INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E": NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 1100/Del/2017
Assessment Year: 2012-13

Himalya International Ltd. Vinod Kumar Bindal & Co., CAs, Shiv Sushil Bhawan, D-219, Vivek Vihar-1 New Delhi 110095 PAN AAACH0158H	Vs.	ITO Ward-11(3) New Delhi.
(Appellant)		**(Respondent)**

ITA Nos. 3838; 3839/Del/2015
Assessment years 2009-10; 2010-11

ITO Ward-11(3), Room No. 412, C.R. Building New Delhi.	Vs.	Himalaya International Ltd. Shubhkhera, Paonta Sahib, Himachal Pradesh PAN AAACH0158H
(Appellant)		**(Respondent)**

Assessee by:	Shri Vinod Bindal, CA, Ms. Sweety Kothari, CA
Department by:	Ms. Shefali Swaroop, CIT(DR) Shri S.R. Senapati, Sr. DR
Date of Hearing	09/05/2018
Date of pronouncement	06/08/2018

O R D E R

PER AMIT SHUKLA, J.M.

The appeals of the revenue for the assessment year 2009-10 and 2010-11 have been filed against impugned order of even date 13.3.2015, passed by Ld. CIT (Appeals)-18, New Delhi for the quantum of assessment passed u/s 143(3); whereas the assessee has filed his appeal against impugned order dated 10.01.2017, passed by the Ld. CIT (Appeals) 18, New Delhi for the quantum of assessment passed u/s 143(3) for the assessment year 2012-13. We will take up the revenue's appeal for the assessment year 2009-10. The only effective ground raised is that "whether the Ld. CIT (A) is correct in deleting the disallowance of assessee's claim of deduction of Rs. 12,80,92,168/-, u/s 80IC of the Income Tax Act 1961."

2. The facts in brief are that the assessee company engaged in the business of manufacturing food products at its plant at Village Subhkhera, Paonta Sahib, Himachal Pradesh and selling the said food product in US on consignment basis through consignee agent, M/s. Global Reliance Inc. (GRI). The assessee company was also setting up a new plant at Vadnagar in District Mehsana, Gujarat, which was expected to be fully operational by October, 2010. The assessee company was also in process of putting a plant at Rajasthan on NH-8 to process almonds and cereals and health bars.

3. The assessee company has claimed substantial expansion and addition undertaken at the Paonta Sahib unit at Himachal Pradesh which was completed in the year under consideration. Hence, it was claimed that this was initial year and accordingly, deduction of Rs. 12,80,92,168/- was made u/s 80IC on the income earned from this unit. As per the audited balance sheet the assessee has shown

addition on account of plant and machinery of Rs. 12,83,76,000/- during the year; and as on 1.4.2008 the total value of plant and machinery was shown at Rs. 24,77,55,000/-. Thus, it was claimed that addition in plant and machinery during the year was more than 50% of the gross block without depreciation. The capital-work-in-progress as per the audited balance sheet as on 31st March, 2008 was Rs. 22,13,39,000/- and as on 31/3/2009 it was reflected at Rs. 14,27,66,000/-. After claiming deduction u/s 80IC on account of substantial expansion of the unit for Rs. 12,80,92,168/-, the return filed u/s 139(1) was filed at NIL.

4. During the course of the assessment proceedings the AO examined the claim of deduction u/s 80IC and raised several queries to the assessee to substantiate the substantial expansion in terms of section 80IC (8). In response, the assessee filed detailed submissions vide letter dated 29.10.2011 alongwith copies of details of addition in plant and machinery, sales tax registration, excise registration, DIC intimation of increase in fixed assets, etc. However, the AO noted that it is very difficult to make out which plant and machinery was added for substantial expansion. He further required the assessee to furnish bills alongwith other expenses incurred like freight, etc., to ascertain the opening value of plant and machinery for the assessment year under consideration and claim of substantial expansion. From the details furnished, AO noted that addition during the assessment year 2009-10 was only 1,24,14,061/- and the remaining amount of Rs. 11,59,62,670/- pertains to the previous year including assessment year 2006-07. Further amount of Rs. 12,83,76,731/- was taken out from capital-work-in-progress. Again he issued show cause notice, in response the assessee vide letter dated 16.12.2011 claimed that the WDV of the Plant & Machinery as at 1.4.2008 was Rs. 14,78,36,000/-

and not Rs. 24,77,55,000/-. The assessee submitted that the bills amounting to Rs. 1,24,14,061/- pertains to the A.Y. 2008-09 and remaining bills of Rs. 11,59,62,670/- pertain to earlier years. The substantial expansion of the unit was completed during the year under consideration and initial assessment year has been taken from this year in which assessee has completed the substantial expansion.

