent with the basic purpose and object of granting the concession. In this background, particularly in the context of the objective sought to be achieved and in the absence of any challenge on the part of the Revenue on the applicability of the binding circulars of CBDT, we are of the view that the condition as regards development, operation and maintenance of an infrastructure facility was

contemporaneously construed by the Authorities at all material times, to cover within its purview the development of an infrastructure facility under a Scheme by which an enterprise would build, own, lease and eventually transfer the facility. This was perhaps a practical realisation of the fact a developer may not possess the wherewithal, expertise or resources to operate a facility, once constructed. Parliament eventually stepped in to clarify that it was not invariably necessary for a developer to operate and maintain the facility. Parliament when it amended the law was obviously aware of the administrative practice resulting in the circulars of CBDT. The fact that in such a Scheme, an enterprise would not operate the facility itself was not regarded as being a statutory bar to the entitlement to a deduction under Section 80IA of the Act . The Court cannot be unmindful in the present case of the underlying objects and reasons for a grant of deduction to an enterprise engaged in the development of an infrastructure facility. The provision was intended to give an incentive to investment for infrastructural growth in the country. In Bajaj Tempo V/s. Commissioner of Income Tax,¹ the Supreme Court emphasized that a provision in a taxing statute granting incentives for promoting growth and development should be construed liberally. In the present case, the administrative circulars issued by the CBDT proceeded on that basis by adopting a liberal view of the scope and ambit of the provisions of Section 80IA of the Act. Parliamentary intervention endorsed the administrative practice. A provision inserted by the legislature to supply an obvious omission and to make a section workable has in certain circumstances been regarded as retrospective particularly when it was intended to remedy unintended consequences. Allied Motors P Limited

1 196 ITR 188 (S.C.)

V/s. C.I.T.² and C.I.T. V/s. Alom Extrusions Limited.³ The Tribunal having only followed these provisions, we do not find any just reason to interfere in our appellate jurisdiction.

22. Another submission which was urged on behalf of the Revenue is that under clause (iii) of sub-section (4A) of Section 80IA, one of the conditions imposed was that the enterprise must start operating and maintaining the infrastructure facility on or after 1st April 1995. The same requirement is embodied in sub-clause (c) of clause (i) of sub-section (4) of the amended provisions of Section 80IA. On this basis, it was urged that since the assessee was not operating and maintaining the facility, he did not fulfill the condition. This submission is fallacious both in fact and in law. As a matter of fact, the Tribunal has entered a finding that the assessee was operating the facility and this finding has been confirmed earlier in this judgment. That the assessee was maintaining the facility is not in dispute. The facility was commenced after 1st April 1995. Therefore, the requirement was met in fact. Moreover, as a matter of law, what the condition essentially means is that the infrastructure facility should have been operational after 1st April 1995. After Section 80IA was amended by the Finance Act of 2001, the section applies to an enterprise carrying on the business of (i) developing; or (ii) operating and maintaining; or (iii) developing, operating and maintaining any infrastructure facility which fulfills certain conditions. Those conditions are : (i) Ownership of the enterprise by a Company registered in India or by a consortium; (ii) An agreement with the Central or State Government, local authority or statutory body; and (iii)

2 (1997) 224 ITR 677 (S.C.)

3 (2009) 319 ITR 306 (S.C.)

The start of operation and maintenance of the infrastructure facility on or after 1st April 1995. The requirement that the operation and maintenance of the infrastructure facility should commence after 1st April 1995 has to be harmoniously construed with the main provision under which a deduction is available to an assessee who develops; or operates and maintains; or develops, operates and maintains an infrastructure facility. Unless both the provisions are harmoniously construed, the object and intent underlying the amendment of the provision by the Finance Act of 2001 would be defeated. A harmonious reading of the provision in its entirety would lead to the conclusion that the deduction is available to an enterprise which (i) develops; or (ii) operates and maintains; or (iii) develops, maintains and operates that infrastructure facility. However, the commencement of the operation and maintenance of the infrastructure facility should be after 1st April 1995. In the present case, the assessee clearly fulfilled this condition.

23. In the view which we have taken, all the assessment years in question to which this batch of appeals relates would be governed by the same principle. The subsequent amendment of Section 80IA (4A) of the Act to clarify that the provision would apply to an enterprise engaged in (i) developing; or (ii) operating and maintaining; or (iii) developing, operating and maintaining an infrastructure facility was reflective of a position which was always construed to hold the field. Before the amendment that was brought about by Parliament by Finance Act of 2001, we have already noted that the consistent line of circulars of the Board postulated the same position. The amendment made by Parliament to Section 80IA (4) of the Act set the matter beyond any controversy by stipulating that the three conditions for development, operation and maintenance were not intended to be cumulative in

nature.

23. In view of the aforesaid observations, the question of law shall accordingly stand answered in favour of the assessee and against the Revenue.

24. For all these reasons, we are of the view that there is no merit in the appeals. The appeals shall accordingly stand dismissed. There shall be no order as to costs.

(J.P. Devadhar, J.)

(Dr.D.Y. Chandrachud, J.)