<u>आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई में।</u>

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM

आयकर अपील सं./ ITA No. 1757/Mum/2015

(निर्धारण वर्ष / Assessment Years 2010-11)

The Dy. Commissioner of Income Tax, Central Circle-6(1) (Earlier CC-34) R.No. 104, First Floor, Aayakar Bhavan, M.K. road, Mumbai-400 020	Vs.	M/s Prism Cement Ltd. Rahejas Main Avenue, V.P Road Santacruz (West), Mumbai-400 054
(अपीलार्थी / Appellant)	..	**(प्रत्यर्थी / Respondent)**
स्थायी लेखा सं./**PAN No. AAACP6224A**		

आयकर अपील सं./ ITA No. 2545/Mum/2015

(निर्धारण वर्ष / Assessment Years 2010-11)

M/s Prism Cement Ltd. Rahejas Main Avenue, V.P Road Santacruz (West), Mumbai-400 054	Vs.	The Dy. Commissioner of Income Tax, Central Circle-6(1) (Earlier CC-34) R.No. 104, First Floor, Aayakar Bhavan, M.K. road, Mumbai-400 020
(अपीलार्थी / Appellant)	..	**(प्रत्यर्थी / Respondent)**

अपीलार्थी की ओर से / **Appellant by**	:	Shri NS Jangpangi Ms Ksum Bansal, DR
प्रत्यर्थी की ओर से **/ Respondent by**	:	Shri S.E.Dastur, AR

सुनवाई की तारीख **/ Date of hearing:**	24.06.2019
घोषणा की तारीख **/ Date of pronouncement :**	20.09.2019

आदेश / O R D E R

महावीर सिंह, न्यायिक सदस्य/
PER MAHAVIR SINGH, JM:

These cross appeals are arising out of the order of the Commissioner of Income Tax (Appeals)]-4, in short CIT(A), in appeal No. CIT(A)-41/ACCC-34/IT-181/2013-14 vide order dated 27.01.2015. The Assessment was framed by the Asst. Commissioner of Income Tax, Circle-34, Mumbai (in short ACIT/ITO/ AO) for the A.Y. 2010-11 vide order dated 28.03.2013, under section 143(3) of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The first issue in this appeal of Revenue is against the order of CIT(A) in holding that the reimbursement of expenses by the assessee to an institute running a school is not hit by the provisions of section 40A(9) of the Act. For this Revenue has raised the following ground No.1: -

> *"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in holding that the reimbursement of expenses made by the assessee to an institute for running of a school at Mankahari, Satna was not hit by the provision of section 401A(9) of the Act."*

3. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted that the CIT(A) has deleted the addition following Tribunal's order in assessee's own case for AY 2000-01 in ITA No. 889/Mum/2005 order dated 27.02.2008 by observing in Para 6.3 as under: -

> *"6.3 I have considered the submissions of the appellant and perused the materials available on record including copies of the judicial decisions relied upon by the appellant. A perusal of the record shows that this is a recurring issue. So for the issue was covered against the appellant by order of Hon'ble Mumbai ITAT dated 27.2.2018 in its own case in ITA No 889/Mum/2004 for AY 2000-01. Following the said decision, the disallowance made by the AO in AYs 2008-09 and 2009-10 was upheld in first appeal. However, as stated above, pursuant to the filing of a Miscellaneous Application by the appellant, the Hon'ble ITAT vide its order dated 22.04.2010 passed in MA No 815/Mum/2008 had recalled the aforesaid order dated 27.02.2008 for deciding the matter afresh. It is observed from the record that while disposing of the said*

recalled matter (ITA No 889/Mum/2005 for AY 2000-01) Vide its order dated 09.05.2014, the Hon'ble ITAT has allowed the claim of the appellant for deduction of expenditure reimbursed by it to an institution established for running a school at Mankahari, Satna by following the decision of the Hon'ble Bombay High Court in the case of CIT vs. Bharat Petroleum corporation Ltd. 252 ITR 43 (Bom.) and that of the Hon'ble Supreme Court in the case of Larsen & Turbo Institute of Technology v. All India Counsel for Technical education (1995) 3 SCC 203. It has now been held that such reimbursement of expenditure by the appellant to an institution established for running a school at mankahari, Satna is not hit by the provisions of section 40A(9) of the Act. Respectfully following the aforesaid order of Hon'ble Tribunal, the disallowance of ₹40,58,414/- made by the AO on this account is deleted. Ground No. 4 of the present appeal is accordingly allowed.

4. We noted from the above that this issue is squarely

covered by Tribunals order in assessee's own case for AY 2000-01. Since, there is no change in facts and expenses are identical, respectfully following the Tribunals decision, we confirm the order of CIT(A) deleting the addition. This issue of Revenue's appeal is dismissed.

