आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं, श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष

BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / ITA Nos.1805 to 1811/PUN/2014

निर्धारण वर्ष / Assessment Years : 2006-07 to 2012-13

The Asst. Commissioner of Income Tax,
Central Circle, Kolhapur .... अपीलार्थी/Appellant

Vs.

D.M. Corporation Pvt. Ltd.,
240/B, Mohite House,
Gen. Thorat Marg,
Tarabai Park, Kolhapur .... प्रत्यर्थी / Respondent

PAN: AADCM6281H

अपीलार्थी की ओर से / Appellant by	:	Ms. Nirupama Kotru, CIT
प्रत्यर्थी की ओर से / Respondent by	:	S/Shri Nikhil Pathak / Sushant Phadnis

सुनवाई की तारीख / **Date of Hearing : 05.02.2018**		घोषणा की तारीख / **Date of Pronouncement: 23.03.2018**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

This bunch of seven appeals filed by the Revenue are against consolidated order of CIT(A), Kolhapur, dated 25.07.2014 relating to assessment years 2006-07 to 2012-13 against respective orders passed under section 143(3) r.w.s. 153A(b) of the Income-tax Act, 1961 (in short 'the Act').

2. This bunch of seven appeals relating to the same assessee for different assessment years on similar issue were heard together and are being disposed

of by this consolidated order for the sake of convenience. First, we shall make reference to the facts and issues in ITA No.1805/PUN/2014, relating to assessment year 2006-07.

3. The Revenue in ITA No.1805/PUN/2014, relating to assessment year 2006-07 has raised the following grounds of appeal:-

> *1. On the facts and in the circumstances of the case, the CIT(A) was not justified in holding that the assessee is eligible for deduction u/s 80IA(4) of the Act.*
>
> *2. On the facts and in the circumstances of the case, the CIT(A) has erred in holding that the assessee is a Developer and not a contractor, when a contract was awarded to the assessee by the Govt. of Maharashtra to undertake the projects for which assessee has claimed deduction u/s 80IA(4) of the I.T. Act.*
>
> *3. On the facts and in the circumstances of the case, the CIT(A) has erred in relying on the decision in the case of CIT vs. ABG Heavy Industries Ltd. (2010) (322 ITR 323) (Bom.) when facts of the case are different.*
>
> *4. On the facts and in the circumstances of the case, the CIT(A) has erred in facts in ignoring the instruction No.3 of 2008 giving clarification in respect of the provisions of the Finance Act, 2007 wherein clarification in respect of "Developer and Contractor" is also given. It is specifically stated that Contractor is not eligible for deduction u/s 80IA(4) of the Act.*
>
> *5. The order of CIT(A) may be vacated and that of the Assessing Officer be restored.*

4. The Revenue has raised additional ground of appeal No.I, which reads as under:-

> *1) In the facts and the circumstances of the case, whether the assessee is entitled to deduction under section 80IA(4) based on the claim made under section 153A when there was no such claim made in the original return of income of the assessee for the year under consideration and no audit report in form 10CCB as mandated under section 80IA(7) was filed with the original return.*

5. Thereafter, the Revenue vide letter dated 27.03.2017 raised additional ground of appeal No.II, which read as under:-

> "*1. On the facts and in the circumstances of the case and in law whether the assessee was entitled to claim deduction under section 80IA(4) of the Income Tax Act, 1961 on non-est Form No.10CCB when such Form No 10CCB was submitted during proceedings under section 153A of the Income Tax Act, 1961, i.e. beyond the date of filling of return under section 139(1) of the Income Tax Act, 1961 and no relaxation under section 119(2) of the Income Tax Act, 1961 was sought from the Central Board of Direct Taxes for such delay."*

> *2. Whether in law the assessee was entitled to the claim of deduction under section 80IA(4) of the Income Tax Act, 1961 on the additional income admitted in statement under section 132(4) of the Income Tax Act, 1961 and included in the return of income in view of the legal position that the assessment proceedings under section 153A are for the benefit of revenue and cannot converted into an appeal or revision in disguise to claim relief in respect of items not claimed in the original assessment proceedings as held in the case of Charchit Agarwal 129 TTJ (Del.) 438 dtd. 28.08.2009."*