5. However, Ld. AO rejected the assessee's contention after detailed discussion as appearing at page 7 to 11 of the assessment order. The sums and substances of AO's finding is that:-

- *Firstly*, no detail has been filed by the assessee about the status of its units in Gujarat and Rajasthan and company is maintaining consolidated capital work in progress account without having project wise and item wise;

- *Secondly,* the assessee has failed to produce any evidence that goods manufactured by unit at Himachal Pradesh are classified under eligible items as mentioned in **14 Schedule** of the Income Tax Act;

- *Thirdly* no details have been provided of the date of commencement of original production and whether any deduction u/s 80IC was ever claimed so as to compute 10 assessment years and no date has been provided when substantial expansion was completed so as to compute the initial assessment year. Thereafter various facts were noted by him in the following manner :

  "Assessee fails to justify the reason of purchasing machinery in the year 2005 which it claimed form part of addition of machinery for substantial expansion.

WDV contains reduction on account of depreciation claimed in earlier years. Therefore, the value of Plant & Machinery installed by financial year 2007-08 should be more than the above mentioned value of Rs. 24,77,55,000/-. The assessee has not filed any document to substantiate its claim in support of opening Gross Value of Plant & Machinery though, specifically asked to submit copies of all bills of Plant & machinery and also bills of the other expenses attributable to Plant & machinery appearing in schedule of fixed assets.

Even if, I accept for the sake of argument that there is an addition of at least 50% of Rs. 24,77,55,000/- which comes to Rs. 12,38,77,500/- and the assessee has claimed addition to the Plant & machinery of Rs. 12,83,76,731/-. It is not acceptable since addition in plant and machinery as per detail filed and explained in show cause notice dated 12/12/2011 is only of Rs. 1,24,14,061/- which is far less than required 50% addition over the previous year without depreciation and comes to just 5% only against required 50%.

Assessee justified remaining addition out of capital work in progress but failed to file detail account of capital work in progress of the two other projects undertaken at Gujarat and Rajasthan……."

- *Fourthly,* assessee failed to furnish Form 10CCB which is mandatory and no document has been placed on record in support of such claim which again support that unit is also eligible for central excise exemption;

- *Fifthly,* Tax auditor has certified that company has not claimed any deduction under Chapter VI A;

- *Sixthly,* the certificates filed by DIC envisage only states that unit is eligible for deduction subject to compliance of conditions but no order has been passed certifying that assessee has undertaken substantial expansion and the expansion of capacity as noted by DIC is over the original capacity as on 7.1.2003; and

- *Lastly,* evidence filed in support of substantial expansion of plant and machinery does not satisfy the condition of 50% expansion over the value of plant and machinery without depreciation for which he has given the above. Thus with these reasons he denied the claim of deduction u/s 80IC.

6. Before the Ld. CIT (A), the assessee gave the details and year wise break up of plant and machinery acquired from manufacturing of ready to eat meals of plant and machinery acquired for various products which was furnished before the AO. The same has been summarised at page 3 to 5 of the appellate order. It was submitted that assessee has been acquiring and installing various items of machinery during the said expansion period which were being debited under the head "Capital-Work-in-Progress" as per the following details:-

Financial Year	Mozzarella Cheese	Ready to Eat Meals	Mushroom Cultivation & Canning	Total
2005-06	4,11,74,875	Nil	Nil	4,11,74,875
2006-07	15,19,180	Nil	Nil	15,19,180
2007-08	32,29,168	6,84,67,101	15,72,346	7,32,68,615
2008-09	19,48,518	4,86,899	99,78,644	1,24,14,061
Total	4,78,71,741	6,89,54,000	1,15,50,990	12,83,76,731