5. The second issue in this appeal of Revenue is against the order of CIT(A) allowing the claim of depreciation by ignoring the provisions of section 32(1) read with explanation 5 of the Act. For this Revenue has raised the following ground No. 2 -

> *"2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was right in holding that the assessee was entitled to claim depreciation of Rs. 66,36,89,891/-, ignoring the fact that as per the provisions of section 321 read with explanation 5, the assessee was eligible to claim only a sum of Rs. 622,83,13,914/-."*

6. We have heard the rival contentions and gone through the facts and circumstances of the case. We noted that the CIT(A) has deleted the addition following his predecessors order for earlier years in present case by observing as under: -

> *"7.3 I have considered the submissions of the appellant and perused the materials*

available on record including copies of the judicial decisions relied upon by the appellant. It is observed form the record that the issue under appeal is also a recurring issue covered in favour of the appellant by order of my predecessor in AY 2006-07 which has been followed while deciding the first appeals filed by the appellant for AY 2008-09 and 2009-10. The facts and submissions made by the appellant are substantially similar to those in AY 2008-09. There being no change in the facts as well as the legal position on this issue. I have no reason to differ from the decision taken by my predecessors in AYs. 2008-09 and 2009-10. In view of the above position, the disallowance of depreciation of ₹3,53,75,977/- made by the AO cannot be sustained and the same is deleted. Grounds bearing Nos. 5(a) to 5(d) raised by the appellant are accordingly allowed."

7. Even we noted that the Tribunal in AYs 2008-09 and 2009-10 in ITA No. 8048/Mum/2011 and 1776/Mum/2013 has dismissed the Revenue's appeal by observing in Para 12 as under: -

"12. The last Ground in the appeal of the Revenue is with regard to assessee's claim of depreciation which was restricted by the Assessing Officer to Rs.13,71,85,165/- from Rs.18,61,04,063/- claimed by the assessee. In this context, the relevant facts are that the Assessing Officer noted from the record that for assessment years 2000-01 and 2001-02, assessee had neither claimed and nor allowed depreciation, as a consequence of which, the written down value of the assets at the beginning of the previous year for the instant assessment year was higher. In this background, the Assessing Officer invoked Explanation -5 to section 32(1) of the Act and held that the same was clarificatory in nature and, therefore, would apply retrospectively. As a consequence, the Assessing Officer reworked the written down value of the assets assuming that the depreciation for assessment years 2000-01 and 2001-02 stood allowed, though in actuality such a claim was neither made and nor allowed by the Assessing Officer in those years. As

a result, the depreciation claimed by the assessee stood reduced. The CIT(A) has since negated the action of the Assessing Officer and restored the claim of the assessee for depreciation. The decision of the CIT(A) is based on the decision of his predecessor CIT(A) in the case of the assessee for 2006-07. The decision of the CIT(A) for assessment year 2006-07 has since been affirmed by the Tribunal vide its order dated 16/05/2016(supra), wherein the decision for assessment year 2005-06 has been followed. The precedents so noted continue to hold the field and, therefore, we find no reason to interfere with the decision of the CIT(A) on this aspect. Thus, on this aspect also Revenue fails."

8. We noted that the issue is covered in favour of assessee by Tribunals decision in assessee's own case for AYs 2008-09 and 2009-10 and hence respectfully following the same, we direct the AO accordingly. This issue of Revenue's appeal is dismissed.

9. The first issue in this appeal of assessee is as regards to the order of CIT(A) confirming the action of the AO in disallowing expenses relatable to exempt income under section

14A of the Act read with rule 8D(2)(ii) of the rules and also disallowance of the expenses while computing book profit under section 115JB of the Act. For this, assessee has raised the following ground 1(a) & (b): -

> *"1. (a) The learned Commissioner of Income Tax (Appeals) erred in upholding the action of the learned Assistant Commissioner of income tax, Central Circle-34, (hereinafter referred to as the Assessing Officer) in disallowing a sum of ₹1,83,50,404/- under section 14A while computing the total income of the appellant under normal provisions as well as book profit under section 115JB.*
>
> *(b) Without prejudice to what is stated above, the appellant submits that Commissioner of Income tax (Appeals) erred in upholding the action of Assessing Officer in considering interest expenses for the purpose of calculation under Rule 8D(ii) as the entire interest paid was for the purpose of its business and for working capital requirements of the appellant and no borrowed funds were utilized for the purpose of investments."*

10. The first issue is regarding the order of CIT(A) confirming the disallowance of expenses relatable to exempt income by invoking the provisions of section 14A of the Act read with Rule 8D2 of the Rules while computing book profit under section 115JB of the Act. The CIT(A) noted that the AO has rightly disallowed expenses relatable to exempt income amounting to ₹2,03,95,311/- by invoking the provisions of section 14A of the Act read with Rule 8D of the Rules, while computing book profit under section 115JB of the Act in view of provision of clause (f) of explanation (1) to section 115JB of the Act. We noted that this issue is squarely covered by the decision of special bench of this tribunal in the case of ACIT vs. Vireet Investments (P.) Ltd. [2017] 58 ITR(T) 313 (Delhi - Trib.) (SB) wherein, it is held that the provisions of section 14A read with Rule 8D of the Rules does not apply while computing book profit under section 115JB of the Act. Hence, respectfully following Special Bench decision in the case of Vireet investment (supra), we delete the disallowance and allow this issue of assessee's appeal.