6. Briefly, in the facts of the case, the assessee had originally filed return of income declaring total income of ₹ 1,83,83,761/- on 30.11.2006, which was processed under section 143(1) of the Act. Search operation under section 132 of the Act was carried out in the case of Shri Ramchandra Maruti Mohite on 25.08.2011. The assessee was one of the group members and was also covered under the search operation. As a result, D.M. Corporation Pvt. Ltd., Kolhapur [Formerly known as Mohite and Mohite (Engineers and Contractors) Pvt. Ltd.] was issued notice under section 153A of the Act. In response to the said notice, the assessee filed return of income declaring Nil income on 23.11.2012. In the said return of income, the assessee had disclosed gross total income at ₹ 3,83,83,761/-, on which it claimed deduction under section 80IA of the Act. The assessee also furnished audit report under section 44AB of the Act and also Form No.10CCB, dated 25.10.2012. The assessee was engaged in development / construction of infrastructure projects such as earthen dams, hydro electricity projects, etc. During the course of search, statement of Shri Dilip Ramchandra Mohite was recorded under section 132(4) of the Act. On going through seized documents and evidences collected during the course of search and post-search enquiries, the Director of assessee company admitted unaccounted income in the case of assessee amounting to ₹ 34.50 crores for different assessment years respectively, which is summarized under para 7 at page 3 of assessment order. The assessee thus, declared ₹ 2 crores on account of unaccounted payment of wages in the return

of income filed under section 153A of the Act as additional income due to result of search. The assessee had declared the said additional income on account of bogus self made vouchers for wages, fictitious payments to sub-contractor and by inflating expenses. The basis for disclosure of additional income was as per the source and application statement prepared by the assessee based on seized documents. Further, the assessee in the return of income had claimed deduction under section 80IA(4) of the Act amounting to ₹ 3.83 crores, both on original and additional income. The assessee was asked to explain as to why the same should be allowed. In response thereto, the assessee pointed out that the claim for deduction under section 80IA(4) of the Act was made in the original return of income by way of Note, wherein it was reported that the assessee was going to claim the deduction under section 80IA of the Act after taking experts' opinion. It was further explained that the said claim for deduction under section 80IA(4) of the Act was made in the returns of income which were filed in response to notice under section 153A of the Act for the respective assessment years on 23.11.2012. The assessee pointed out that as per section 153A(a) of the Act, the return filed under sub-section was deemed to be return filed under section 139 of the Act and provisions of the Act shall apply accordingly to the said return. The assessee has summarized chart of deduction under section 80IA(4) of the Act for assessment years 2006-07 to 2012-13 with original date of filing the return of income under section 139 of the Act at page 4 of the assessment order, which is part of written submissions filed by the assessee. The assessee also explained as to why it was entitled to claim the said deduction being engaged in development of infrastructure facilities within meaning of section 80IA(4) of the Act. The written submissions are reproduced at pages 4 to 22 of the assessment order. The Assessing Officer noted that the assessee was a civil contractor engaged in the activities

of executing contracts of civil work. The Arjuna Irrigation Project, Tal. Rajapur, Dist. Ratnagiri related to construction of Earthen Dam & Appurtenant Structures for Arjuna Irrigation Project and was allotted by the Govt. of Maharashtra, Irrigation Department vide their work order dated 08.06.2001 to the assessee. The Assessing Officer traced the history of insertion of section 80IA(4) of the Act from 1996 and the amended provisions by the Finance Act, 2001 w.e.f. 01.04.2002, wherein sub-section 4(a) was amended. The Assessing Officer was of the view that where the assessee was a contractor and only income was profit arising out of contract, whereas for developer the income arises from the asset after being brought into existence. The Assessing Officer was of the view that the assessee was only a works contractor and in view of Explanation which was inserted by the Finance Act, 2007 with retrospective effect from 01.04.2000, below sub-section 13 of section 80IA of the Act and subsequently, substituted by Finance (No.2) Act, 2009 with retrospective effect from 01.04.2000 clarified that the deduction under section 80IA(4) of the Act would not be available to works contractor. Reference was made to CBDT's Circular No.3/2008, dated 12.03.2008. The Assessing Officer also perused the TDS certificate in which the nature of work was contract. Moreover, the assessee had to pay VAT as contractor under the Sales Tax Act, whereas such was not the position for developer. Accordingly, the claim of deduction under section 80IA(4) of the Act of assessee amounting to ₹ 3.83 crores was dismissed. The Assessing Officer also referred to various judicial precedents on the issue and denied the deduction claimed by assessee and assessed the income in the hands of assessee i.e. on account of original income offered to tax and additional income offered pursuant to search on the premises of assessee.