7. Assessee also gave point wise details and the breakup of the plant and machinery acquired. Thereafter, assessee after explaining the details of addition to the plant and machinery, submitted that large scale expansion requires long duration of time spanning over a number of years and the said plant and machinery was never put to use for production in any of the earlier preceding years otherwise assessee would have claimed depreciation in the earlier years and would have been examined in the assessments which were completed u/s 143(3), right from the assessment years 2006-07, 2007-08 and 2008-09. Depreciation on the said items of plant and machinery debited under the head capital-work-in-progress was neither claimed by the assessee nor allowed by the AO; therefore, the allegation of the AO that plant and machinery items had actually been used in the earlier years is not correct. Assessee further gave detailed submission to point out that all the requisite conditions for availing deduction u/s 80-IC has been duly complied with which for the sake of ready reference is reproduced as under:-

S.No.	Condition	Compliance
1.	It has begun or begins to manufacture or produce any article or thing. Or It manufactures or produces any article or things and undertakes substantial expansion	The assessee has undertaken substantial expansion during the year since it has increased the investment in plant machinery by Rs. 12,83,76,731/- which is 51.82%. i.e. more than 50% of the book value of plant and machinery of Rs. 24,77,55,000/- as on 01/04/08 as has been explained in detail hereinabove.
2.	Item manufactured or produced should not be an article or thing specified in Thirteenth Schedule	The items manufactured and operations carried out by the assessee are covered under the following broad categories: (i) Processing, Preservation and Packaging of

		Mushrooms, (ii) Food Processing and Packaging (iii) Milk and Milk based products None of the above items or operations is covered under the Thirteenth Schedule (Part-B) as applicable for the State of Himachal Pradesh as can be verified from the copy of the said Schedule enclosed.
3.	Substantial Expansion to be undertaken during the period beginning on 07/01/2003 and ending before 01/04/2012	The substantial expansion was completed during the relevant previous year as explained in detail hereinabove, which falls within the prescribed dates.
4.	The plant and machinery installed for substantial expansion must be new and should not have been used previously.	The purchase bills in respect of each item of plant and machinery covered under the substantial expansion were produced before the AO (photocopies are also furnished in the present appellate proceedings). It must be appreciated that all these items were purchased directly from plant manufacturers hence they were all new.
5.	The unit should be situated in a notified area in the State of Himachal Pradesh	The manufacturing unit of the assessee is situated in Hadbust No. 113 (Khasra No. 194) Village Shubhkhera, Tehsil Paonta Sahibm District Sirmaur, H.P. In this respect copies of the following documents given to the AO are enclosed: (a) Notification No. 1269(E), dated 04/11/2003, (b) Certificate dated 07/12/11 from Member Secretary, Single Window Clearance Agency, Paonta Sahib, Distt.

		Sirmaur, H.P. confirming the address of the manufacturing unit of the assessee, and (c) Certificate dated 03/12/11 from Patwari in this regard
6.	The unit is not formed by splitting up or reconstruction of a business already in existence.	The said requirement arises in the case of a new unit but is not applicable in the case of substantial expansion of an existing unit. But in any case, it is categorically stated that the unit was not formed by splitting up or reconstruction of a business already in existence.
7.	A report of Accountant in support of deduction claimed u/s 80-IC must be filed	CA report dated 22/06/09 on Form No. 10CCB was filed vide letter dated 24/11/11 before the AO during the assessment proceedings. Photocopies of the same are enclosed above.

8. Assessee also filed point wise rebuttal of AO's allegation which has been dealt with Ld. CIT (A) in detail in the impugned order. The objection for admission of additional evidence was also filed to rebut the various allegations of the AO which has been discussed in detail in the impugned order. The said additional evidences were forwarded to the AO on which AOs' remand report was called upon and the same has been incorporated in the appellate order from pages 10 to 13. The AO was also directed to conduct inquiry by the Ld. CIT (A) in terms of directions given vide letter dated 30.6.2014. In response to which AO has filed his report dated 5.11.2014, wherein he has made inquiry from Central Excise Department and also sought for Inspector's report. All these details too are appearing in the impugned order.

9. After considering the entire gamut of material evidences on the remand report of the AO the Ld. CIT (A) has threadbare discussed the issue and allowed the claim of deduction u/s 80IC. The sums and substances of his finding are that:-

- *Firstly,* the amount of Rs. 24.77 crores was the actual cost of plant and machinery which was reflected in 'Schedule V' of the balance sheet as on 31st March, 2008 as per the Companies Act and AO's observation in this regard is factually incorrect. The plant and machinery was included in capital-work-in-progress in the balance sheets from 31st March 2005 onwards, on which no depreciation has been claimed and there is no adverse finding to this effect in the scrutiny assessment passed u/s 143(3) year after year. He has also incorporated the details of capital-work-in- progress as shown in the balance sheet from 31.5.2005 onwards which is as under :-

  Capital Work in Progress
  (Including Capital Advances)

As on 31.03.2005	Rs. 31696 (in '000)
As on 31.03.2006	Rs. 50886 (in '000)
As on 31.03.2007	Rs. 71853 (in '000)
As on 31.03.2008	Rs. 221339 (in '000)
As on 31.03.2009	Rs. 142766 (in '000)

  He also analysed the various details of plants purchased for the period of time which were included in capital-work-in-progress and also discussed the reasons for delaying in the plant and machinery put for use.

- *Secondly,* he also noted that the expenses of plant and machinery has not been denied in the report submitted by the AO and AO's apprehension that assessee was simultaneously establishing plants in Rajasthan and Gujarat has been found to

be factually wrong, because till 31st March, 2008, there is no purchase of any machinery of plants by the assessee in any of the unit. He also analysed the various expenses identified by the inspection team and held that even if there is a little doubt with regard to particular expenses and if it is excluded from the investment in the expenses, then also investments in plant machinery still remains more than 50%, which is substantial.

- *Thirdly,* The Central Excise department has clarified to the AO during the assessment proceedings that unit was registered under Central Excise Range with requisite registration number and also referred to the letters written by the assessee to the Supdt. of Central Excise evidencing the intimation to the concerned authorities about expansion of its plant, running of trial production and the commercial production from the new plant and machinery. He has also duly noted that the trial production in the new line of products which was intimated to the central excise department was w.e.f. 27.9.2008. All these facts have been duly verified by the AO in the remand proceedings. Regarding non-mention of deduction under chapter VI-A in the tax audit report, Ld. CIT(A) observed that tax audit was conducted by a CA on 21.8.2009 and the same CA has signed the Form No. 10CCB dated 22.6.2009. Therefore, assessee should not be made to suffer from inadvertent error on the part of the CA; and
- *Lastly,* he also held that all conditions stipulated for eligibility of deduction u/s 80IC stands fulfilled.

10. Before us, Ld. DR strongly relied upon the order of the AO and submitted that whatever observations which have been made by the Ld. CIT(A) has not been verified by him and has solely relied upon the

assessee's submissions as well as evidences filed. All the allegations made by the AO have not been properly rebutted on certain evidences or inquiry report discussed by AO and CIT (A) should have applied his own mind. He submitted that matter can be restored back to the file to the Ld. CIT (A) so that he can apply his mind and verify the evidences himself.

11. On the other hand, Ld. Counsel for the assessee after explaining the entire facts submitted that all these evidences which were filed before the AO were also filed before the Ld. CIT (A) and not once but twice. He has sought for the remand report and also conducted inquiry through AO based on which detailed report has been filed which has been properly analysed and thereafter threadbare discussed each and every point of AO. Therefore, the relief given by the Ld. CIT (A) is based on cogent reasons after appreciating the entire material on record by him. Thus, he strongly relied upon the order of the Ld. CIT (A) and also made detailed submissions vis a vis various documents and evidences filed before the authorities below.