11. The next issue in this appeal of assessee is against the order of CIT(A) confirming the disallowance of expense relatable to exempt income by invoking the provisions of section 14A of the Act read with Rule 8D (2)(ii) and (iii) of the Rules. The AO noted that the assessee has received dividend of ₹13,29,95,026/- and claim the same as exempt under section 10(38) of the Act. The assessee while computing the total income has disallowed the expenses relatable to exempt income

in view of the provisions of section 14A read with Rule 8D(2) of the Rules at ₹20,44,907/-. The AO invoked the provisions of section 14A of the Act read with Rule 8D(2)(ii) of the Rules and made proportionate interest disallowance of ₹71,33,684/- and under Rule 8D(2)(iii) being administrative expense i.e. ½ % of the average value of investments at ₹1,32,61,627/-. The AO computed the total disallowance of expenses relatable to exempt income at ₹2,03,95,311/- as against the suo moto already disallowed by the assessee at ₹20,44,907/-. The AO made the balance disallowance of ₹1,83,50,404/-. Aggrieved, assessee preferred the appeal before CIT(A). Before CIT(A), the assessee contended that there is no satisfaction recorded by the AO and he referred to the assessment order for this. The learned Counsel for the assessee, before CIT(A), contended that the AO simply applied formula and no satisfaction was recorded. The CIT(A) considered this aspect and stated that this is only a procedural and hence, he rejected the claim of the assessee as regards to recording of satisfaction. For this CIT(A), in Para 5.3.1 and 2 has considered this aspect and noted as under: -

> *"5.3.1……Thus, all the essential elements for invoking the provisions of Section 14A are present in this case. It is observed that the appellant had suo moto disallowed Rs.20,44,907/- u/s.14A as per the tax audit report u/s.44AB. In this connection, I find merit in the plea of the*

appellant that the A.O. has not given any cogent reasons for rejecting the working of disallowance u/s.14A amounting to Rs.20,44,907/- made by the appellant and resorting to the provisions of Section 14A(2) r.w.Rule 8D.

5.3.2 A perusal of the impugned order reveals that the A.O. has not properly examined the working of disallowance of Rs.20,44,907/- u/s.14A suo moto made by the appellant. Nor has the A.O. expressed any opinion on the correctness or otherwise of the appellant's claim in respect of aforesaid expenditure, having regard to the accounts of the appellant. However, such lapse or omission on part of the A.O. is at best a procedural lapse and it cannot be said to be fatal. It is not a defect affecting the fundamental jurisdiction of the A.O. to make the assessment but one which can be cured at the stage of first appeal. It is also well-established that the powers of CIT(A) are co-terminus with those of the Assessing Officer and that the former can do what the latter can do [CIT v. Kanpur Coal

Syndicate 53 ITR 225 (SC)]. There is no conflict between the powers of the Assessing Officer and those of the CIT(A) and the latter can always correct the error committed by the former 133 ITR 182 (SC) and 159 ITR 801 (Cal). In light of this background, it is now proposed to examine the working of disallowance of Rs.20,44,907/- made by the appellant. In the first place, no working of the aforesaid amount of disallowance has been furnished either in the tax audit report u/s.44AB or as part of the return of income filed by the appellant. No such working has been submitted either before the A.O. or even at the appellate stage. The appellant has till date not provided the basis and calculation for arriving at the said amount of disallowance of Rs.20,44,907/-."

Aggrieved assessee is in appeal before Tribunal.

12. We have heard rival contentions and gone through the facts and circumstances of the case. We noted that the CIT(A) has categorically admitted that here is no satisfaction recorded in the assessment order while referring to the provisions of section 14A of the Act read with Rule 8D(2) of the Rules. We

noted that this issue is squarely covered in favour of assessee and against Revenue by the decision of Supreme Court in the case of Maxopp Investment Ltd. vs. CIT [2018] 402 ITR 640 (SC). However, this issue also covered by the decision of Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing Company Ltd vs. DCIT [2017] 394 ITR 449 (SC). As this issue is squarely covered in favour of assessee and against the Revenue, hence, we delete the disallowance only on the issue of non-recording of satisfaction for invoking the provisions of section 14A of the Act read with Rule 8D of the Rules. Hence, this issue of assessee's appeal is allowed.

13. The next issue in this appeal of assessee is against the order of CIT(A) upholding the action of the AO in allowing depreciation of UPS @ 15% treating the same as part of plant and machinery, as against the claim of depreciation of the assessee @ 60% as part of the computer. For this assessee has raised the following ground No.2 (a) & (b): -

> *"2(a) The learned Commissioner of Income-tax (appeals) erred in upholding the action of the Assessing Officer in allowing depreciation on UPS @ 15% by treating the same as plant & machinery as against depreciation claimed by the appellant @ 60% as part of computer.*

(b) Without prejudice to what is stated above, the appellant submits that UPS are in the nature of energy saving device and as such entitled to depreciation @ 80%."

14. We have heard rival contentions and gone through the facts and circumstances of the case. We noted that this issue was identical in earlier year i.e. AYs 2008-09 & 2009-10, in ITA No.8048/Mum/2011 & 1776/Mum/2013, wherein this issue has been dealt with vide Para 8 and 8.1: -

"8. In the fourth Ground, the grievance of the assessee is against the action of the income tax authorities in allowing depreciation on UPS @15% treating it as a part of Plant & Machinery, as against assessee's claim for allowance of depreciation @60% as part of computer.

8.1 On this aspect, it was submitted before us that in assessment year 2005-06, the Tribunal vide its order dated 16/05/2016 (supra) has upheld the claim of the assessee for depreciation @60%. Following such precedent, which continues to hold the field, we uphold the claim of the assessee for depreciation on UPS @

60%. Thus, assessee succeeds on this aspect."

15. As the Tribunal relied on the assessment year 2005-06 dated 16.05.2016 in assessee's own case, as consistently, this issue has been dealt with and depreciation was allowed at the rate of 60% on UPS, we also consistently following the same allow the claim of the assessee. This issue of assessee's appeal is allowed.

16. The assessee has also raised additional grounds in the assessee's appeal against the order of CIT(A) confirming the order of AO under section 143(3) of the Act. The First ground raised by assessee are on the following issues.

"(i) The claim of sale tax exemption availed during the year under consideration is to be treated as capital receipt not taxable.

(ii) The second issue raised is that the receipt from sale of carbon credit earned during the year under consideration is to be treated as capital receipt not taxable."

For this assessee has raised the following additional ground No. 1 and 2: -

"1. That on the facts and in circumstances of the case, sales tax

exemption of ₹15,02,80,412/- availed during the year under consideration be treated as a capital receipt and hence not taxable in computing total income under the normal provisions of the Income Tax Act, 1961 ('the Act').

2. That on the facts and in circumstances of the case, income from sale of carbon credit of ₹ 1,14,34,760/- earned during the year under consideration be treated as a capital receipt and hence not taxable in computing of total income under the normal provisions of the Act."

17. Similarly, in consequence to the above two grounds the assessee also claimed that the sale tax exemption and receipt on account of sale of carbon credit cannot be treated as income while computing book profit under section 115JB of the Act. For this assessee has raised the following grounds No. 4 & 5: -

"4. That on the facts and in circumstances of the case, sales tax exemption of ₹ 15,02,80,412/- availed during the year under consideration be treated as a capital receipt and hence be

excluded in computing book profit under section 115JB of the Act.

5. That on the facts and in circumstances of the case, income from sale of carbon credit of ₹ 1,14,34,760/- earned during the year under consideration be treated as a capital receipt and hence be excluded in computing book profit under section 115JB of the Act."

18. Another issue raised by way of additional ground is as regards to the claim of deduction under section 80IA of the Act as certified in form No. 10 CCB in respect of infrastructure facility in the nature of Rail System developed, operated and maintained by assessee. For this assessee has raised following ground No. 3: -

"3. That on the facts and in circumstances of the case, deduction under section 80IA of the Act certified in Form 10CCB be allowed to the appellant in respect of the infrastructure facility in the nature of Rail System developed, operated and maintained by it."

19. Before us, the learned Counsel for the assessee argued issue wise on the above additional grounds and narrated the

facts. The learned Counsel for the assessee stated the first issue of sale tax exemption under package scheme of incentives, 1993 is capital receipt. He stated the facts that the assessee is an integrated building materials company having following three divisions:

a) Prism Cement - engaged in manufacturing of cement.

b) RMC Ready mix - engaged in manufacturing of ready mix concrete

C) H & R Johnson ('HRJ) - engaged in manufacturing of ceramic tiles, sanitary-ware, bath fittings, kitchens and engineered marble.

20. HRJ division has manufacturing units at various Locations. One of the said manufacturing units of HRJ division at Pen, Dist. Raigad, Maharashtra, due to its Location, has enjoyed Sale Tax incentive from the State Government of Maharashtra in the form of Sales Tax exemption under the Package Scheme of Incentives, 1993. The said incentive is declared with an objective of dispersal of industry outside Mumbai, Thane and Pune belt and attracts them to underdeveloped E developing areas of Maharashtra. The said incentive is available to new units as well as units undertaking expansion. During the previous year relevant to the AY 2010-11, the assessee had availed sales tax exemption amounting to Rs. 15,02,80,412/- under the above scheme. Since the aforesaid incentive has been granted for setting up of new units and expansion of existing

units in the backward areas, the same is capital in nature and hence liable to be excluded in the computing total income both under the normal provisions of the Act and in computing book profit under section 115JB of the Act. It is submitted that while filing income tax return for the AY 2010-11, the aforesaid sales tax exemption was not considered as a capital receipt in the computing total income both under the normal provisions of the Act and in computing book profit under section 115JB of the Act. Accordingly, the assessment was completed taxing the said amount of sales tax exemption. The assessee has now been advised that as per the various judicial pronouncements on the issue, such sales tax exemption being a capital receipt is not subject to tax. As advised, the assessee intends to take up additional grounds of appeal seeking to exclude the said sates tax exemption in computing total income both under the normal provisions of the Act and in computing book profit under section 115JB of the Act. For AYs 2005-06 to 2009-10, the assessee had filed similar additional ground of appeal before the Hon'ble ITAT in respect of treatment of sales tax subsidy as capital in nature. The Hon'ble ITAT was pleased to admit the said additional ground of appeal and sent the issue to file of the Assessing Officer to examine the claim of the assessee and decide in accordance with law. The copies of the orders of the Hon'ble ITAT for AY 2005-06 to AY 2007-08 ITA No.5957/Mum/2009, 3275/Mum/2010, 8049/Mum/2010, order dt. 1605-2016] and AY 2008-09 to AY 2009-10 [ITA No. 8554/Mum/2011 965/Mum/2013, Order dt. 16-06-2017 are

enclosed herewith as Annexure-A and Annexure-B respectively.

21. The next issue is sale of carbon credit earned during the year under consideration is to be treated as capital receipt. He stated the facts that the assessee has undertaken a Clean Development Mechanism ('COM') project by utilization of waste gases emitted from gas based power generating system for spray drying and vertical drying application at HRJ unit in Dewas, Madhya Pradesh. The project for utilization of waste gases generated has been registered under IJNFCCC as CDM Project. The assessee received Carbon Emission Reductions (CER5') for utilization of waste gases. During the previous year relevant to AY 2010-11, the assessee has earned Rs. 1,14,34,760/- on account of income from sale of CERs. The same was credited to the profit & loss account of the assessee company. Carbon credit being in the nature of an entitlement' received to improve atmosphere and environment reducing carbon, heat and gas emissions, it is arising out of environmental concerns and not as part of the business of the assessee. Hence, in the absence of any element of profit or gain, income from sale of carbon credit should be treated as a capital receipt and should be excluded in computing total income both under the normal provisions of the Act as well as in computing book profit under section 115JB of the Act. It is submitted that while filing income tax return for the AY 2010-11, the aforesaid income from sale of carbon credit was not considered as a capital receipt in the computing total income

both under the normal provisions of the Act and in computing book profit u/s 115JB of the Act. Accordingly, the assessment was completed taxing the said amount of income from sale of carbon credit. Subsequently, the assessee came across the decision of the Hon'ble Karnataka High Court in the case o CIT - vs.- Subhash Kabini Power Corporation Ltd. [2016] 69 taxmann.com 394 (order dt. 29-03-2016) wherein it was held that income from sale of carbon credit should be treated as a capital receipt. Based on the said decision, the assessee sought advice from its consultants and the assessee was advised that such a claim can be made. Accordingly, as advised, the assessee intends to take up additional grounds of appeal seeking to exclude the said income from sale of carbon credit in the computing total income both under the normal provisions of the Act and in computing book profit under section 115JB of the Act.

22. The next issue is infrastructure facility. The facts are that the Infrastructure facility developed, operated and maintained by the assessee. The assessee has its cement manufacturing units at Satna, Madhya Pradesh. As a part of cement manufacturing process, the assessee has developed and has been operating and maintaining the following infrastructure facility:

Rail System

The assessee has developed an integrated Rail System between its cement manufacturing plant and the nearest railway station of the Indian Railways for inward and outward movement of goods for efficient and cost effective transportation to/from various destinations. The assessee fulfills the prescribed conditions in order to claim deduction u/s 80-IA in respect of the aforesaid infrastructure facility. However, the assessee was neither aware of the fulfillment of the said eligibility conditions nor any judicial precedents in this regard. As such, no claim of deduction u/s 80-IA in respect of the aforesaid infrastructure facility was made white filing the income tax return, during the course of assessment as well as during the appellate proceedings before the CIT(A).

23. Subsequently, the assessee noticed that the Hon'ble Mumbai ITAT in the case of M/s. Ultratech Cement Ltd. -vs.- DOT [ITA No. 5107 It 7614/Mum/2014, Order dt. 05-0420171 dealing with the similar facts as that of the assessee's case, has granted deduction u/s 80-IA in respect of Rail System. Based on the said decision, the assessee sought advice from its consultants and the assessee was advised that such a claim can be lodged. Accordingly, as advised, the assessee intends to take up additional ground of appeal seeking to claim deduction u/s 80-IA in respect of the Rail System.

24. The learned Counsel for the assessee before us relied on the decision of Hon’ble Bombay High Court (Full Bench) in the

case of Ahmedabad Electricity Co. Ltd. vs. CIT (1993) 199 ITR 351 (Bom) and he drew our attention at para 18 and 19 of the judgement of Hon'ble Bombay High Court wherein the Full Bench has considered this issue and held that the Tribunal has power under section 254(1) of the Act to admit the additional grounds as raised for the first time before it, so long as the additional grounds were the subject matter of the proceedings. The learned Counsel referred to the ratio of Hon'ble Bombay High Court and stated that the words mentioned in section 254(1) of the Act pass such orders as Tribunals "thinks fit" includes all the powers (accept possibly the power of enhancements) which are conferred upon the CIT(A) by section 254 of the Act. He referred to Para 18 and 19 which read as under: -

> *"18. In the case of Hukumchand Mills Ltd. v. CIT [1967] 63 ITR 232 , the Supreme Court was required to consider the powers of the Tribunal under old section 33(4) of the 1922 Act which is equivalent to the present section 254 of the 1961 Act. In the case before the Supreme Court the assessee-company was incorporated in the then native State of Indore. It was assessed in British India, except for the assessment year 1948-49, as a non-resident on such income as fell*

with section 4(1)(a) or (c) read with section 42 of the 1922 Act. After the Constitution of India came into force Indore became a part B State and the 1922 Act was brought into force in Part B States with effect from 1-4-1950. For the assessment year 1950-51 the assessee became assessable as a resident. The Tribunal in that case had permitted the department to raise for the first time the contention that the ITO had not considered the provisions of paragraph 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950 and remanded the matter back to the ITO to ascertain whether any depreciation was allowed under the Indore Industrial Tax Rules and, if he was of opinion that these rules related to income-tax or super tax or any law relating to tax on profits of business, to take into consideration such depreciation actually allowed under these rules also for the purpose of computing the written down value. The assessee contended that the Tribunal should not have allowed the department to raise the contention for the first time before it and

remanded the case. The Supreme Court held that the Tribunal had sufficient power under section 33(4) to entertain the contention of the department and to remand the case to the ITO.

19. After referring to section 33(4) which gave to the Tribunal power to pass 'such order thereon as it thinks fit', the Supreme Court said:

> *"The word 'thereon', of course, restricts the jurisdiction of the Tribunal to the subject-matter of the appeal. The words 'pass such orders as the Tribunal thinks fit' include all the powers (except possibly the power of enhancement) which are conferred upon the Appellate Assistant Commissioner by section 31 of the Act. ..." (p. 237)*

And a little later, the Court explained:

> *"In the present case, the subject-matter of the appeal before the Tribunal was the question as to what should be the proper written down value of the buildings, machinery,*

> *etc. of the assessee for calculating the depreciation allowance under section 10(2)(vi) of the Act. ..." (p. 237).*
>
> *Therefore, the Supreme Court clearly said that the Tribunal could permit additional grounds to be raised for the first time before it so long as these additional grounds were the subject-matter of the proceedings; because quite clearly the Court has interpreted the subject-matter of the appeal widely as covering the various issues arising in the proceedings whether raised earlier or not."*

25. Finally, the Full Bench of Hon'ble Bombay High Court has directed in Para 39 as under: -

> *"39. In view of the above decisions it is quite clear that the Tribunal has jurisdiction to permit additional grounds to be raised before it even though these may not arise from the order of the AAC, so long as these grounds are in respect of the subject-matter of the entire tax proceedings."*

26. When these were confronted to the learned CIT

Departmental Representative, he only opposes the admission of additional grounds. The assessee has filed following additional grounds of appeal:

> a) Sales tax exemption of Rs. 15.02 crore availed during the year under consideration be treated as capital receipt.
>
> b) Income from sale of carbon credit of Rs. 1.14 crore be treated as a capital receipt and hence not taxable.
>
> c) Deduction u/s 801A certified in Form 1000B amounting to Rs. 32.01 crore be allowed in respect of Rail system developed, operated and maintained by it.

27. The learned CIT DR stated on the issue of Sales tax exemption, the assessee has claimed that its manufacturing unit at Pen, Raigad District of Maharashtra has enjoyed the above sales tax incentive from Government of Maharashtra under Package Scheme of Incentives, 1993 for setting up of new units and expansion of existing units in backward areas and hence the same is capital in nature. The reasons given for making this fresh claim is as under:

> The appellant has now been advised that as per the various judicial pronouncements on the issue, such sales tax exemption being a capital receipt is not subject to tax"

28. The assessee has also claimed that the Tribunal in AY 2005-06 to 2009-10 in its own case has admitted the said

additional ground and sent the issue to the file of the AO to examine the claim and decide in accordance of law.

29. On the issue of sale of carbon credit, the reasons given by the assessee for making the fresh claim is the decision of the Hon'ble Karnataka High Court in case of CIT vs. Subhash Kabini Power Corporation Ltd. [2016] 69 taxmann.com 394 [order dated 29.03.2016]

30. On the issue of deduction u/s 801A, the reasons given by the assessee for making the fresh claim before the Tribunal is as under:

> *Subsequently, the appellant noticed that Hon'ble Mumbai ITAT in the case of MIs. Ultratech Cement Ltd. vs DCIT ITA No. 5107 & 76141Mum12014. order dated 05-04-2017] dealing with similar facts as that of the appellant's case has granted deduction u/s 80IA in respect of Rail System.*

Submission of The Department Filed by Learned CIT DR

> *"5. Decision of Hon'ble Bombay High Court in the case of Ultratech Cement Limited reported in [2017] 81 taxmann.com 74 (Bom) [date of order: 18.04.2017] is the latest decision of the*

jurisdictional High Court dealing with the power of the ITAT to admit additional ground. The said decision is related additional ground claiming deduction u/s 801A on infrastructure facility namely Jetty/Port. But the principles enunciated therein applies to additional ground on any issue.

6. Decision of Hon'ble Bombay High Court in case of Ultratech Cement Limited [supra] has considered all the landmark judgements. delivered so far on the subject matter and it is requested that the aforesaid decision of the jurisdictional High Court should be followed to decide all the three issues in the present case including the issue of admitting addl. ground related to Sales Tax exemption claimed to have been covered by the ITAT's order in the case of the assessee for the earlier years because the decision of the High Court in case of Ultratech Cement Ltd. is subsequent to the decisions of the Tribunal in case of appellant and hence not considered by the Hon'ble ITAT.

7. In the case of Ultratech Cement Limited reported in [2017] 81 taxmann.com 74 (Bom), the additional ground was not admitted because relevant facts which would entitle the assessee to claim the benefit of section 80-IA were not part of record for assessment year under consideration. This was so held in spite of the fact that the assessee claim u/s 80 IA on jetty/port was already allowed by the Department for Subsequent assessment year.

8. The Tribunal in case of Ultratech Cement Ltd. did not permit the assessee to raise additional ground for the reason that material facts to support such claim for subject assessment year was not on record before the Assessing Officer.

9. Hon'ble Bombay High Court also affirmed the decision of the Hon'ble ITAT and did not allow the additional ground holding that" In the present facts, as pointed out above and being reiterated once more, the additional ground, which is raised, is not a pure question of law, but would depend upon the satisfaction of

the authority as to the facts existing in the subject assessment year for allowing the benefit of Section BOIA of the Act. The additional ground is being raised for the first time before the Tribunal without relevant evidence being on record.'

10. In no uncertain terms, the Bombay High Court has held that claim u/s 801A in not a pure question of law.

11. It is also clear from the aforesaid decision that record means record before assessing officer.

12. In the present case also, the assessee has claimed deduction u/s 80IA on Rail siding which is not a pure question of law as held by jurisdictional High Court in case of Ultratech Cement Ltd. and material facts to support such claim was not on record before the Assessing Officer.

13. In the present case, the assessee is for the first time filing form no. 1OCCB and agreements with Railway authorities in support of its claim under section 801A. Obviously, these are fresh evidences not

existing on record before the lower authorities.

14. The interpretation that record means record before the Assessing officer will be clear beyond doubt if we see the land mark decision of the Supreme Court in case of NTPC Ltd. though it was in favour of the assessee.

15. The decision of the Supreme Court in case of National Thermal Power Co. Ltd. Vs. CIT [1998] 229 ITR 383 (SC)] also deals with the power of the Appellate Tribunal u/s 254. In that decision, the supreme Court held as under:

1. --------Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings, we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess that tax liability of an assessee

The reframed question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee.

16. To conclude, in case of National Thermal Power Co. Ltd. Vs. CIT [1998] 229 ITR 383 (SC)], it was held that the assessee can make a legal claim before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item before the lower authorities.

17. The Supreme Court in case of CIT vs. Rai Bahadur Hardutroy Motilal Chamari [1967] 66 ITR 443 (SC) which deals with power of CITA u/s 251 has held as under:

As we have already stated, it is not open to the Appellate Assistant Commissioner to travel outside the record. i.e. the return made by the assessee or the assessment order of the Income -tax Officer with a view to find out new sources of income .....

In case of Addl. CIT Vs. Gurjargravures (P.) Ltd. [1978] 111 hR 1(SC) dealing with power of CIT(A) u/s 251, the Honble Apex Court decided the issue in favour of revenue holding as under:

In the present case neither any claim was made before the Income-tax Officer, nor was there any material on record supporting such a claim. We, therefore, hold that, on the facts of this case, the question referred to the High Court should have been answered in the neagative"

In the aforesaid decision of the Gurjargravures (P.) Ltd. Honbie Supreme Court has also reiterated its own decision in case of Rai Bahadur Hardutroy Motilal Chamaria.

19. In case of Jute Corpn. of India Ltd. vs.CIT [1990] 53 Taxman 85 (SC), the assessee did not claim deduction of its liability to pay purchase tax as assessee entertained a belief that it was not liable to pay purchase tax. But later on. it was assessed to purchase tax and claimed deduction of it during the pendency of

appeal before AAC. The assessee was entitled to the deduction as per order of the Supreme Court in case of Kedarnath Jute Mfg. Co. Ltd. vs. CIT [1971] 82 ITR 363 (SC). In these circumstances, the AAC allowed to raise this question and after hearing the ITO, he granted deduction from assessee's income. Here what the AAC allowed was purely a legal claim and the facts are not in dispute.

20. In the case of Ahmedabad Electricity Co. Ltd. VS. CIT [1993] 199 ITR 351 (Born), the assessee did not claim deduction of amounts transferred to Reserve' as per Electricity Supply Act either before ITO or AAC. Subsequently, the High Court in case of Amalgamated Electricity Co. Ltd. [1974] 97 ITR 334 (Born) held that such amounts represent allowable deduction on revenue account. In view of above, the additional grounds were allowed. There was no dispute in this case regarding the amount transferred to reserve. Only the legal claim of deduction was made fresh.

21. Therefore, the decision of the Supreme Court in case of Jute Corpn. of India Ltd. vs.CIT [1990] 53 Taxman 85 (SC) and Bomaby High Court in case of Ahmedabad Electricity Co. Ltd. VS. CIT [1993] 199 ITR 351 (Born) did not require investigation of fresh facts and hence cannot help the assessee in present case where investigation of fresh facts are required like the Sales Tax Exemption scheme is to be examined to know the purpose of the incentive and then to take a decision as to whether the incentive is capital receipt or revenue receipt. There is no claim made by the assessee that copy of the scheme was filed before any lower authority. Actual utilisation of incentives or amount exempt will also to be examined before coming to conclusion. All these facts are not available on record before the AO.

22. Similarly, the form no. 1000B and agreement with Railway authority in support of its claim u/s 801A are also being filed before Tribunal for the first

time and the same are not available on record before the Assessing Officer.

23. In case of sale of carbon credits also, the basic facts of its receipts and sales are not available on record.

24. The reasons given by the assessee to file additional ground on sales tax incentive is mentioned as" The appellant has now been advised that as per the various judicial pronouncements on the issue such sales tax exemption being a capital receipt is not subject to tax ". The aforesaid reason is really vague and cannot be termed as bona fide reasons from any angle. There is no mention of even any concrete decision on basis of which such claim is being made. Moreover, when the basic facts to allow such claim are not available on record in the assessment proceedings, therefore, additional ground on sales tax exemption cannot be allowed to be raised following the decision of Jurisdictional High Court in case of Ultra Cement Ltd. (Supra).

25. On the issue of deduction u/s 801A, the reasons given by the assessee for making the fresh claim before the Tribunal is as under:

subsequently. the appellant noticed that Honbie Mumbai ITAT in the case of MIs. Ultratech Cement Ltd. vs DCIT [ITA No. 5107 & 7614/Mum/2014. order dated 05-04-2017] dealing with similar facts as that of the appellant's case has granted deduction u/s 80 IA in respect of Rail System."

The aforesaid reason is also not bona fide If we peruse paragraph 12 and 13 of the aforesaid ITAT order in case of Ultratech Cement Ltd., the Tribunal has decided the issue of deduction u/s 801A on Railway sidings in favour of assessee in case of Ultratech Cement Ltd. long back vide following orders:

ITA No. 7735 & 7736/Mum/2007 dated 20.08.2009 for AY 2004-05 & 2005-06 ITA No. 2604/M/09 dated 31.5.2010 for AY 2006-07 ITA No. 8143/Mum/2010 and

ITA No. 1813/Mum/2012 dated 28,042014 for AY 2007-08 and 2008-09.

Therefore, the order of the Tribunal dated 05/04/2017 is not a new order on the subject matter and cannot constitute bona fide reasons.

26. Moreover, the Jurisdictional High Court in case of Ultratech Cement Ltd. vide its order date 18.4.2017 has held that additional ground related to deduction u/s 801A is not a pure question of law. Further, the facts also do not exist on record in the assessment proceedings to allow benefit u/s 801A.

27. To conclude, in the present case, all the three additional grounds are being raised for the first time before the Tribunal without relevant evidence being on record in the assessment proceedings. Here, not only the claims raised are new but also the evidences sought to be adduced are new. In such a situation, neither the evidences can be admitted nor the additional grounds or fresh claims can be entertained. Further, the reasons cited

for taking additional grounds are not at all bona fide for detailed reasons in the preceding paragraphs. If such claims are entertained which are not pure question of law and which require factual investigation that too without necessary evidence on record, it will lead to a great uncertainty so far finality of assessments are concerned. In view of above, it is submitted that the assessee should not be allowed to raise additional grounds in appeal on any of the issues."

31. We have heard these issues on these additional grounds and noted that the additional grounds relating to Sale tax exemptions, income from receipt of sale of carbon credit which arising out of the accounts of the assessee are part of the proceedings of the assessment with regard to the accounts of the assessee including the audit report. Further, in regard to claim of deduction under section 80IA of the Act i.e. regarding infrastructure facility development, operated and maintained by the assessee in regard to the development of integrated Rail System between its system manufacturing plant and the nearest railway station of the Indian Railways for inward and outward movement of goods for efficient and cost effective transportation to and from various destination is also part of the audit report which is also part of the assessment records. In our

view these additional grounds are to be admitted and to be adjudicated. Since, the below authorities have not gone into the details and verification of documents, these are admitted and set aside to the file of the AO for adjudication in term of the law. Hence, these three additional issues are admitted and the matter remanded back to the file of the AO.

32. **In the result, the appeal of Revenue is dismissed and the appeal of the assessee is partly allowed for statistical purposes.**

Order pronounced in the open court on 20.09.2019.

Sd/-	Sd/-
(राजेश कुमार / RAJESH KUMAR)	(महावीर सिंह /MAHAVIR SINGH)
(लेखा सदस्य / ACCOUNTANT MEMBER)	(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 20.09.2019

सुदीप सरकार, व.निजी सचिव / *Sudip Sarkar, Sr.PS*

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //**True Copy**//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**