7. The CIT(A) noted that Mumbai Bench of Tribunal in the case of BT Patil & Sons Belgaum Construction Pvt. Ltd. reported in 126 TTJ (Mumbai) (TM),

order dated 26.10.2009 and Pune Bench of Tribunal in the case of Laxmi Engineering Service Pvt. Ltd. in ITA Nos.431, 435/PN/2007 & 254/PN/2008, order dated 18.02.2010 had allowed the deduction under section 80IA(4) of the Act, wherein it was held that the assessee was not merely a contractor but a developer and hence eligible to the benefit of deduction under section 80IA(4) of the Act. The CIT(A) then noted the facts of case, wherein the assessee was awarded contract by the Govt. of Maharashtra for construction of Arjuna Irrigation Project related to water supply irrigation facilities. The CIT(A) was of the view that as per amended law w.e.f. assessment year 2002-03, development of infrastructure facility was sufficient for claim of deduction under section 80IA(4) of the Act. It was further held as under:-

> *"15. As per the amended law w.e.f. assessment year 2002-03, development of infrastructure facility is sufficient for claim of deduction u/s 80IA(4). In the instant case conditions stipulated in sub clause (a) of sub-section (4)(i) with regard to the enterprise being owned by the company registered in India is duly fulfilled. The condition stipulated in sub-clause (b) requiring that the assessee company to enter into agreement with the Central or State Government for development of new infrastructure facility is also fulfilled. The condition stipulated under sub-clause (c), which required that the assessee has started operating and maintaining infrastructure facility on or after 1st day of April, 1995 is also fulfilled."*

8. Reliance was placed on different decisions of various Benches of Tribunal and the CIT(A) observed that in execution of every development work, the developer will definitely be a works contractor but every contractor may not be a developer. Thereafter, the CIT(A) held as under:-

> *"30. In the present case it has not been denied that assessee has developed the infrastructure facility as per the agreement with the State Government. The scope of assessee's work was undertaking of preliminary and detailed site survey of the scheme, formulation of designs - considering various alternatives based on survey, parameters specified and need of beneficiaries, preparation of intricate designs involving hydraulic, civil, automation aspects, scrutinising the designs and obtaining approval from the concerned Government department, taking over lands either from the Government, local authority or to acquire lands from the landowners as per terms of the agreement, obtaining the statutory permissions, then undertaking the development of the project , construction and execution including procurement of material, construction, installation of mechanical, electrical and instrumentation components, co-ordination between all activities, so that the project is on smooth track, erection and commissioning of the entire project, undertaking of all the risks involved in*

the project, inverting its own funds and also borrowed funds for the development of the project and thereafter recording the same from the client in form of R.A. bills.

31. After completion of project the assessee undertakes maintenance of the project till defect liability period as prescribed in the tender, which is normally one year and finally after completion of the project in all respect, the project is handed over to Government/ local authority/statutory authority.

32. The assessee has demonstrated that it has undertaken risks in terms of deployment of technical personnel, plant and machinery, technical know-how, expertise and financial resources. Due to the fact that the contracts for the project undertaken by the appellant involve design, development, and construction of shafts, tunnels, barrages, canals, gates, earthen dams, lift irrigations systems, erection and maintenance of cranes, hydraulic hoists; financial involvement including furnishing security deposit; and defect correction in liability period, then as held in various decisions cited above, the contracts entered into by the assessee cannot be called simple works contract so as to deny the deduction available under section 80IA(4). The appellant has claimed deduction under section 80IA(4) in respect of project undertaken due to a valid contract entered into with the State Government. The claim is in respect of business income found as a result of search and seizure operation and pertains to income from Arjuna Irrigation project in which the contract was for construction of shafts and tunnels which is an infrastructure project of immense complexity in execution and of huge magnitude. The appellant was required to bring in the finance, technical expertise and material and adhere to the quality requirements irrespective of cost. In completion of the project the assessee utilized its own funds, its expertise, its employees and took responsibility of developing infrastructure facility. Under such circumstances, it is the overwhelming opinion in majority of the decisions of various benches of the Honourable ITAT and especially of the jurisdictional Tribunal in the case Laxmi Civil Engg. (supra), Pratibha Constructions and Engineers Ltd. (supra) and appellants own case (supra), that the developer of the infrastructure facility cannot be denied the benefit of deduction available under section 80IA(4). I, respectfully following the decision of the Jurisdictional Tribunal in the above cases and the other cited decisions, allow the claim of the appellant in respect of claims of deduction including additional claim of deduction made under section 80IA(4) in respect of all the years.