12. We have heard the rival submissions and perused the relevant finding given in the impugned orders as well as material referred to before us at the time of hearing. The assessee company is engaged in the business of food products at its unit at Village Subhkhera, Paonta Sahib, Himachal Pradesh. Earlier the assessee was in business of Mushroom cultivation and canning of Mushrooms and fruits and vegetables. In the year 2005, the company decided to expand into manufacturing of mozzarella cheese and ready to eat meals and also decided to expand its existing capacity of mushroom cultivation and canning. Such an expansion has been stated to be completed over the span of four year which commenced from the financial year, 2005-06 and the plant and machinery for such an expansion was purchased

over a period of four years and such expansion was completed during the year under consideration. Details of year wise break up of plant and machinery acquired for all the three manufacturing lines has been stated to be as under:-

S.No.	Machine Heads	Cost (Rs.)
1.	**FY 2005-06** Cheese Vat, HTST Pasteurizer, Cold Milk Standardizing, Clarifier, Whey Pot, Cheese cutting knives, Curd Chip Mill, etc. (Custom cleared in Sep., 2005 Importetd from First Family Holding Inc. USA)	4,11,74,875
2.	**FY 2006-07** Cheese Stretching Machine with Accessories (Custom cleared in Mar., 2007 imported from Almac SRL, Modena, Italy)	15,19,180
3.	**FY 2007-08** Homogenizer (Custom cleared in July, 2007 Imported from HPM SRL, Italy) Packaging Machines (Custom cleared in Nov. 2007 Imported from LavorozioneAcctaidInox, Italy)	32,29,168
5.	**F.Y. 2008-09** Steam Generating Boiler, Tanks, etc. (Indian machinery installed in parts up to July,	19,48,518

	2008)	
	Total :	4,78,71,741

S. No.	Machine Heads	Cost (Rs.)
1.	**FY 2007-08** FrigoscandiaGyrostackSpiral Freezer, Multivac tray packing machine, Custom made incline conveyor belt, Custom made 89 long portable stainless steel incline conveyor, Foot conveyor, Stem patty enroder/coater, Stein L.S. 34 breading machine, Stein fryer and boiler, Bridge patty former, Hobart stainless steel double door freezer, Shelf stainless steel table with attafchments, Thermoking MDW 30 reefer unit, SS Washer SS incline Transfer conveyor, etc. (Custom cleared up to February, 2008 Imported from Rain Dance America, USA)	6,84,67,101
2.	**FY 2008-09** Electrical Motors and Installation of above machines	4,86,899
	Total	**6,89,54,000**

S. No.	Machine Heads	Cost (Rs.)
FY 2007-08		
1.	Air Handling Unit, Air Cooling Plant, Kirloskar Pump, etc. (From India)	15,72,346

FY 2008-09		
2.	Mixing Machinery Blowers, Air Handling Units, Plate Heating Exchangers, Compressors, etc. (From India)	99,78,644
	Total :	1,15,50,990

13. The purchase details of plant and machinery was filed before the authorities below and has also been placed before us in paper book from pages 2 to 21. It is not in dispute that acquisition of plant and machinery right from the financial year 2005-06 to 2008-09 were debited under the head "Capital-Work-in-Progress" and were neither put to use for production in any of the earlier preceding years nor any depreciation was claimed by the assessee on the said plant and machinery and neither it has been allowed by the AO while making the assessments u/s 143(3) right from the assessment years 2006-07, 2007-08 and 2008-09. It always shown as the CWIP which represented investment made only for Himachal Pradesh Unit and no investment was made in Gujarat and Rajasthan till 31st March, 2008. Therefore, the AO's allegation that there is consolidated capital-work-in-progress in all the three units is not tenable. It has also been brought on record as discussed by the Ld. CIT (A) that the commercial production commenced from 27.9.2008 i.e.,. in the year under consideration and the committed figure of plant and machinery was Rs. 12.83 crores which was transferred from CWIP to gross block of assets under the head plant and machinery. The figure of Rs. 24,77,55,000/- was the opening balance of gross block of assets and not as WDV, because no depreciation was claimed in the earlier years and the WDV of other plant and machinery was separately shown at Rs. 14,78,36,000/-. The gross block of plant and machinery as on

12.4.2008 was Rs. 24,77,55,000/- and the investments made in new plant and machinery on account of substantial expansion during the year has been shown at Rs. 12,83,76,731/- which comes to approx. 52% of the gross block of asset of the earlier plant and machinery. Further, from the inquiry made from the AO from DIC it has come on record that the proposal for expansion was approved by the DIC Committee on 9.1.2008 and commercial production had commenced on 27.9.2008; and therefore, the claim of deduction was made on 2009-10. The assessee had also intimated to the Excise Department about the completion of the substantial expansion and running of trial production vide letter dated 23.6.2008, copy of which has been placed at page 223 of the paper book to show that trial production had commenced w.e.f. 14.6.2008 and commercial production started from 29.9.2008. The copy of intimation has been placed on page 224 of the paper book.

14. Further, the assessee has made a claim for deduction u/s 80-IC (2)(a) which does not have any condition that the product must be specified in the **Fourteenth** S**chedule**, because this condition is applicable only when the deduction is claimed u/s 80IC(2)(b). The condition applicable for claiming deduction u/s 80IC (2)(a) is that the article should not fall in the thirteenth schedule. In so far as condition of filing of audit report is concerned, whether same stood complied with or not, is not in dispute, because, admittedly it was before the AO during the course of the assessment proceedings and if such an audit report was available with the Assessing Officer, then the condition stands fulfilled and this proposition stands covered by the decision of **Commissioner of Income-Tax v. Contimeters Electricals P. Ltd. 317 ITR 249.** Apart from that, we find that Ld. CIT (A) has carried out inquiry through AO and sought for various remand reports for coming

to his conclusion of allowing the deduction u/s 80IC after threadbare analyzing each and every piece of evidence which has been dealt in detail in the impugned order.

15. One very important fact which is culled out from the record is that, nowhere there is any allegation by the Assessing Officer or the department or has any material has been brought on record that, assessee has been claiming deduction u/s 80 IC in respect of the Himanchal Pradesh Unit in the earlier years and suddenly by making substantial expansion, assessee has sought to extend the claim or has tried to alter or change the 'initial assessment year' to make fresh claim of 100% from this year. All the assessments have been completed under scrutiny proceedings u/s 143(3) and no-where it has come on record that assessee had made a claim u/s 80IC which has been allowed in the earlier years. Though assessee had tried to make a claim for the first time in the A.Y. 2008-09, but same could not be claimed in absence of audit report in Form 10CCB and it was never allowed also to the assessee. Thus, it was for the first time that claim has been made in the A.Y. 2009-10 which has been examined. It is also not the case of the Revenue that assessee has been claiming deduction u/s 80 IC in the earlier years and before the sunset clause period assessee has tried to make fresh claim by making substantial expansion and changing the 'initial assessment year'. Under these facts and circumstances, we do not find any infirmity in the order of the Ld. CIT(A) in allowing the deduction u/s 80IC (8)and therefore same is affirmed and the grounds raised by the revenue is dismissed.

16. In the assessment year 2010-11, AO has disallowed the claim of deduction of Rs. 1,81,27,539/- u/s 80IC based on his finding given in the assessment order for A.Y. 2009-10. Since, Ld. CIT(A) has referred to its decision for the assessment year 2009-10 which has been

discussed in detail by us in the foregoing paragraphs, therefore, our finding given above will apply *mutatis mutandis* for this year also and therefore, we affirm the order of the Ld. CTI(A) in allowing the claim of deduction. Accordingly, the revenue's appeal for the A.Y. 2010-11 is also dismissed.

17. Coming to the assessee's appeal for the asstt. Year 2012-13, the assessee has raised following grounds:

> *1. The Ld. CIT(Appeals) erred in law and on facts in confirming the disallowance of Rs. 17,17,610/- claimed u/s 80IC –*
> *a. By misinterpreting the provisions of section 80AC on legal issue as well as on facts; and*
> *b. By incorrectly applying the stipulation contained u/s 80A(5) on deduction claimed u/s 80IC.*

18. Here in this year, the AO has denied the claim of deduction u/s 80IC amounting to Rs. 17,17,610/- following the earlier year of Asstt. Year 2009-10. However, one additional fact noted by the AO is that assessee has not claimed deduction u/s 80IC in the original return of income filed on 29.7.2012, but has been claimed in the revised return filed on 23.3.2013 which is not in accordance with section 80AC. Thus, on this count he disallowed the claim of deduction u/s 80IC amounting to Rs.17,17,610/-.

19. Ld. CIT (A) though held that in the earlier years deductions u/s 80IC has been allowed and therefore, same has to be allowed in this year also because the issue of substantial expansion has been duly discussed and allowed in the earlier years. However, with regard to denial of deduction on the ground that it was not claimed in the original return but in the revised return which is in violation of section 80A(5), he has upheld the denial of the deduction made by the AO. While coming to the conclusion he has discussed various judgments

in the impugned order especially the judgment of Special Bench in the case of **Saffire Garments 140 ITD 6**; and Calcutta High Court decision in the case of **Shelcon Properties (P.) Ltd. (2014) 44 taxmann.com 170.** But after referring to these judgments, he noted that these judgments may not apply completely, because here in this case assessee has filed its return of income u/s 139(1), but in that return he has not made any claim for deduction u/s 80IC which has been shown only by way of revised return u/s 139 (5). In such a case also, he submitted that deduction cannot be allowed in view of the clear provision of section 80A (5) which envisages that claim has to be made in the return of income filed u/s 139(1). While coming to this conclusion he strongly relied upon following judgments:-

(i) Lakshmi Energy & Foods Ltd. (2014) 44 taxmann.com 248 (Chandigarh –Trib.)

(ii) Kadachira Services Co-op. Bank Ltd. (2013) 30 taxmann.com 32 (Cochin-Trib.)

Ld. CIT(A) has also distinguished the judgment relied upon by the assessee and finally, held that restriction put in section 80IC is that return has to be filed in time and the claim has to be made in return filed u/s 139(1) only and any default would lead to his disentitlement of the deduction claimed.

20. Before us Ld. Counsel had strongly relied upon the following judgments of the Tribunal:-

i) ACIT vs. Precot Meridian Ltd. ITA No. 1214/Mds/2012 order dated 29th April, 2013;

ii) M/s. Symbiosis Pharmaceuticals vs. DCIT ITA No. 501/Chd/2017 order dated 4.10.2017;

iii) ACIT vs. M/s. Monarch Innovative Technologies Pvt. Ltd. ITA No. 4815/Mum/2016 order dated 12.2.2018.

In all these judgments the Tribunal has considered the similar claim of 80IC, wherein the claim has been made by way of revised return u/s 139(5) after interpreting the provision of section 80A(5).

21. On the other hand, Ld. DR submitted that it is mandatory that claim for deduction has to be made in the return of income filed u/s 139(1) in terms of section 80 AC, otherwise the assessee will not be eligible for deduction nu/s 80IC. He thus strongly relied upon the order of the Ld. CIT (A).

22. We have heard the rival submissions and also perused the relevant finding given in the impugned order. It is undisputed fact that the assessee is otherwise eligible for claim of deduction u/s 80IC in respect of his Himachal Pradesh Unit which is being consistently allowed to the assessee for the assessment year 2009-10 as held by us in the aforesaid appeals. The assessee has filed its return of income u/s 139(1) on 27.9.2012 showing an income of Rs. 17,17,610/-. Later on assessee filed revised return u/s 139(5) on 23.3.2013, declaring income at 'nil' and had stated that the claim of deduction u/80IC was by mistake omitted to be claimed in the original return of income. Therefore, such a claim is now being made in the revised return. Thereafter a notice u/s 143(2) was issued on 6.8.2013 to scrutinise the revised return of income. Even the AO has taken due cognizance of such revised return. The claim of section 80IC has been denied by the department on the ground that such a claim has not been made in the return filed u/s 139(1) *albeit* in the revised return u/s 139(5). The said claim has been denied on interpretation of section 80AC read with section 80A (5). Section 80A(5) provides that, if the assessee fails to

make a claim in his return of income for any deduction u/s 10A or section 10AA , 10B or 10BA or under any provision of chapter VIA if assessee fails to make a claim in his return of income. Here in this case, the assessee has made a claim in the return of income by way of revised return; therefore this provision will not disentitle the assessee for claiming u/s 80IC. However, section 80AC provides that deduction shall not be allowed unless return has been furnished u/s 139(1). The said provision reads as under:-

> ***[Deduction not to be allowed unless return furnished.***
>
> ***80AC.*** *Where in computing the total income of an assessee of the previous year relevant to the assessment year commencing on the 1st day of April, 2006 or any subsequent assessment year, any deduction is admissible under section 80-IA or section 80-IAB or section 80-IB or section 80-IC [12][or section 80-ID or section 80-IE], no such deduction shall be allowed to him unless he furnishes a return of his income for such assessment year on or before the due date specified under sub-section (1) of section 139.]"*

23. The aforesaid section puts an embargo for allowing the deduction u/s 80IC, unless assessee furnishes a return of income on or before the due date specified under sub section (1) or section 139. CBDT Circular No. 14/2006 dated 28.12.2006 which provides explanatory notes on the said provision has expressed the intention of the said provision in the following manner:-

> *"Circular No. 14/2006, Dated 28-12-2006*
>
> *10. Benefits of certain deductions not to be allowed in cases where return is not filed within the specified time limit.*

10.1 Section 139(1) casts an obligation on every assessee to furnish the return of income by the due date. With a view to enforce the compliance in this regard by the assessees who are entitled for deduction under section 10B from their income, a proviso (fourth proviso) to sub-section (1) of section 10B has been inserted so as to provide that no deduction under section 10B shall be allowed to an assessee who does not furnish a return of his income on or before the due date specifled in sub-section (1) of section 139. Similarly, with a view to enforce the compliance for furnishing the return of income by the due date by the assessees who are entitled for deductions under section 80-IA or section 80 IAB or section 80-IB or section 80-IC from their income, a new section 80AC has been inserted so as to provide that no deduction under section 80-IA or section 80-IAB or section 80-IB or section 80-IC shall be allowed to an assessee who does not furnish a return of his income on or before the due date specified in sub-section (1) of section 139.

10.2 This amendment takes effect retrospectively from 1-4-2006 and applies in relation to the assessment year 2006-07 and subsequent years. ”

Ergo, the intention of the legislature is that the assessee should furnish a return of his income on or before due date specified u/s 139 (1). Nowhere it has been clarified or stated that if assessee has fails to claim the deduction in return u/s 13(1) and later on makes a claim in the revised return u/s 139(5), then also it has to be denied. The said provision in our opinion will apply where the assessee does not file any return of income under sub section (1) of section 139, but does not envisages that such a claim has to be made only in the return filed

u/s 139(1) and not u/s 139(5). Language in the section is absolutely clear that no deduction shall be allowed to him unless he furnishes his return of income u/s 139 (1). A revised return u/s 139(5) is filed where the assessee voluntarily and suo moto correct any omission or any wrong statement in the original return filed u/s 139(1). A revised return u/s 139(5) supersedes the return u/s 139(1), if is filed within the time. If revised return has been accepted by the AO and has not been held to be invalid then original return of income filed u/s 139(1) gets effaced and same is replaced by return filed u/s 139(5). The purpose of revised return u/s 139(5) is to ensure that any admission of omission or any wrong statement has to be voluntarily within the specified time limit. Further it is not a case of the AO that the requisite condition of filing of audit report in form 10CCB has not been filed during the course of the assessment proceedings. Whence, in the initial assessment years, i.e., A.Y.s 2009-10, 2010-11 and 2011-12 the claim of deduction u/s 80IC has been found to be otherwise allowable to the assessee and this being the 4th year of the claim based on same set of facts, then it cannot be held that the claim made by the revised return is not voluntarily and omission to make such claim in the original return of income was not bonafide. Even otherwise also, if one goes by the principle laid down by the Hon'ble Supreme Court in the case of **Goetz India Ltd. (2006) reported in 284 ITR 323,** if the claim has not been made before the AO by way of revised return then same can be made before the appellate authorities. This principle has been reiterated and explained by various judgments like in the case of **CIT vs. Ramco International (2011) 332 ITR 306 (P&H).** Accordingly, we hold that the claim of deduction u/s 80IC to the assessee cannot be denied simply because such a claim was not made in the return field u/s 139 (1) *albeit* was made in the revised return u/s 139(5) filed within the stipulated time provided in the said section;

and further such a claim can always been entertained at the appellate stage if all the conditions laid down for such a claim is whether on the facts and material on record. Thus, the grounds raised by the assessee are allowed.

24. In the result appeal of the assessee is allowed.

Order pronounced in the Open Court on 6th August, 2018.

sd/-	**sd/-**
(PRASHANT MAHARISHI)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 06/08/2018

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi