



\$~62

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment delivered on: 30.01.2025***

+ **ITA 619/2019**

PR. COMMISSIONER OF INCOME TAX- 2Appellant

Through: Mr. Indruj Singh Rai, SSC with
Mr. Sanjeev Menon, JSC, Mr.
Rahul Singh, JSC, Mr. Anmol
Jagga & Mr. Prathviraj Day,
Adv.

versus

**M/S CELEBI DELHI CARGO MANAGEMENT INDIA PVT.
LTD.**Respondent

Through: Ms. Kavita Jha, Sr. Adv. with
Mr. Himanshu Aggarwal, Adv.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

**HON'BLE MR. JUSTICE HARISH VAIDYANATHAN
SHANKAR**

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. This appeal is directed against the order of the **Income Tax Appellate Tribunal**¹ dated 23 October 2018 and came to be admitted on the following question of law: -

“(a). Whether the ITAT was legally justified in quashing the order passed by the PCIT-2 under Section 263 of the Act which had been passed as the order of the Assessing Officer ["AO"] was erroneous and prejudicial to the interest of revenue?”

2. The principal issue which arises for our consideration is

¹ Tribunal



whether the respondent-assessee could have claimed benefits flowing from Section 80IA of the **Income Tax Act, 1961**². Although the respondent-assessee was held eligible to claim benefits under that provision by the **Assessing Officer**³, the **Principal Commissioner of Income Tax**⁴ while exercising powers under Section 263 chose to overturn the view so expressed. It is this order of the PCIT dated 31 March 2016 which was ultimately assailed before the Tribunal.

3. We find that the PCIT had, while dealing with the question of whether Section 80IA could apply in the case of the respondent-assessee, held as follows: -

“No evidence is available on assessment record to suggest that any of these aspects of the Contract along with its other parts were either examined or verified by the A.O. in the course of the assessment proceedings. These features are a part of the contract which was executed for providing certain inputs to M/s DIAL during the F.Y. 2010-11 relevant to the A.Y. 2011-12. The agreement in question is silent on the role or any services to be provided by CELEBI HAYA SERVISI AS a Company. The reference to the OMDA (Operation Management and Development Agreement) was made on 4 April 2006 in between AAIL and DIAL. The company in question neither was in existence nor was it an Executants of the agreement on 4 April 2006.

In view of the above facts, it is a case where a sub-contractor (the assessee) has been asked by DIAL to provide services on contractual basis without conferring and or assigning any ownership rights to the assessee i.e. (CELEBI). Its claim that it comes within the provisions of section- 80IA and is eligible for deduction under that section is contrary to the facts on records.

The A.O. failed to examine the source of income derived during the year. There is neither any substance in the contention of the assessee on this issue nor is there any evidence to confirm this

² Act

³ AO

⁴ PCIT



view. The income declared by the assessee along with the deduction u/s 80IA is contrary to the law. The decision of the assessing officer on this issue was a prejudicial order being erroneous on law.

The company failed to place on assessment record any verifiable documentary evidence in support of the deduction it claimed u/s 80IA. In fact, the company is ineligible for the allowance of deduction @ 100 % of such profit u/s 80IA for the following reasons: -

i. The assessee was not doing the eligible business i.e. infrastructure development specified in section 80IA (4) (i) of the Act, Up gradation and maintenance of Cargo Terminal is not in the list of allowable infrastructure for deduction u/s 80IA.

ii. The company did not enter into an agreement with the Central Government or a State Government or a Local authority or any other salutatory body for (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining a new infrastructure facility. DIAL did not cover under the above category.

iii. The agreement for up-gradation and maintenance of cargo terminal was entered with the different company from claiming deduction under the above category.

The assessee failed to place on assessment record in the course of the assessment proceedings any such documentary evidence of substantive nature to justify the deduction u/s 80IA. Onus in this regard was upon the assessee to place all such material facts before the assessing officer in r/o the revenue generated and earned by it in the F.Y. 2010-11, so as to justify its claim under the provision of the law after due diligence and verification of the evidence by the A.O.”

4. The issue itself arose in the context of a **Concession Agreement⁵** which came to be executed between **Delhi International Airport Pvt. Ltd.⁶** and the respondent-assessee on 24 August 2009. The scope of the said Concession was envisaged to include the

⁵ Concession

⁶ DIAL



upgradation, modernization, financing, operating, maintaining and management of the Cargo Terminal at DIAL.

5. The PCIT appears to have taken the view that the AO had clearly omitted to bear in consideration the plain text of Section 80IA and which would have enabled deductions being claimed, provided it were shown that the profits and gains in question had been derived by an undertaking or an enterprise from any business referred to in sub-section (4).

6. Although Section 80IA, and as it exists on the statute book today, is broadly couched in similar terms, we are in this matter concerned with the previous version of that section and which spoke of gross total income of an assessee derived from business of an industrial undertaking as well as a host of other activities which were spelt out.

7. Sub-section (4) of Section 80IA explained that the provision would apply to any enterprise carrying on the business of “developing”, “operating and maintaining” or “developing, operating and maintaining” any infrastructure facility which fulfilled the conditions prescribed therein. Sub-section (4) as it presently stands reads as follows:-

“(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 India 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 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;

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

[Provided further that nothing contained in this section shall apply to any enterprise which starts the development or operation and maintenance of the infrastructure facility on or after the 1st day of April, 2017.]

[*Explanation.*—For the purposes of this clause, “infrastructure facility” means—

(a) a road including toll road, a bridge or a rail system;

(b) a highway project including housing or other activities being an integral part of the highway project;

(c) a water supply project, water treatment system, irrigation project, sanitation and sewerage system or solid waste management system;

(d) a port, airport, inland waterway [inland port or navigational channel in the sea].

[(ii) any undertaking which has started or starts providing telecommunication services whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services on or after the 1st day of April, 1995, but on or before the [31st day of March, 2005];]

(iii) any undertaking which develops, develops and operates or maintains and operates an industrial park [or special economic



zone] notified by the Central Government in accordance with the scheme framed and notified by that Government for the period beginning on the 1st day of April, 1997 and ending on the 31st day of March, [2006]:

Provided that in a case where an undertaking develops an industrial park on or after the 1st day of April, 1999 or a special economic zone on or after the 1st day of April, 2001 and transfers the operation and maintenance of such industrial park or such special economic zone, as the case may be, to another undertaking (hereafter in this section referred to as the transferee undertaking), the deduction under sub-section (1), shall 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 to the transferee undertaking :]

[Provided further that in the case of any undertaking which develops, develops and operates or maintains and operates an industrial park, the provisions of this clause shall have effect as if for the figures, letters and words “31st day of March, 2006”, the figures, letters and words “[the 31st day of March, 2011]” had been *substituted*;]

(iv) an [* * *] undertaking which,—

(a) is set up in any part of India for the generation or generation and distribution of power if it begins to generate power at any time during the period beginning on the 1st day of April, 1993 and ending on [the 31st day of March, 2017];

(b) starts transmission or distribution by laying a network of new transmission or distribution lines at any time during the period beginning on the 1st day of April, 1999 and ending on [the 31st day of March, 2017]:

Provided that the deduction under this section to an [* * *] undertaking under sub-clause (b) shall be allowed only in relation to the profits derived from laying of such network of new lines for transmission or distribution.

[(c) undertakes substantial renovation and modernisation of the existing network of transmission or distribution lines at any time during the period beginning on the 1st day of April, 2004 and ending on [the 31st day of March, 2017].

Explanation.—For the purposes of this sub-clause, “substantial renovation and modernisation” means an increase in the plant and machinery in the network of transmission or distribution lines by at least fifty per cent of the book value of such plant and machinery as on the 1st day of April, 2004.]

[(v) an undertaking owned by an Indian company and set up for reconstruction or revival of a power generating plant, if—



(a) such Indian company is formed before the 30th day of November, 2005 with majority equity participation by public sector companies for the purposes of enforcing the security interest of the lenders to the company owning the power generating plant and such Indian company is notified before the 31st day of December, 2005 by the Central Government for the purposes of this clause;
(b) such undertaking begins to generate or transmit or distribute power before the [31st day of March, 2012].]
[* * *]”

8. Prior to the aforesaid provision being amended by Finance Act, 2001, clause (b) of Section 80IA(4) had read as under:-

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

9. Undisputedly, it is Section 80IA(4) which would determine the eligibility to benefits that were claimed. The PCIT bearing the aforesaid statutory position in mind has come to hold that the grant as made to the respondent-assessee by DIAL would not fall within the ambit of Section 80IA(4) since it was not pertaining to an agreement with the Central Government, State Government, local authority or any other statutory body for the purposes of developing, maintaining or operating a new infrastructure facility.

10. Undisputedly, DIAL was a consortium which had been granted the right to manage, develop and operate the Delhi International Airport pursuant to the agreement titled ‘**Operation Management**



and Development Agreement⁷, which came to be executed in its favour by the **Airport Authority of India⁸** in exercise of powers conferred by Section 12A of the **Airports Authority of India Act, 1994⁹**. It is these facts which led the PCIT to observe that the assessee was not dealing in any eligible business which could be said to fall within the scope of Section 80IA(4) nor was it a party to any agreement with a Central or State Government, local authority or any other statutory body.

11. When the matter travelled up to the Tribunal, it perfunctorily disposed of this challenge by observing thus:-

“30. Considering these facts in totality, it can be safely concluded that the Assessing Officer did raise queries which were complied by the assessee. It is a settled position of law that powers u/s 263 of the Act can be exercised by the Commissioner on satisfaction of twin conditions, i.e., the assessment order should be erroneous and prejudicial to the interest of the Revenue. By 'erroneous' is meant contrary to law. Thus, this power cannot be exercised unless the Commissioner is able to establish that the order of the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. Thus, where there are two possible views and the Assessing Officer has taken one of the possible views, no action to exercise powers of revision can arise, nor can revisional power be exercised for directing a fuller enquiry to find out if the view taken is erroneous. This power of revision can be exercised only where no enquiry, as required under the law, is done. It is not open to enquire in case of inadequate inquiry. Our view is fortified by the decision of Hon'ble High Court of Bombay in the case of CIT vs. Nirav Modi, [2016] 71 Taxmann.com 272 (Bombay).

31. In view of the above discussion on the facts vis a vis the judicial pronouncements on the subject, we set aside the order of the Id. PCIT and restore that of the Assessing Officer dated 14.03.2014 framed u/s 143(3) of the Act.”

⁷ OMDA

⁸ AAI

⁹ AAI Act



12. As is manifest from the above, there was an evident failure on the part of the Tribunal to even briefly allude to the pre-conditions which must be satisfied for the purposes of an assessee claiming benefit of Section 80IA.

13. Ms. Jha, learned senior counsel who appeared for the respondent-assessee, however, has taken us in great detail through the following provisions and covenants which form part of the OMDA and which are reproduced hereinbelow:-

**“OPERATION, MANAGEMENT AND DEVELOPMENT
AGREEMENT**

This **Operation, Management and Development Agreement** (the “**Agreement**” or “**OMDA**”) made on this 4th day of April, 2006,

BY AND BETWEEN:

1. The **Airports Authority of India** acting through its Chairman (hereinafter referred to as the “**AAI**”, which expression shall, unless repugnant to the context or meaning thereof, include its successors and assigns) of the **FIRST PART**; and

2. **Delhi International Airport Private Limited**, a company incorporated under the Companies Act, 1956 having its registered office at Delhi Airport, New 'Delhi (hereinafter referred to as the “**JVC**”, which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns) of the **SECOND PART**.

AAI and JVC are hereinafter collectively referred to as “**Parties**” and individually as “**Party**”.

WHEREAS:

(A) AAI is an authority established under the Airports Authority of India Act, 1994 (the “**AAI Act**”), which is responsible for the development, operation, management and maintenance of airports in India.

CHAPTER II



SCOPE OF GRANT

2.1 Grant of Functions

2.1.1 AAI hereby grants to the JVC, the exclusive right and authority during the Term to undertake some of the functions of the AAI being the functions of operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Airport and to perform services and activities constituting Aeronautical Services, and Non-Aeronautical Services (but excluding Reserved Activities) at the Airport and the JVC hereby agrees to undertake the functions of operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Airport and at all times keep in good repair and operating condition the Airport and to perform services and activities constituting Aeronautical Services and Non-Aeronautical Services (but excluding Reserved Activities) at the Airport, in accordance with the terms and conditions of this Agreement (“**the Grant**”).

2.1.2 Without prejudice to the aforesaid, AAI recognizes the exclusive right of the JVC during the Term, in accordance with the terms and conditions of this Agreement, to:

- (i) develop, finance, design, construct, modernize, operate, maintain, use and regulate the use by third parties of the Airport;
- (ii) enjoy complete and uninterrupted possession and control of the Airport Site and the Existing Assets for the purpose of providing Aeronautical Services and Non-Aeronautical Services;
- (iii) determine, demand, collect, retain and appropriate charges from the users of the Airport in accordance with Article 12 hereto; and
- (iv) Contract and/or sub contract with third parties to undertake functions on behalf of the JVC, and sub-lease and/or license the Demised Premises in accordance with Article 8.5.7.

2.2 Sole Purpose of the JVC

2.2.1 The JVC having been set up for the sole purpose of exercising the rights and observing and performing its obligations and liabilities under this Agreement, the JVC or any of its subsidiaries shall not, except with the previous written consent of AAI, be or become directly or indirectly engaged, concerned or interested in any business other than as envisaged herein. Provided



however that the JVC may engage in developing, constructing, operating or maintaining a second airport pursuant to exercise of the Right of First Refusal granted to the JVC under the State Support Agreement.

8.5.7 Contracts, Lenses and Licenses

(i) **Sub-Contracting, Sub-leasing and Licensing**

(a) Any activity may be sub-contracted by the JVC, provided always that notwithstanding the sub-contract, the JVC retains overall management, responsibility, obligation and liability in relation to the sub-contracted Airport Service. Any such subcontracting shall not relieve the JVC from any of its obligations in respect of the provision of such Airport Services under this Agreement. It is clarified that JVC shall remain liable and responsible for any acts, omissions or defaults of any sub-contractor, and shall indemnify AAI in respect thereof. Provided however that any sub-contract involving foreign manpower or materials shall be subject to the political sensitivities of GOI.

(b) AAI hereby recognizes the right of JVC to sub-lease and license any part (but not whole) of the Airport Site to third parties for the purpose of performance of its obligations hereunder.”

14. On the basis of those stipulations contained in the OMDA, it was Ms. Jha’s submission that DIAL was in essence an entity which had stepped into the shoes of AAI and since it was that body which had conferred the right upon the respondent-assessee, the same must be recognized as qualifying the requirements placed by Section 80IA. That submission was also sought to be founded upon a decision rendered by the High Court of Karnataka in **Pr. Commissioner of Income Tax-2 v. M/s Menzies Aviation Bobba (Bangalore) Pvt. Ltd.**¹⁰ and which had in essence followed an earlier judgment rendered by that High Court in **Flemingo Dutyfree Shops Private**

¹⁰ ITA No. 224 of 2021



Limited, Navi Mumbai v. Union of India and others¹¹.

15. Since the judgment in *Menzies* bases itself upon the judgment which that High Court rendered in *Flemingo Dutyfree Shops*, we propose to firstly notice the latter. Suffice it to note that *Flemingo Dutyfree Shops* was dealing with a challenge to an action taken by the **Bangalore International Airport Ltd.**¹² and in the context of which one of the questions which appears to have arisen was whether the same would be maintainable under Article 226 of the Constitution. It is the said objection which led to the Karnataka High Court formulating two prefatory questions with the first being whether the functions and duties discharged by BIAL are statutory or public duties and thus it being liable to be construed as “State” under Article 12 of the Constitution. The second ancillary question was whether the nature of duties performed by BIAL at the International Airport is a statutory function under Section 12 of the AAI Act.

16. The High Court after noticing a whole body of precedent which has evolved in the context of Article 12 of the Constitution ultimately came to observe as follows:-

“32. With reference to the above rival legal contentions urged by the both the learned Senior Counsel for the parties and learned Counsel on behalf of the parties, on careful examination and consideration of the same by us, Point Nos. 1 and 2 have to be answered in favour of the petitioner for the following reasons.—

(i) As per notification dated 26-4-2005 published by the State Government granting exemption under Section 9(1) of the Karnataka Stamp Act, 1957 for registration of the lease deed

¹¹ 2008 SCC OnLine Kar 603

¹² BIAL



executed between BIAL and KSIIDC for establishment of International Airport, the KIADB has transferred the lands covered therein to KSIIDC and in turn in favour of BIAL. The registration fee of Rs. 25.33 crores is exempted by giving 100% concession under notification dated 15-4-2005. In view of this, the lands acquired by the State Government in favour of Karnataka Industrial Areas Development Board (in short referred to as 'KIADB') for the infrastructure facility defined under the Karnataka Industrial Areas Development Act, 1966 for establishing International Airport in exercise of its eminent domain powers under Section 28(1) and 28(4) of KIADB Act, the vast extent of land nearly four thousand and odd acres was acquired under the KIADB Act, the same was subsequently transferred by KIADB to KSIIDC for establishment of International Airport and vast extent of land was leased in favour of BIAL for that purpose, the acquisition of vast extent is for the above public purpose. As per the explanation of Section 28-A of the A.A.I. Act for removal of doubts, it is declared that for the purposes of aforesaid clause, 'airport' includes private airport. The benefit of Chapter V-A of the A.A.I. Act is incorporated in the concession agreement to evict the unauthorised occupants from the premises of BIAL.

(ii) We are required to examine the nature of functions and duties performed by BIAL. It is necessary for this Court to extract 'air traffic service', 'air transport service' and the functions of the Airport Authority enumerated in Sections 2(d), (e), (nn) and 12 of the A.A.I. Act reads as under:

"2. (d) "Air Traffic Service" includes flight information service, alerting service, air traffic advisory service, air traffic control service, area control service, approach control service and airport control service;

(e) "Air Transport Service" means any service, for any kind of remuneration, whatsoever, for the transport by air of persons, mail or any other thing, animate or inanimate, whether such service relates to a single flight or series of flights".

34. It is further held by Mathew J., that:

"The State may aid a private operation in various ways other than by direct financial assistance. It may give the organisation the power of eminent domain, it may grant tax exemption, or it may give monopolistic status for



certain purposes. All these are relevant in making an assessment whether the operation is private or savours of State action. See generally: 'The meaning of State action', LX Columbia Law Rev 1083.

Institutions engaged in matters of high public interest or performing public functions are by virtue of the nature of the functions performed Government agencies. (See the decision in *Terry v. Adams*, (1926) 273 US 536 and *Nixon v. Condon*, (1931) 268 US 73). Activities which are too fundamental to the society are by definition too important not to be considered Government function".

.....

23. From this perspective, the logically sequitur is that it really does not matter what guise the State adopts for this purpose, whether by a Corporation established by statute or incorporated under a law such as the Companies Act or the Societies Registration Act, 1860. Neither the ostensible *form* of the Corporation, nor is ostensible *autonomy* would take away from its character as 'State' and its constitutional accountability under Part II *vis-a-vis* the individual if it were in fact acting as an instrumentality or agencies of the Government.

.....

40. The picture that emerges is that the tests formulated in *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722, para 9, are not a rigid set of principles so that if a body falls within any one of them it must, *ex hypothesi*, be considered to be a State within the meaning of Article 12. The question in each case would be - whether in the light of the cumulative facts as established, the body is financially functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

41. Coming now to the facts of CSIR, we have no doubt that it is well-within the range of Article 12, a conclusion which is sustainable *when judged according to the test judicially evolved for the purpose*.



.....

98. Simply by holding a legal entity to be an instrumentality or agency of the State it does not necessarily become an authority within the meaning of “other authorities” in Article 12. To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to the public. Further, the statute creating the entity should have vested that entity with power to make law or issue binding directions amounting to law within the meaning of Article 13(2) governing its relationship with other people or the affairs of other people - their rights, duties, liabilities or other legal relations. If created under a statute, then there must exist some other statute conferring on the entity such powers. In either case, it should have been entrusted with such functions as are Governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence Governmental. Such authority would be the State, for, one who enjoys the powers or privileges of the State. It is this strong statutory flavour and clear indicia of power - constitutional or statutory, and its potential or capability to act to the detriment of fundamental rights of the people which makes it an authority; though in a given case, depending on the facts and circumstances, an authority may also be found to be an instrumentality or agency of the State and to that extent they may overlap....”.

(ix) In view of *Zee Tele Films Limited's case*, in which tests are laid down in para 40 that the body must be financially, functionally and administratively dominated under the control of Government and such control must be particular to the body in question and must be pervasive. No doubt, in that case after referring to some tests from *Ajay Hasia's case*, it is held that BCCI is not ‘State’ and it is not created by statute and no part of its capital is held by the Government. Practically no financial assistance is given by the Government to meet the whole or entire expenditure of the Board. The Board does enjoy a monopoly status in the field of cricket but such status is not State conferred or State protected. There is no existence of a deep and pervasive State control. The control if any is only regulatory in nature as applicable to other similar bodies. This control is not specifically



exercised under any special statute applicable to the Board. All functions of the Board are not public functions. The Board is not created by transfer of a Government-owned Corporation. It is an autonomous body.

(x) The decision of *Smt. Ujjam Bai's case* having regard to changing socio-economic policies in India and variety of methods by which Governmental functions are performed or by which the Government carries on trade or business by a society, corporation *etc.*, the functions that would be carried on by BIAL is an instrumentality of the 'State' under Article 12 of the Constitution of India. The statutory body-second respondent may be empowered to divest its power and functions wholly or partially in any interest or juridical person or it may act generally or in collaboration with the other bodies, public or private, for performing its functions.

(xi) In the case of *Burton*, after referring to the act of a private lessee to a private authority has held to be State action in violation of 14th amendment as the lessee of the parking authority was operating a restaurant in the automobile parking building and was refusing to serve solely on the ground that he was a negro, the relevant para of the law laid down reads thus:

"Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance.

The land and building were publicly owned. As an entity, the building was dedicated to 'public uses' in performance of the authority's 'essential Governmental functions'.

Addition of all these activities, obligations and responsibilities of the authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, *indicates that degree of State participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.....* By its inaction, the authority, and through it the State, has not only made itself a party to the refusal of service, but *has elected to place its power, property and prestige behind the admitted*



discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognised as a joint participant in the challenged activity, which on that account cannot be considered to have been so 'purely private' as to fall outside the scope of the Fourteenth Amendment..... what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment-must be complied with by the lessee as certainly as though they were binding covenants written into the lease itself."

(xii) In another case in Evans, regarding bequeathing of private land by a will to the Mayor and Council of Macon, Georgia after the death of the testator's wife and daughters, for use as 'a park and pleasure ground' for white people only, was held to be usable by all - whites and blacks - and that no 'segregation' could be permitted in view of the 14th Amendment as it was a 'public park', the relevant portion reads thus:

"What is 'private' and what is 'State' action is not always easy to determine. Conduct that is formally private may become so entwined with Governmental policies or so impregnated with a Governmental character as to become subject to constitutional limitations placed upon State action.

Under the circumstances of this case, we cannot but conclude that the public character of the park requires it to be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has titled under State law".

(xiii) In another case *Jackson*, which decision has been referred to in the *Ramana Dayaram Shetty's case*, it is laid down as hereunder:

"A particularised inquiry into the circumstances of each case is necessary in order to determine whether a given factual situation falls within 'the variety of individual — State relationship'... The dis-positive question in any State — action case is not whether any single fact or relationship presents a sufficient degree of State involvement, but rather whether the aggregate of all relevant factors compels a finding of



State responsibility.

It is not enough to examine *seriatim* each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of State action. It is the aggregate that is controlling.

In the aggregate, these factors depict a monopolist providing essential services as a licensee of the State and within a framework of extensive State supervision and control. The particular regulations at issue, were authorised by State law and were made enforceable by the weight and authority of the State. Moreover, the State retains the power of oversight to review and amend the regulations if the public interest so requires. Respondent's actions are sufficiently intertwined with those of the State, and its termination of service provisions are buttressed by State law, to warrant a holding that respondent's actions in terminating this house-holder's service were 'State action' for the purpose of giving federal jurisdiction over respondent under 42 USC s. 1983".

(xiv) From the aforementioned legal principles laid down by the Constitutional Benches of the Supreme Court and American Law, the doctrine of "State action" would with all fours applicable to the facts of the case to come to the conclusion that to provide duty-free shops in the BIAL as per the agreement referred to supra is necessary in the International Airport. The facilities provided therein are in the nature of statutory functions/public functions by BIAL for the convenience of travelling public. All the facilities provided by BIAL, be it a State, lessee or entity, performs statutory/public functions in the airport. This is expressly apparent from Clause 7.1 of Clause 7 of S.S.A. dated 20-1-2005. The relevant clause reads as hereunder:

"7.1 Airport operation and maintenance.—BIAL shall operate and maintain the airport in accordance with good industry practice. BIAL shall at all times comply with applicable laws in the operation and maintenance of the airport and shall maintain, keep in good operating repair and condition, the airport, in accordance with the operation and maintenance plan, an indicative outline of which is as set out in



Schedule 6 attached hereto. BIAL shall submit the operation and maintenance plan to GOK no later than one (1) year from financial close.

BIAL shall also renew, replace and upgrade to the extent reasonably necessary, the airport which for these purposes shall exclude any systems or equipment to be operated by AAI in accordance with the terms of the CNS/ATM agreement.

All operation, maintenance, repair and other works shall be carried out in such a way as to minimise inconvenience to users of the airport. If any operation, maintenance, repair or other works necessitate interrupting or suspending the landing or taking-off of any aircraft, or the closure of the airport, for any period of time, BIAL shall, except in case of an emergency, give to the DGCA and to all affected users of the airport such prior written notice thereof as the DGCA may from time to time reasonably require”.

(xv) Section 22-A of the A.A.I. Act empowers the 2nd respondent to levy and collect development fee from embarking passengers under clause (b) for establishment or development of a new airport *in lieu* of the airport referred in clause (a) or (c) for investment in the equity in respect of shares to be subscribed by the authority in companies engaged in establishing, owning, developing, operating or maintaining a private airport *in lieu* of the airport referred to in clause (a) or advancement of loans to such companies or other persons engaged in such activities.

(xvi) The effect of the exclusion of provisions of Chapter V-A of the A.A.I. Act from the ambit of Rent Control Act from the premises leased to BIAL is that the Government while dealing with the citizens in respect of its property, would not act for its own purpose as a private landlord but would act in public interest. In this regard, the Constitutional Bench of the Apex Court at para 69 in the case of *Ashoka Marketing Limited v. Punjab National Bank* [(1990) 4 SCC 406.] , after referring to its earlier decision in the case of *Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay* [AIR 1989 SC 1642 : (1989) 3 SCC 293.] , has laid down the



law as under:

“69..... every activity of a public authority especially in the background of the assumption on which such authority enjoys immunity from the rigours of the Rent Act, must be informed by reason and guided by the public interest. All exercise of discretion or power by public authorities as the respondent, in respect of dealing with tenants in respect of which they have been treated separately and distinctly from other landlords *on the assumption that they would not act as private landlords*, must be judged by that standard”.

(xvii) The assistance provided by both the Union of India and State Government and other statutory authorities in permitting BIAL to establish and maintain BIAL at Devanahalli, without which the airport could not have been established, and Rs. 250 crores provided to BIAL by the Government of Karnataka under the State agreement and capital of BIAL partly owned by it, 26% share capital owned by 2nd respondent, 13% by BIAL, in pursuant to the concessional agreement referred to supra, there is transfer of powers of respondents 2 to 3 in relation to air traffic services to be rendered to the public at large. The grant of monopoly status in the concession agreement given to the BIAL is State conferred or State protected as the concession agreement provides exclusivity of private concession to the existing airport and prohibits any airport being set-up within 150 kms from BIAL.

(xviii) Even if it is not an entity and ‘State’ under Article 12 of the Constitution of India, the actions of BIAL are subject to judicial review under Article 226 of the Constitution of India. In this regard, learned Senior Counsel for petitioner has rightly placed reliance upon the decisions in the case of *Rohtas Industries Limited v. Rohtas Industries Staff Union* [(1976) 2 SCC 82.] , (1991) 1 SCC 171 (sic), (1995) 1 SCC 1811 (sic), *G. Bassi Reddy v. International Crops Research Institute* [AIR 2003 SC 1764 : (2003) 4 SCC 225.] . The principles laid down in those decisions with all fours applicable to the case on hand and therefore BIAL is amenable to writ jurisdiction of this Court under Article 226 of the Constitution of India as it has been discharging statutory functions/duties in establishing International



Airport at Devanahalli as it has undertaken to discharge the statutory functions of the Airport Authority in establishing private airport and its maintenance.

(xix) The word “Person” is with avowed object deliberately used in Article 226 of the Constitution of India, which may be a natural person or juridical person such as Government, private or public limited company, society, body, corporation *etc.*, who will perform public functions/duties in the public interest. They are all amenable to judicial review power of this Court is the legal principle, enunciated by the Apex Court in the above referred cases.

(xx) Further as per the decisions in *Rohtas Industries Limited*, *Andi Mukta* and *Unni Krishnan's cases*, the Supreme Court has succinctly held that the scope of High Court power under Article 226 of the Constitution of India is also to issue writs against a private body/person. The words “any person or authority” referred to in Article 226 of the Constitution of India is therefore not to be confined only to statutory authorities and instrumentalities of State for issuing writs against any persons. They may cover any person or body performing statutory, public functions and duties. The form of the body is not relevant for the purpose of exercise of power of this Court under Article 226 of the Constitution of India. What is relevant is the nature of functions or duties imposed upon such person and performed by it. As per the development of law, Prof. D. Smith, whose statement is extracted in *Andi Mukta's case* at paras 17 to 23, it is stated thus:

“The words ‘any person or authority’ used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body... Here again we may point out that *mandamus* cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states: ‘To be enforceable by *mandamus* a public duty does not necessarily have to be one imposed by statute. It may be



sufficient for the duty to have been imposed by charter, common law, custom or even contract'. We share this view".

(xxi) In *Unni Krishnan's case*, after referring to *Andi Mukta* and *Dwarkadas Marfatia and Sons cases*, it is held at paragraphs 81 and 83 as under:

"81. As a sequel to this, an important question arises : What is the nature of functions discharged by these institutions? They discharge a public duty. If a student desires to acquire a degree, for example, in medicine, he will have to route through a medical college. These medical colleges are the instruments to attain the qualification. If, therefore, what is discharged by the educational institution, is a public duty, that requires, to act fairly.

.....

83. The emphasis in this case is as to the nature of duty imposed on the body. It requires to be observed that the meaning of authority under Article 226 came to be laid down distinguishing the same term from Article 12. In spite of it, if the emphasis is on the nature of duty on the same principle it has to be held that these educational institutions discharge public duties. Irrespective of the educational institutions receiving aid it should be held that it is a public duty. The absence of aid does not detract from the nature of duty".

(xxii) The learned Senior Counsel for the petitioner has placed reliance upon the following decisions of the Apex Court wherein the scope of Article 226 is laid down by the Apex Court in *G. Bassi Reddy's case*, the Apex Court has laid down the law that "A writ under Article 226 can lie against a 'person' if it is a statutory body or performs a public function or discharges a public or statutory duty", in the case of *Zee Tele Films Limited*, referring to *Andi Mukta's case*, it has held that "Thus, it is clear that when a private body performs its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution by way of a writ petition under Article 226". Lastly referring to the cases of *Binny Limited* and *Zee Tele Films Limited*, it has held that : 'Article 226 is couched, in such a way that a



writ of mandamus could be issued even against a private authority.... discharging a public function... A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.

(xxiii) For the foregoing reasons, we answer Point Nos. 1 to 3 in favour of the petitioner.”

17. It becomes pertinent to note that the High Court appears to have been persuaded to negate the preliminary objection to maintainability which was taken by finding that even if BIAL was not liable to be seen as an entity which could be termed as “State” within the meaning of Article 12 of the Constitution, its actions would in any case be subject to judicial review under Article 226 of the Constitution. It had in this respect sought to draw sustenance from a judgment of the Supreme Court in **G. Basi Reddy vs. International Crops Research Institute and Another**¹³. It is the aforesaid reasoning which convinced it to hold that BIAL was “*discharging a statutory function/duty in the course of establishing the international airport*” and that “*it had undertaken to discharge the statutory functions of AAI*”.

18. Suffice it to note that the decision in *G. Basi Reddy* was explained in a subsequent judgment of the Supreme Court in the matter of **Ramakrishna Mission and Another v. Kago Kunya and**

¹³ (2003) 4 SCC 225



Others¹⁴ and where the expanse of Article 226 of the Constitution and when a writ petition would lie was explained in the following words:-

“34. Thus, contracts of a purely private nature would not be subject to writ jurisdiction merely by reason of the fact that they are structured by statutory provisions. The only exception to this principle arises in a situation where the contract of service is governed or regulated by a statutory provision. Hence, for instance, in *K.K. Saksena* [*K.K. Saksena v. International Commission on Irrigation & Drainage*, (2015) 4 SCC 670 : (2015) 2 SCC (Civ) 654 : (2015) 2 SCC (L&S) 119] this Court held that when an employee is a workman governed by the Industrial Disputes Act, 1947, it constitutes an exception to the general principle that a contract of personal service is not capable of being specifically enforced or performed.

35. It is of relevance to note that the Act was enacted to provide for the regulation and registration of clinical establishments with a view to prescribe minimum standards of facilities and services. The Act, inter alia, stipulates conditions to be satisfied by clinical establishments for registration. However, the Act does not govern contracts of service entered into by the hospital with respect to its employees. These fall within the ambit of purely private contracts, against which writ jurisdiction cannot lie. The sanctity of this distinction must be preserved.

36. For the above reasons, we are of the view that the Division Bench of the High Court was not justified in coming to the conclusion that the appellants are amenable to the writ jurisdiction under Article 226 of the Constitution as an authority within the meaning of the Article.

37. For the reasons that we have adduced above, we hold that neither the Ramakrishna Mission, nor the hospital would constitute an authority within the meaning of Article 226 of the Constitution.

38. Before concluding, it would be necessary to also advert to the fact that while the learned Single Judge had come to the conclusion that the appellants are “State” within the meaning of Article 12, the Division Bench has not accepted that finding. The Division Bench ruled, as we have noticed earlier, that the appellants do not fall within the description of “State” under Article 12. This finding has not been challenged before this Court by the State of Arunachal

¹⁴ (2019) 16 SCC 303



Pradesh.

39. Even otherwise, we are clearly of the view that the tests which have been propounded in the line of authority of this Court in *Ajay Hasia v. Khalid Mujib Sehravardi* [*Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] , *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology* [*Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111 : 2002 SCC (L&S) 633] and *Jatya Pal Singh v. Union of India* [*Jatya Pal Singh v. Union of India*, (2013) 6 SCC 452 : (2013) 2 SCC (L&S) 617] support the conclusion of the High Court that the appellants are not “State” within the meaning of Article 12 of the Constitution of India.

40. For the above reasons, we allow the appeal and set aside the judgment and order of the High Court dated 6-4-2018 in Writ Appeal No. 25 (AP/2017). In consequence, the writ petition filed before the High Court, namely, WP (Civil) No. 520 (AP/2015) shall stand dismissed. There shall be no order as to costs. Pending application(s), if any, shall stand disposed of.”

19. The decision of the Supreme Court in *G. Bassi Reddy* was duly explained by the Supreme Court with it being observed as under:-

“24. In *G. Bassi Reddy v. International Crops Research Institute* [*G. Bassi Reddy v. International Crops Research Institute*, (2003) 4 SCC 225] , a two-Judge Bench of this Court dealt with whether the International Crop Research Institute for the Semi-Arid Tropics (ICRISAT) which is a non-profit research and training centre, is amenable to the writ jurisdiction under Article 226. The dispute concerned the termination of employees of ICRISAT. The Court held that only functions which are similar or closely related to those that are performed by the State in its sovereign capacity qualify as “public functions” or a “public duty” : (SCC p. 237, para 28)

“28. A writ under Article 226 can lie against a “person” if it is a statutory body or performs a public function or discharges a public or statutory duty ... ICRISAT has not been set up by a statute nor are its activities statutorily controlled. Although, it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The primary activity of ICRISAT is to conduct research and



training programmes in the sphere of agriculture purely on a voluntary basis. A service voluntarily undertaken cannot be said to be a public duty. Besides ICRISAT has a role which extends beyond the territorial boundaries of India and its activities are designed to benefit people from all over the world. While the Indian public may be the beneficiary of the activities of the Institute, it certainly cannot be said that ICRISAT owes a duty to the Indian public to provide research and training facilities.”

Applying the above test, this Court upheld the decision of the High Court that the writ petition against ICRISAT was not maintainable.

30. Thus, even if the body discharges a public function in a wider sense, there is no public law element involved in the enforcement of a private contract of service.”

20. It is thus evident that it was an opinion rendered in the context of maintainability of a writ petition under Article 226 of the Constitution which was adopted by the Karnataka High Court in *Menzies Aviation* to answer the question posited with reference to Section 80IA as under:-

“8. We have considered the submissions made on both sides and have perused the record. Before proceeding further, it is apposite to take note of section 80-IA of the Act, the relevant extract of which is reproduced below for the facility of reference:.....

Thus, from close scrutiny of section 80-IA(4)(i)(b) of the Act, it is evident that the assessee must be engaged in the business of developing or operating and maintaining or developing, operating and maintaining any infrastructure facility which fulfils the following conditions, namely (a) it is owned by a Company, (b) it has entered into an agreement with Central Government or a State Government or a local authority or any other statutory body for developing or operating and maintaining or developing, operating and maintaining a new infrastructure facility.

9. So far as the requirement of entering into a statutory body is concerned, the same is no longer res integra as a Bench of this Court in M/s. Flamingo Dutyfree Shops Pvt. Ltd. has already held



that BIAL is a statutory body. Thus, the assessee has complied with the aforesaid condition. It is pertinent to mention here that the Special Leave Petition against the aforesaid decision has been disposed of by order dated 16-9-2016. Thus, the view taken by this Court in M/s. Flamingo Dutyfree Shops Pvt. Ltd. holds the field. In view of aforesaid enunciation of law, it is evident that the assessee has complied with the condition of entering into an agreement with the statutory body.

10. Now, we may deal with the issue whether the activity of the assessee in providing cargo handling services is covered under the expression 'infrastructure development'. The Commissioner of Income-tax (Appeals), vide order dated 11-6-2012, inter alia has held that from perusal of the layout map of the airport, it is evident that the cargo complex is connected to other infrastructure facilities by airside service road running parallel to the main runway. The aforesaid road serves the isolation bay, fire station, cargo complex, fuel farm and maintenance area as per clause 4 of the concession agreement between the BIAL and Government of India. It has further been held that cargo handling services have been classified as material but competitive by AERA by an order dated 16-8-2011 in the assessee's own case. It has also been held that the expression 'aerodrome' as defined in section 2(2) of the Aircraft Act is an inclusive definition and uses the expression 'includes'. It has further been held that large amount of non-passenger cargo is being uploaded to the commercial aircraft in addition to passenger's luggage and therefore, location of cargo handling area is linked with critical airside service road and partaking of statutory infrastructure relating to security, customs, x-rays, etc. within its own operations, indicates that this service is part of commercial operations undertaken by air cargo operators and other air transporters whose equipment and machinery are also integrated in to the definition of aerodrome as per Section 2(22) of the Aircraft Act, 1934. Thus, it has been held by the Commissioner of Income-tax (Appeals) that cargo handling services are located within the airport and are critical infrastructure facilities and are deemed to be part of the airport.

11. The Appellate Authority has also taken note of the fact that SPRH agreement gives rights for design, construction, financing, testing, commissioning, management and operation of the facility for a total period of 20 years to the assessee and the concession is on built, operate and transfer basis. Therefore, it has been held that every contractor may not be a developer but every developer developing infrastructure facility on behalf of the Government is a



contractor. In *Chettinad Lignite Transport Services (P.) Ltd.*, (*supra*), it has been held that proviso intends to extend the benefit of deduction under section 80-IA of the Act even to a transferee or a contractor who is approved and recognized by the concerned authority and undertakes the work of development of infrastructure facility or only operates or maintains the same. Thus, in view of aforesaid enunciation of law, it has rightly been concluded by the Appellate Authority that the assessee is engaged in development operation and maintenance of an infrastructure facility in the light of provisions of SPRH agreement. The aforesaid finding has been affirmed in appeal by the Tribunal. The aforesaid findings are concurrent findings of fact which do not suffer from any perversity. Learned counsel for the revenue was unable to point out any perversity in the findings of fact recorded by the Commissioner of Income-tax (Appeals) as well as by the Tribunal. It is well settled in law that the concurrent findings of fact do not suffer from any perversity warranting interference of this court in exercise of powers under section 260A of the Act. [See: *Syeda Rahimunnisa v. Malan Bi By L.RS.* (2016) 10 SCC 315 and *Principal Commissioner of Income Tax v. Softbrands India (P.) Ltd.* (2018) 406 ITR 513].”

21. We, with due respect, note that principles which guide us in evaluating whether a writ petition would be maintainable under Article 226 of the Constitution cannot be extrapolated to answer whether a transaction would fall within the scope of Section 80IA. The language in which Section 80IA stands couched is unambiguous. The scope and extent of its coverage would clearly be governed and regulated by sub-section (4) and which in unequivocal terms explains the nature of activities and contracts which could lead to a claim being laid for benefits being derived therefrom.

22. Sub-section (4) is prefaced by the Legislature stipulating that Section 80IA would apply to an enterprise carrying on business of developing, operating and maintaining any infrastructure facility. The



phrase “*infrastructure facility*” has been defined by the Explanation appended to sub-section (4) in the following terms:-

“[*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].”

23. While it was sought to be contended by the appellants that a Cargo Terminal does not find specific mention in the Explanation, we proceed on the premise that since “infrastructure facility” is defined to include an airport, a facility integral or supportive and concomitant to an airport would also be covered.

24. That would still leave us to examine whether the concession which was granted by DIAL in favour of the respondent-assessee would qualify the principal part of sub-section (4). This would necessarily entail it being found and established that the respondent-assessee was an enterprise carrying on either a business or operating and maintaining an infrastructure facility in terms of and pursuant to an agreement entered into with either the Central or State Governments, a local authority or any other statutory body.

25. It is here that the claim of the respondent falters and falls. We, firstly find ourselves unable to countenance or acknowledge DIAL to be either the Central or State Government, a local authority or for that



matter a statutory body. DIAL came into existence pursuant to a bidding process which was initiated by AAI in avowed fulfilment of objectives underlying Section 12A of the AAI Act. The OMDA represents a grant which was made, a concession granted by that authority to a consortium of private entities. That cannot possibly lead to DIAL being elevated to the status of a statutory body. Merely because AAI granted a concession to DIAL and enabled it to discharge some of its functions in terms of the scheme of the AAI Act, the same would clearly not result in DIAL itself being viewed as a statutory body.

26. The second fundamental aspect which arises is whether the respondent-assessee could be viewed to be an enterprise which had entered into an agreement with either the Central or State Governments, a local authority or a statutory body. The construct of the concession clearly fails to meet the aforesaid primordial requirement as laid in place by Section 80IA(4). Once it is held that DIAL does not fall within the ambit of the principal qualifying provision, the concession which it granted to the respondent would also not qualify for benefits under Section 80IA. We are thus of the considered opinion that the PCIT was justified in doubting whether the benefits flowing from Section 80IA could have been claimed by the respondent-assessee.

27. In our considered opinion, the Tribunal has clearly erred in holding otherwise and interfering with the order which had been framed by the PCIT in valid exercise of powers flowing from Section



263 of the Act.

28. We consequently allow the appeal and answer the question as framed in the negative and in favour of the appellant. The order of the Tribunal dated 23 October 2018 is consequently set aside and that of the PCIT restored.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.
JANUARY 30, 2025/DR