33. The AO has made an observation that in the TDS details, the business of assessee has been mentioned as Contractor. I find that in the chapter XVII relating to TDS the nearest section matching the nature of work in which assessee is engaged is sec 194C relating to contractors. Since there is not separate provision in respect of Developers, the TDS is made under this section. The use of word contractor will, in view of the observation made by various ITATs and the Bombay High Court, in no way alter the nature of work of the assessee."

9. The Revenue is in appeal against the order of CIT(A).

10. The learned Departmental Representative for the Revenue pointed out that the assessee had filed return of income in response to notice under section 153A of the Act and the issue which arises is whether in such return of income,

the assessee can claim additional benefits? For the above said, reliance was placed on the following decisions:-

i) *Charchit Agarwal Vs. ACIT (2009) 34 SOT 348 (Del)*

ii) *CIT Vs. Sun Engineering Works (P.) Ltd. (1992) 198 ITR 297 (SC)*

iii) *Sarla Handicrafts (P.) Ltd. Vs. Addl.CIT (2008) 296 ITR 94 (P&H)*

iv) *Suncity Alloys (P.) Ltd. Vs. ACIT (2009) 124 TTJ 674 (JD)*

v) *Dhanush General Stores Vs. CIT (2011) 339 ITR 651 (Chhattisgarh)*

vi) *Shri Gajendra D. Pawar Vs. DCIT in ITA Nos.1009 to 1012/PUN/2015, relating to assessment years 2005-06 to 2008-09, order dated 31.10.2017*

11. The learned Authorized Representative for the assessee in reply, pointed out that the assessee was engaged in development of infrastructure facilities. During the course of search on 25.08.2011, the assessee surrendered ₹ 34.50 crores mainly on account of inflated wages. However, in the revised surrender, ₹ 9.50 crores was surrendered on account of wages and ₹ 25 crores on account of unbilled revenue for assessment year 2012-13. The learned Authorized Representative for the assessee further pointed out that the proceedings for assessment years 2006-07 to 2009-10 were not pending or abated assessments but were completed assessments. However, for assessment year 2010-11, assessment was pending; for assessment year 2011-12, the due date for filing the return of income had still to expire and assessment year 2012-13 was the year of search. He pointed out that in the return of income filed in response to notice under section 153A of the Act, income was offered on account of inflated wages as business income and deduction was claimed under section 80IA of the Act on original income and also on additional income. Referring to the order of Assessing Officer, it is pointed out by the learned Authorized Representative for the assessee that there is discussion about eligibility of claim of deduction under section 80IA(4)

of the Act. The Assessing Officer was of the view that the assessee was awarded work by the Government, so the assessee was a contractor and was not entitled to deduction under section 80IA(4) of the Act. On the other hand, the CIT(A) relying on series of decisions of Pune Bench of Tribunal and the Hon'ble Bombay High Court had held the assessee not to be contractor but a developer. He pointed out that the issue is covered by the Hon'ble Bombay High Court in CIT Vs. B.G. Shirke Construction Technology P. Ltd. (2017) 395 ITR 371 (Bom). He submitted that for assessment year 2010-11, proceedings had abated and the assessment proceedings were pending, for assessment year 2011-12 fresh return of income was filed under section 139(1) of the Act and the claim was made for deduction. Similarly, in assessment year 2012-13, return of income was filed within period allowed under section 139(1) of the Act and the deduction was claimed under section 80IA(4) of the Act. In view of the decision of Hon'ble Bombay High Court (supra) where the return of income has been filed under section 139(1) of the Act or in response to notice under section 153A of the Act, fresh claim could be made with regard to completed assessments i.e. assessment years 2006-07 to 2009-10. The issue was whether the assessee would make a fresh claim of deduction. In this regard, he placed reliance on the ratio laid down by Hon'ble Bombay High Court in CIT Vs. (1) Continental Warehousing Corporation (Nhava Sheva) Ltd. (2) All Cargo Global Logistics Ltd., (2015) 374 ITR 645 (Bom). The learned Authorized Representative for the assessee stressed that in principle the assessee was entitled to claim the deduction. He also admitted that in original return of income, no such claim was made. However, if it was 148 proceedings, then the assessee could offer additional income and also to make fresh claim in this regard. He placed reliance on the ratio laid down by Hon'ble Bombay High Court in CIT Vs. Caixa Economica De Goa (1994) 210 ITR 719 (Bom). He

further placed reliance on the decision of Pune Bench of Tribunal in DCIT Vs. Tapi Prestressed Products Ltd. in ITA No.2139/PN/2013, relating to assessment year 2009-10, order dated 31.07.2015 and on Mahalakshmi Infra Projects Ltd. Vs. DCIT in ITA Nos.2571 to 2577/PN/2012 and cross appeals in ITA Nos.50 to 56/PN/2013, relating to assessment years 2004-05 to 2010-11, vide order dated 09.12.2015.

12. We have heard the rival contentions and perused the record. In the facts of the present case before us, the assessee was awarded contract work for Arjuna Irrigation Project. Search under section 132 of the Act was carried out at the premises of assessee on 25.08.2011, wherein the assessee furnished additional income to the tune of ₹ 34.50 crores. The assessee did offer additional income but revised its surrender by offering ₹ 9.50 crores on account of wages and ₹ 25 crores on account of unbilled revenue for assessment year 2012-13 i.e. the year of search. Consequent to notice issued under section 153A of the Act, the assessee furnished returns of income for the respective years. The assessee had originally in the return of income filed for assessment years 2006-07 to 2010-11 not claimed any deduction under section 80IA(4) of the Act. However, in the return of income filed pursuant to notice under section 153A of the Act, such claim was made for the first time. The said claim was made not only on the original income offered to tax in the original returns of income filed on the respective dates but also on the additional income offered during the course of search. In other words, though the assessee had offered ₹ 34.50 crores as additional income, after claiming the aforesaid deduction, net effect was Nil income, was offered in each of the years covered pursuant to search upon the assessee. The year-wise details of additional income offered are as under:-

(Rs. In Crores)

A.Y. 2006-07	A.Y. 2007-08	A.Y. 2008-09	A.Y. 2009-10	A.Y. 2010-11	A.Y. 2011-12	A.Y. 2012-13	Total
Wages	Wages	Wages	Wages	Wages	Wages	Wages	
2.00	2.00	1.25	1.25	1.25	1.50	0.25	09.50
Unrecorded bill						25.00	25.00
					Total	25.25	34.50

13. The tabulated details of income offered in the original returns of income and additional undisclosed income declared pursuant to search action year-wise are as under:-

Sr. No.	F.Y.	A.Y.	Original Return Filing Date	Claimed in return U/s. 153A(a)		
				As per regular Books of account	In respect of undisclosed income declared during search action	Total
1	2005-06	2006-07	30/11/2006	1,83,83,760.00	2,00,00,000.00	3,83,83,761.00
2	2006-07	2007-08	31/10/2007	59,92,806.00	2,00,00,000.00	2,59,92,806.00
3	2007-08	2008-09	01/10/2008	41,46,520.75	1,25,00,000.00	1,66,46,520.75
4	2008-09	2009-10	26/09/2009	7,15,65,861.64	1,25,00,000.00	8,40,65,861.64
5	2009-10	2010-11	30/09/2010	10,01,50,501.00	1,25,00,000.00	11,26,50,501.00
6	2010-11	2011-12	29/09/2011	2,97,17,651.00	1,50,00,000.00	4,47,17,651.00
7	2011-12	2012-13	28/09/2012	Loss	-	-

14. Though the Assessing Officer denied the deduction under section 80IA(4) of the Act on several counts including the amendment to provisions of the Act but the CIT(A) held the assessee to be eligible to claim the aforesaid deduction not only on the original income offered to tax, on which originally no deduction was claimed and also on additional income offered pursuant to search on the assessee. The Revenue is in appeal against the order of CIT(A), wherein the first issue raised vide original ground of appeal is that where the assessee had furnished Form No.10CEB during the proceedings under section 153A of the Act i.e. beyond the date of filing the return of income under section 139(1) of the Act and without any relaxation under section 119(2) of the Act being sought from CBDT for such delay, can the assessee be held to entitle to claim the deduction under section 80IA(4) of the Act. The second issue is in relation to additional income offered in the statement recorded under section 132(4) of the Act and whether the assessee could claim the said deduction in

assessment proceedings under section 153A of the Act. In this regard, the argument which has been raised is that proceedings initiated under section 153A of the Act are for the benefit of Revenue and could not be converted into an appeal or revision in disguise to claim relief in respect of items not claimed in the original assessment proceedings. The additional ground of appeal No.1 is also on the claim of deduction made under section 80IA(4) of the Act in the return of income filed in response to notice under section 153A of the Act, where no such claim was made in the original return of income. In the original grounds of appeal, the Revenue is aggrieved by the order of CIT(A) in holding the assessee to be eligible to claim the deduction under section 80IA(4) of the Act by observing that the assessee was a developer and not a contractor. The case of Revenue is that where a contract was awarded to the assessee by Govt. of Maharashtra to undertake the projects for which the assessee had claimed aforesaid deduction, then the same was not allowable as the assessee was only a contractor and not a developer. The Revenue is also aggrieved by the order of CIT(A) in ignoring Instruction No.3/2008 giving clarification in respect of provisions of Finance Act, 2007. The Revenue is also aggrieved by the order of CIT(A) in holding the assessee to be eligible for the aforesaid deduction relying on the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. ABG Heavy Industries Ltd. (2010) 322 ITR 323 (Bom).

15. The first issue which needs adjudication is whether the assessee was developing infrastructure facility enabling it to claim the aforesaid deduction under section 80IA(4) of the Act. The first aspect of the issue is the claim of deduction under section 80IA(4) of the Act on profits of Infra projects carried on by the assessee. The said deduction under section 80IA(4) of the Act was not claimed by the assessee in assessment years 2006-07 to 2009-10, in the original return of income filed on the respective dates. Thereafter, for the first

time, the said claim was made in assessment years 2010-11, 2011-12 and 2012-13. The Assessing Officer denied the assessee aforesaid deduction under section 80IA(4) of the Act on the ground that the work was awarded by the Government of Maharashtra, so the assessee was a contractor and not entitled to the said claim. In this regard, the learned Authorized Representative for the assessee has placed reliance on the ratio laid down by Hon'ble Bombay High Court in CIT Vs. ABG Heavy Industries Ltd. (supra). The assessee claims that it was engaged in executing Infra projects, hence was entitled to claim the aforesaid deduction under section 80IA(4) of the Act. The CIT(A) has elaborately discussed the issue and allowed the claim of deduction under section 80IA(4) of the Act holding the assessee to be eligible to claim the aforesaid deduction. The Revenue has not been able to controvert the findings of CIT(A) in this regard. Further, we also find that the Tribunal in ACIT Vs. Mahalaxmi Infraprojects Ltd. in ITA Nos.142 to 145/PUN/2016, relating to assessment years 2007-08 to 2010-11 and in ITA Nos.146 & 147/PUN/2016, relating to assessment years 2011-12 & 2012-13, vide order dated 17.01.2018 had allowed the aforesaid claim of deduction under section 80IA(4) of the Act in the case of assessee engaged in executing infrastructure projects. Following the same line of reasoning, we hold the assessee to be eligible to claim the aforesaid deduction under section 80IA(4) of the Act.

16. The second aspect of the issue is in claiming the deduction under section 80IA(4) of the Act on the additional income offered by the assessee on account of wages. The assessee had claimed the aforesaid deduction on the additional income offered in the return of income filed pursuant to notice issued under section 153A of the Act. The assessee had claimed the aforesaid deduction in all the years, where notice under section 153A of the Act was issued. The Tribunal in the case of ACIT Vs. Mahalaxmi Infraprojects Ltd.

(supra) relying on earlier decision of Tribunal in the case of said assessee had also allowed the said claim of deduction under section 80IA(4) of the Act on the additional income offered by the assessee, holding as under:-

> "*16. Now, coming to the first issue raised by the Revenue i.e. against the order of CIT(A) in allowing deduction under section 80IA(4) of the Act on additional income offered by the assessee. It may be pointed out herein itself that during the course of search also, certain additional income was offered by the assessee, on which it claimed the aforesaid deduction under section 80IA(4) of the Act. The Tribunal vide paras 132 to 136 at pages 80 to 85 had considered the second issue of allowability of deduction under section 80IA(4) of the Act on the additional income declared during the course of search. The said additional income was offered on account of certain non-genuine expenditure being debited in the books of account. The Tribunal in turn, relied on the ratio laid down by the Hon'ble Bombay High Court in the case of Gem Plus Jewellery India Ltd. 333 ITR 175 (Bom) and in the case of CIT Vs. Sheth Developers (P) Ltd. in ITA No.3724/2010, vide order dated 27.07.2012 and also other decisions of Pune Bench of Tribunal. The Tribunal held the assessee to be eligible to claim the said deduction on the additional income offered."*

17. After deciding the basic issue, let us now take up the grounds of appeal raised by the Revenue year-wise.

18. The case of Revenue is that the assessee is not entitled to the said claim of deduction under section 80IA(4) of the Act, which was claimed in the return of income filed pursuant to issue of notice under section 153A of the Act. The assessee in original return of income filed for assessment years 2006-07 to 2010-11 had not claimed the aforesaid deduction under section 80IA(4) of the Act. The return of income for assessment year 2011-12 was not filed till date of search. We take up each of the years separately as the facts of each year are different. The aspect which has to be kept in mind is whether the proceedings are abated or non abated assessment. The issue which is raised in the present appeal is whether the assessee can claim the deduction under section 80IA(4) of the Act in the return of income filed in response to notice issued under section 153A of the Act. The assessments for assessment years 2006-07 to 2009-10 had not abated. In all these years, incriminating material was found and on the basis of incriminating material, the assessee declared certain

additional income on account of wages in the respective years and offered the same in the return of income filed in response to notice under section 153A of the Act. In the original return of income, the assessee though entitled to the benefit of deduction under section 80IA(4) of the Act, had not made any such claim of deduction. For the first time, a fresh claim of deduction under section 80IA(4) of the Act was made in the return of income filed under section 153A of the Act both on account of original income offered to tax and also on the additional income furnished during the course of search.

19. We find that the said issue has already been deliberated by us in Shri Gajendra D. Pawar Vs. DCIT in ITA Nos.1009 to 1012/PUN/2015, relating to assessment years 2005-06 to 2008-09, order dated 31.10.2017. The relevant findings of Tribunal on similar issue of making fresh claim of deduction in the return of income filed in response to notice under section 153A of the Act for assessment years which had not abated, were as under:-

> *"11. We have heard the rival contentions and perused the record. The first issue which arises in the present appeal is in respect of claim of expenditure on account of interest and in some cases on account of depreciation. Admittedly, the said expenditure was not claimed by the assessee in the return of income filed prior to search at the premises of assessee. However, consequent to search proceedings carried on the premises of assessee, notice under section 153A of the Act was served upon the assessee. In response thereto, in the return of income filed by the assessee, fresh claim of interest expenditure and depreciation on certain assets was made. The said claim was not allowed by the authorities below. The assessments for assessment years 2005-06 to 2008-09 i.e. appeals listed before us have not abated. In such cases, where the assessment has not abated, then the Hon'ble Bombay High Court (supra) has laid down that only undisclosed income and undisclosed assets detected during the course of search could be brought to tax. Applying the said ratio to the facts of the present case, we hold that the assessee is not entitled to claim any deduction on account of fresh claim i.e. on account of interest and depreciation in the respective years. Applying the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. (1) Continental Warehousing Corporation (Nhava Sheva) Ltd. (2) All Cargo Global Logistics Ltd. (supra), we hold that in the years under appeal, where the assessment has not abated, then no deduction is to be allowed in respect of fresh claim made in the return of income filed in response to notice under section 153A of the Act. Consequently, the first issue raised by way of ground of appeal No.1 in assessment year 2005-06, grounds of appeal No.1 and 3 in assessment year 2006-07, ground of appeal No.1 in assessment years 2007-08 and 2008-09 are dismissed."*

20. Applying the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. (1) Continental Warehousing Corporation (Nhava Sheva) Ltd. (2) All Cargo Global Logistics Ltd. (supra) and the ratio laid down in Shri Gajendra D. Pawar Vs. DCIT (supra), we hold that the assessee is not entitled to the claim of deduction under section 80IA(4) of the Act both on original income and on additional income offered, even if the assessee in principle is entitled to claim the aforesaid deduction. For the sake of repetition, it may be pointed out that the years under consideration i.e. assessment years 2006-07 to 2009-10 are non abated assessment years and in the original return of income, no such claim was made. Here, the learned Authorized Representative for the assessee has tried to draw *simile* that wherein the original return of income, there was no such claim of deduction, but in the return of income filed in response to 148 proceedings, where additional income was offered, then expenses were allowed by the Hon'ble Bombay High Court in CIT Vs. Caixa Economica De Goa (supra). The learned Departmental Representative for the Revenue, on the other hand has placed reliance on the ratio laid down by the Hon'ble Supreme Court in CIT Vs. Sun Engineering Works (P.) Ltd. (1992) 198 ITR 297 (SC) and it was held that where in the original assessment proceedings the assessee had not claimed any set of claim and since the original assessment had been concluded finally against the assessee, it was not permissible for the assessee in re-assessment proceedings to seek review / revision of concluded assessment for the purpose of computation of escaped income. Accordingly, we hold that in the years, where the assessment had not been abated, the assessee could not make any fresh claim of deduction under section 80IA(4) of the Act, even if in principle the assessee was entitled to claim the said deduction. We further hold that even on additional income so offered, the assessee cannot make claim of deduction under section 80IA(4) of the Act

in the non-abated assessments relating to assessment years 2006-07 to 2009-10. Hence, the additional income offered for the years is to be assessed in the hands of assessee, in addition to the original income offered in the original return of income filed by the assessee.

21. Now, let us take up the appeals for assessment years 2010-11 to 2012-13. The assessment proceedings for assessment year 2010-11 were pending on the date of search, hence were abated proceedings. Similarly, the assessee for assessment years 2011-12 and 2012-13 filed fresh returns of income and made the said claim of deduction under section 80IA(4) of the Act. In respect of assessment year 2010-11, the assessee in response to return of income filed under section 153A of the Act, claimed the aforesaid deduction.

22. Since, we have in the paras hereinabove already decided the issue that the assessee is entitled to claim the deduction under section 80IA(4) of the Act in principle, then the years under appeal being abated proceedings, any fresh claim of deduction can be made by assessee. Accordingly, we hold that the assessee is entitled to claim the aforesaid deduction under section 80IA(4) of the Act in assessment years 2010-11 to 2012-13. In respect of additional income offered, the assessee is also entitled to make this claim as held by the Tribunal in Mahalaxmi Infra Projects Vs. DCIT in ITA Nos.2571 to 2577/PN/2012 and in ACIT Vs. Mahalaxmi Infra Projects Ltd. in ITA Nos.50 to 56/PN/2013, relating to assessment years 2004-05 to 2010-11, order dated 09.12.2015, which has been further applied in order dated 17.01.2018, which has been referred to by us in the paras hereinabove. Accordingly, we hold that the assessee is entitled to claim the deduction under section 80IA(4) of the Act on additional income offered in the abated assessment proceedings i.e.

assessment years 2010-11 to 2012-13. Accordingly, the grounds of appeal raised by Revenue in assessment years 2006-07 to 2009-10 are allowed and the grounds of appeal raised by Revenue relating to assessment years 2010-11 to 2012-13 are dismissed.

23. In the result, appeals of Revenue for assessment years 2006-07 to 2009-10 are allowed and for assessment years 2010-11 to 2012-13 are dismissed.

Order pronounced on this 23rd day of March, 2018.

Sd/-	**Sd/-**
(D.KARUNAKARA RAO)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 23rd March, 2018.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A), Kolhapur;
4. The CIT – I / II, Kolhapur / The CIT (Central), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune