IN THE INCOME TAX APPELLATE TRIBUNAL
"H" Bench, Mumbai

Before Shri S. Rifaur Rahman, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA. No.6609 /Mum/2019
(Assessment Year: 2013-14)

The Saraswat Co-operative Bank Ltd. Sarawat Bank Bhavan, Plot No.953, Appasaheb Marathe Marg, Prabhadevi, Mumbai – 400 025	Vs	Income tax Officer-1(3)(1) Aayakar Bhavan, M.K. Road, Churchgate, Mumbai – 400 020
PAN – AABAT4497Q		
(Appellant)		**(Respondent)**

ITA. No.6610/Mum/2019
(Assessment Year: 2014-15)

The Saraswat Co-operative Bank Ltd. Sarawat Bank Bhavan, Plot No.953, Appasaheb Marathe Marg, Prabhadevi, Mumbai – 400 025	Vs	DCIT-1(3)(2) Aayakar Bhavan, M.K. Road, Churchgate, Mumbai – 400 020
PAN – AABAT4497Q		
(Appellant)		**(Respondent)**

Appellant by: Shri Anil Sathe, A.R
Respondent by: Shri Neehar Pandey, CIT D.R

Date of Hearing: 21.06.2021
Date of Pronouncement: 28.06.2021

O R D E R

PER RAVISH SOOD, JM:

The captioned appeals filed by the assessee are directed against the respective orders passed by the CIT(A)-3, Mumbai, dated 07.08.2019 for

A.Y. 2013-14 and A.Y. 2014-15, which in turn arises from the respective assessment orders passed u/s 143(3) of the Income Tax Act, 1961 (for short 'Act'). As common issues are involved in the aforementioned appeals, therefore, the same are being taken up and disposed off by way of a consolidated order. We shall first take up the appeal for A.Y. 2013-14 in ITA No. 6609/Mum/2019, wherein the impugned order has been assailed by the assessee on the following grounds before us:

"1. The learned Commissioner of Income Tax (Appeals) erred in facts and in law in not deleting the disallowance under section 14A of the Act to the extent of Rs. 50.64 lakhs which was offered by the appellant in the return of income, on the ground that such claim would amount to an additional claim which could only have been made by way of filing a revised return of income and not otherwise.

2. The learned Commissioner of Income Tax (Appeals) erred in facts and in law in not appreciating that there is no restriction on the powers of an appellate authority to admit an additional claim raised otherwise than by way of filing a revised return.

3. The learned Commissioner of Income Tax (Appeals) should have deleted the entire disallowance of Rs. 50.64 lakhs under section 14A of the Act, having held that the investments in exempt income yielding securities were made out of own funds.

4. The learned Commissioner of Income Tax (Appeals) erred in facts and in law in not allowing appellants claim of deduction under section 36(1)(vii) r.w.s. 36(1)(viia) of the Act to the extent of Rs. 27.66 crores on the ground that such claim would amount to an additional claim which could only have been made by way of filing a revised return of income and not otherwise.

5. The learned Commissioner of Income Tax (Appeals) should have allowed the claim of Rs. 27.66 crores under section 36(1)(vii) r.w.s. 36(1)(viia) of the Act, having held that the amount of deduction under section 3 6(1)(vii) would be the excess of actual debts written off over the "opening balance" of provision created under section 36(1)(viia) as laid down in circular no. 17/2008 of CBDT.

6. The Appellant craves leave to add alter or amend Not Applicable any of the grounds of appeal at any time before or at the time of hearing."

Further, the assessee has raised the following "additional grounds of appeal" before us :

"7. Based on the facts and the circumstances of the case and in law, the Assessing Officer be directed to allow the deduction in respect of education cess paid on income-tax amounting to 2,90,37,888/- for the year under consideration.

Without prejudice to the above, where your Honours decide the aforesaid Ground No. 7 in favour of the appellant and any other grounds against the appellant, then the Appellant humbly request your Honours to allow the deduction of total education cess paid on income-tax after considering the additional education cess payable on the tax effect relating to the ground(s) which is/are decided against the Appellant.

The Appellant craves leave to add, alter, amend or withdraw all or any above Grounds of appeal hereinabove and to submit such statements, documents and papers as may be considered necessary either at or before the hearing of this appeal as per law."

2. Briefly stated, the assessee which is a multi state co-operative bank had e-filed its return of income for A.Y.2013-14 on 24.09.2013, declaring a total income of Rs. 417,08,47,940/-. Subsequently, the assessee filed a revised return of income on 25.02.2015 declaring an income of Rs. 325,54,79,830/-. The return of income was processed as such u/s 143(1) of the Act. Thereafter, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee during the year under consideration was in receipt of tax free dividend income of Rs.4,76,06,497/-. On a perusal of the records, it was observed by the A.O that the assessee had offered a suo motto disallowance under Sec. 14A r.w. Rule 8D of Rs.50,64,432/-. It was noticed by him that the assessee while computing the disallowance under Sec. 14A had excluded the investment of Rs. 20 crores made in its subsidiary company viz. M/s Saraswat Infotech Ltd. Being of the view that the assessee had wrongly excluded the aforesaid investment made in its subsidiary company while computing the disallowance u/s 14A, the A.O reworked out the disallowance at an amount of Rs.1,86,62,836/-, as under:

Calculation of disallowance under Sec. 14A r.w Rule 8D

	(31.03.2013)		
1.Actual Direct Expenditure	0		
2. Interest expenditure not directly attributable to any particular income or receipt. (Working note 1 and 2)	17290778		
3. 0.5% of average value of investment. (Working note 3 &4)	1372058		
Total Disallowance u/s 14A in respect of exempt income (dividend) (1+2+3)	18662836		
Working note 1			
1. Interest expenditure			

Int. on deposits	1537,47,00,019.62		
Int. on borrowings	78,55,64,203.98	16160264224	A
2. Average Value of Investments (Exempt) (Refer Working note 4)		274411633	B
(excluding investment in SIL)			
3. Average of Total Assets (excluding SIL) (Refer Working note 2)			
Total Assets as on 31.03.2012	243912786963		
Total Assets as on 31.03.2013	269027058545		
Average		256469922754	C
Interest expenditure not directly attributable to any particular income or receipt.	**A+B+C**	17290778	
Working note 2			
Calculation of total Assets	31.03.2013	31.03.2021	
Total assets as per Balance sheet	272048309995	247020188513	
Less: Revaluation reserve	3021251450	3107401550	
Total assets	269027058545	23912786963	
Working note 3			
1. average value of investment (refer working note 4)	274411633		
0.5% of above		1372058	
Working note 4			
Average value of investments (excl. SIL)			
Invt. In shares as on 31.03.2012	124411650		
Investment in shares of SIL	199999983		
Invt. In Mutual funds dividend option as on 31.03.2012	0		
		324411633	
Invt. In shares as on 31.03.2013	24411650		
Investment in shares of SIL	199999983		
Invt. In mutual funds dividend option as on 31.03.2013	0		
		224411633	
Average		274411633	

As the assessee had already offered a suo motto disallowance u/s 14A of Rs.50,64,432/-, therefore, a further disallowance of Rs.1,35,98,404/- was made by the A.O. It was further observed by the A.O that the assessee had claimed a deduction of Rs. 15 crore u/s 36(1)(viii) of the Act. However, on a perusal of its profit and loss account it was observed by the A.O that the assessee had credited an amount of Rs. 7.50 crore towards reversal of the excess special reserve. On being queried, it was stated by the assessee that as 20% of the profits derived from eligible business was computed at Rs. 7.50 crore, therefore, it had reversed the Special reserve to the extent of Rs. 7.50 crore [Rs. 15 crore (minus) Rs. 7.5 crore]. It was observed by the A.O that since the assessee had not created any reserve during the year under consideration, thus, for the said reason its claim for deduction u/s 36(1)(viii) was not to be allowed. Accordingly, the A.O disallowed the assessee's claim for deduction of Rs. 7.50 crore u/s 36(1)(viii) of the Act. On the basis of his aforesaid deliberations the A.O vide his order passed u/s 143(3), dated 22.03.2016 assessed the income of the assessee bank at Rs. 334,05,90,740/-

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4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). During the course of the appellate proceedings, the assessee by way of an "additional ground of appeal" assailed the disallowance of the interest expenditure u/s 14A r.w. Rule 8D(2)(ii). It was the claim of the assessee that as it had sufficient self-owned funds for making investments in the exempt income yielding securities, thus, no disallowance of any part of the interest expenditure under Sec. 14A r.w. Rule 8D(2)(ii) was called for in its hands. In support of its aforesaid contention the assessee had drawn support from the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. HDFC Bank Ltd. (2014) 366 ITR 505 (Bom). It was further submitted by the assessee that the ITAT, Mumbai in the assessee's own case for the preceding years, viz. A.Y 2008-09, A.Y 2009-10 & A.Y 2010-11, vide a common order dated 31st October, 2018 had after considering the judgments of the Hon'ble High Court of Bombay in the case of HDFC Bank Ltd. Vs. DCIT (2016) 383 ITR 529 (Bom) and CIT Vs. Reliance Utilities and Powers Limited (2009) 313 ITR 340 (Bom) had restored the matter to the A.O, with a direction, that in case the assessee's own interest-free funds were more than the investments in the securities capable of yielding exempt income, then, the presumption, unless rebutted by the revenue would be that the assessee had utilized its own interest-free funds for making investments in the said securities. The CIT(A) after necessary deliberations admitted the "additional ground of appeal" qua the aforesaid issue in question. The CIT(A) following the judgment of the Hon'ble High Court of Bombay in the case of HDFC Bank Limited (supra), and also, the view taken by the Tribunal in the assessee's own case for the preceding years, principally concurred with the assessee that where significant interest-free funds were available with an assessee for making investment in securities yielding exempt income, then, it has to be presumed that such investment was out of the interest free funds and no disallowance of interest could be made u/s 14A of the Act. The CIT(A) observed that the assessee undisputedly was having interest free funds more than the investments made by it in the exempt income yielding securities. However, the

CIT(A) was of the view that as the assessee had in its original return of income suo motto disallowed u/s 14A an amount of Rs. 50.64 lacs, therefore, any reduction beyond the said amount could have been made only by filing of a revised return of income. Observing, that the assessee had not raised the aforesaid claim by filing a revised return of income, the CIT(A) restricted the disallowance u/s 14A to an amount of Rs.50.64 lacs i.e the amount of disallowance u/s 14A that was suo motto offered by the assesee in its return of income. Accordingly, the CIT(A) vacated the additional disallowance of Rs. 1,35,98,404/- that was made by the A.O u/s 14A of the Act. As regards the disallowance made by the A.O u/s 36(1)(viii), it was observed by the CIT(A) that the assessee had appropriated profits of the earlier year to the extent of Rs.15 crore and had credited the same to the Special Reserve Account. However, it was noticed by the CIT(A) that a credit to the extent of 7.5 crore. which was in excess of 20% of the eligible profit as per 36(1)(viii) was reversed during the same year and deduction of Rs.7.5 crore was claimed by the assessee u/s 36(1)(viii) of the Act. It was observed by the CIT(A) that the A.O had disallowed the aforesaid claim of deduction of Rs.7.5 crore, for the reason, that the reserve had not been created by debiting the profit and loss account. It was observed by the CIT(A) that his predecessor while disposing off the assessee's appeal for the preceding years, viz. A.Y. 2009-10, A.Y. 2011-12 and A.Y. 2012-13 had allowed its claim of deduction u/s 36(1)(viii) of the Act. It was further observed by the CIT(A) that the ITAT, Mumbai in the case of the assessee for A.Y 2012-13 had considered the issue in question and decided the same in favour of the assessee. Accordingly, the CIT(A) following the view taken by the Tribunal in the assessee's own case for the immediately preceding year vacated the disallowance of Rs.7.5 crore made by the A.O under Sec. 36(1)(viii) of the Act. Before the CIT(A), the assessee had by way of an "additional ground", therein stated, that while raising the claim in respect of bad debts written off u/s 36(1)(vii) of the Act, which therein contemplates, that the deduction would be restricted to the amount of bad debts which is in excess of the balance in the provision made u/s 36(1)(viia) of

the Act, the assessee had by mistake wrongly restricted the deduction u/s 36(1)(vii) to the extent the bad debts were in excess of the "closing balance" of the provision made u/s 36(1)(viia). It was stated by the assessee that the manner in which the aforesaid claim was raised was accepted by the A.O. Referring to the CBDT Circular No. 17/2008, dated 26th November, 2008, it was submitted by the assessee that the same clearly provided that for the purpose of making the claim u/s 36(1)(vii) it was the 'opening balance' in the provision for bad and doubtful debts which was to be considered. In the backdrop of the aforesaid facts, the assessee by raising the aforesaid "additional ground of appeal" had sought for an incremental/additional claim of deduction of Rs. 27.66 crores. As is discernible from the records, though the CIT(A) admitted the "additional ground of appeal" and principally agreed with the contention of the assessee as regards its entitlement towards claim of deduction u/s 36(1)(vii) of the Act, however, relying on the judgment of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. Vs. CIT (2006) 284 ITR 323 (SC) he had declined to grant the relief for the standalone reason that the said claim was not raised in the return of income. Accordingly, in the backdrop of his aforesaid deliberations the CIT(A) partly allowed the appeal.

5. Aggrieved, the assessee has assailed the order passed by the CIT(A) before us. It was submitted by the ld. A.R that though the CIT(A) had observed that the assessee had significant self-owned funds for making investments in the exempt income yielding securities, but had erred in not allowing the consequential relief. Elaborating further, it was averred by the ld. A.R that the CIT(A) had declined to vacate the disallowance of interest expenditure under Sec. 14A r.w Rule 8D(2)(ii) in *toto*, for the standalone reason that the said disallowance was suo motto offered by the assessee u/s 14A in its return of income. The CIT(A) was of the view that the scaling down of the disallowance u/s 14A to a figure lower than that offered in the return of income could have been done only by filing of a revised return, which the assessee had failed to do. It was submitted by the ld. A.R that the assessee

by raising the aforesaid "additional ground of appeal" before the CIT(A) had sought for quantification of the disallowance u/s 14A as per the binding judgement of the Hon'ble High Court of Bombay in the case of HDFC Bank Ltd. (supra). It was submitted by the ld. A.R, that the CIT(A) after principally agreeing with the assessee, both on facts and the settled position of law, was thus obligated to have granted the necessary relief that was sought by the assessee. It was stated by the ld. A.R that though the judgment of the Hon'ble Supreme Court in the case of Goetze India Ltd. (supra) jeopardised the powers of the A.O to allow any relief which had not been claimed by the assessee in its return of income, however, the same was not applicable insofar the appellate authorities were concerned. In support of his aforesaid claim the ld. A.R had relied on the judgement of the Hon'ble High Court of Bombay in the case of CIT Vs. Pruthvi Brokers & Shareholders (P) Ltd. (2012) 349 ITR 336 (Bom). As regards the assessee's entitlement towards claim of deduction u/s 36(1)(vii), it was submitted by the ld. A.R that though the CIT(A) had principally agreed and accepted the claim of the assessee, however, he had declined to allow the consequential relief for the standalone reason that the said claim was not raised in the return of income. It was submitted by the ld. A.R that the CIT(A) while declining to allow the consequential relief in conformity with the CBDT Circular No. 17/2008, dated 26.11.2008, had relied on the judgment of the Hon'ble Supreme Court in the case of Goetze India Ltd. (supra). Rebutting the aforesaid observation of the CIT(A), it was once again submitted by the ld. A.R that no embargo was placed upon the appellate authorities qua entertaining and therein adjudicating an issue involving a question of law as long as the facts were borne from the record. Once again reliance was placed by the ld. A.R on the judgment of the Hon'ble High Court of Bombay in the case of Pruthvi Brokers & Shareholders (P) Ltd.(supra). Further, the ld. A.R in support of the "additional ground of appeal" that was raised before us, therein submitted, that pursuant to the judgment of the Hon'ble High Court of Bombay in Sesa Goa Ltd Vs. JCIT (2020) 423 ITR 426

(Bom) health and education Cess was to be allowed as a deduction while computing the assessee's income for the year under consideration.

6. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities.

7. We have heard the ld. authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. Admittedly, the assessee in its return of income had offered a suo motto disallowance u/s 14A r.w. Rule 8D of Rs.50.64 lacs, as under:

Disallowance of interest expenditure u/r 8D(2)(vi)	Rs.46.92 lacs
Administrative expenditure u/r 8D(2)(iii)	Rs.3.72 lacs
Total	Rs.50.64 lacs

Observing, that the assessee while computing the disallowance u/s 14A r.w Rule 8D had excluded an investment of Rs.20 crore that was made in the shares of its wholly owned subsidiary, viz. M/s Saraswat Infotech Ltd., for the reason, that the same was in the nature of a strategic investment, the A.O not finding favour with the said claim had included the same and recomputed the disallowance u/s 14A r.w. Rule 8D at Rs.1,86,62,836/-, as under:

Particular	Amount
u/r 8D(2)(i)	Nil
Disallowance of interest expenditure u/r 8D(2)(ii)	Rs.1,72,90,778/-
Disallowance of administrative expenses u/r 8D(2)(iii)	Rs. 13,72,058/-
Total	Rs.1,86,62,836/-

8. As observed by us hereinabove, for the reason, that the assessee had significant self-owned funds to justify the investments in the exempt income yielding securities, therefore, it had by relying on the judgment of the Hon'ble High Court of Bombay in the case of HDFC Bank Ltd. (supra) and the order of the Tribunal in the assessee's own case for the preceding years, viz. A.Y

2008-09, A.Y 2009-10 & A.Y 2010-11, vide a common order dated 31st October, 2018 had by raising an "additional ground of appeal" sought that the entire disallowance of interest expenditure u/s 14A r.w Rule 8D(2)(ii) be vacated. The CIT(A) after necessary deliberations admitted the "additional ground of appeal". As observed by us herein above, the CIT(A) following the judgment of the Hon'ble High Court of Bombay in the case of HDFC Bank Limited (supra), and also, the view taken by the Tribunal in the assesee's own case for the preceding years, principally concurred with the assessee that as significant interest-free funds were available with it for making investments in securities yielding exempt income thus, it was to be presumed that such investments were made out of the interest free funds and no disallowance of interest expenditure could be made u/s 14A of the Act. The CIT(A) further observed that the assessee undisputedly was having interest free funds more than the investments made by it in the exempt income yielding securities. However, the CIT(A) was of the view that as the assessee had in its original return of income suo motto disallowed u/s 14A an amount of Rs. 50.64 lacs, therefore, the reduction beyond the said amount could have been made only by filing of a revised return of income. Observing, that the assessee had not raised the aforesaid claim by filing a revised return of income, the CIT(A) rejected the assessee's claim for vacating the disallowance of interest expenditure u/s 14A r.w Rule 8D(2)(ii) in toto; and restricted the said disallowance to an amount of Rs.50.64 lacs that was suo motto offered by the assessee in its return of income. Accordingly, the CIT(A) vacated the additional disallowance of Rs. 1,35,98,404/- [Rs. 1,86,62,836/- (-) Rs. 50,64,432/-] that was made by the A.O u/s 14A of the Act.

9. We have given a thoughtful consideration qua the aforesaid issue; and are of the considered view that as held by the Hon'ble Supreme Court in the case of Goetze India Ltd. Vs. CIT (2006) 284 ITR 323 (SC), though an A.O is precluded from allowing any relief that had not been claimed by an assessee in its return of income, but no such restriction can be read into the powers of

the appellate authorities. As such, we are unable to persuade ourselves to subscribe to the view taken by the CIT(A), who we find had read a similar restriction as regards raising of a fresh claim by an assessee before the appellate authorities. In our considered view, as held by the Hon'ble Apex court in the case of Goetze India Ltd. (supra), the aforesaid restriction of not allowing a claim beyond that raised by an assessee in its return of income, except for where the same had been raised by way of filing of a revised return, is applicable only qua the assessing officer and cannot be extended to disable the powers of an appellate authority. In case a view to the contrary is taken, then, the very purpose of admission of an "additional ground of appeal" by the appellate authorities would be rendered as redundant or in fact purposeless. Our aforesaid conviction that a question of law can be raised for the first time before the appellate authority, as long as the facts are borne out from the records is supported by the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Pruthvi Brokers & Shareholders (P) Ltd. (2012) 349 ITR 336 (Bom). In its said judgment, it was held by the Hon'ble High Court that an assessee is entitled to raise additional grounds not merely in terms of legal submissions, but also additional claims to wit claims not made in the return filed by it. The Hon'ble High Court while concluding as hereinabove had observed as under:

> "10. A long line of authorities establish clearly that an assessee is entitled to raise additional grounds not merely in terms of legal submissions, but also additional claims to wit claims not made in the return filed by it. It is necessary for us to refer to some of these decisions only to deal with two submissions on behalf of the department. The first is with respect to an observation of the Supreme Court in Jute Corporation of India Limited v. Commissioner of Income Tax, 1991 Supp (2) SCC 744 = (1991) 187 ITR 688. The second submission is based on a judgment of the Supreme Court in Goetze (India) Limited v. Commissioner of Income Tax.
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> 11(A). In Jute Corporation of India Limited v. CIT, for the assessment year 1974-75 the appellant did not claim any deduction of its liability towards purchase tax under the provisions of the Bengal Raw Jute Taxation Act, 1941, as it entertained a belief that it was not liable to pay purchase tax under that Act. Subsequently, the appellant was assessed to purchase tax and the order of assessment was received by it on 23rd November, 1973. The appellant challenged the same and obtained a stay order. The appellant also filed an appeal from the assessment order under the Income Tax Act. It was only during the hearing of the appeal that the assessee claimed an additional deduction in respect of its liability to purchase tax. The

Appellate Assistant Commissioner (AAC) permitted it to raise the claim and allowed the deduction. The Tribunal held that the AAC had no jurisdiction to entertain the additional ground or to grant relief on a ground which had not been raised before the Income Tax Officer. The Tribunal also refused the appellant's application for making a reference to the High Court. The High Court upheld the decision of the Tribunal and refused to call for a statement of case. It is in these circumstances that the appellant filed the appeal before the Supreme Court.

The Supreme Court held as under :-

"5. In CIT v. Kanpur Coal Syndicate, a three Judge bench of this Court discussed the scope of Section 31(3)(a) of the Income Tax Act, 1922 which is almost identical to Section 251(1)(a). The court held as under: (ITR p. 229)

> "If an appeal lies, Section 31 of the Act describes the powers of the Appellate Assistant Commissioner in such an appeal. Under Section 31(3)(a) in disposing of such an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment; under clause (b) thereof he may set aside the assessment and direct the Income Tax Officer to make a fresh assessment. The Appellate Assistant Commissioner has, therefore, plenary powers in disposing of an appeal. The scope of his power is co-terminus with that of the Income-tax Officer. He can do what the Income-tax Officer can do and also direct him to do what he has failed to do." (emphasis supplied)

6. The above observations are squarely applicable to the interpretation of Section 251(1)(a) of the Act. The declaration of law is clear that the power of the Appellate Assistant Commissioner is co-terminus with that of the Income Tax Officer, if that be so, there appears to be no reason as to why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income Tax Officer. No exception could be taken to this view as the Act does not place any restriction or limitation on the exercise of appellate power. Even otherwise an Appellate Authority while hearing appeal against the order of a subordinate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations if any prescribed by the statutory provisions. In the absence of any statutory provision the Appellate Authority is vested with all the plenary powers which the subordinate authority may have in the matter. There appears to be no good reason and none was placed before us to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income Tax Officer." [emphasis supplied]

(B) It is clear, therefore, that an assessee is entitled to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before them. The appellate authorities have the discretion whether or not to permit such additional claims to be raised. It cannot, however, be said that they have no jurisdiction to consider the same. They have the jurisdiction to entertain the new claim. That they may choose not to exercise their jurisdiction in a given case is another matter. The exercise of discretion is entirely different from the existence of jurisdiction.

12. At page 694, after referring to certain observations of the Supreme Court in Additional Commissioner of Income-tax v. Gurjargravures P. Ltd., (1978) 111 ITR 1, the Supreme Court observed at Page 694 as under :-

> "The above observations do not rule out a case for raising an additional ground before the Appellate Assistant Commissioner if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made, or that the ground became available on account of change of circumstances or law. There may be several factors justifying raising of such new plea in appeal, and each case has to be considered on its own facts. If the Appellate Assistant Commissioner is satisfied he would be acting within his jurisdiction in considering the question so raised in all its aspects. Of course, while permitting the assessee to raise an additional ground, the Appellate Assistant Commissioner should exercise his discretion in accordance with law and reason. He must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The satisfaction of the Appellate Assistant Commissioner depends upon the facts and circumstances of each case and no rigid principles or any hard and fast rule can be laid down for this purpose." [emphasis supplied]

13. The underlined observations in the above passage do not curtail the ambit of the jurisdiction of the appellate authorities stipulated earlier. They do not restrict the new/additional grounds that may be taken by the assessee before the appellate authorities to those that were not available when the return was filed or even when the assessment order was made. The sentence read as a whole entitles an assessee to raise new grounds/make additional claims :-

"if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made..."

"or"

if "the ground became available on account of change of circumstances or law"

The appellate authorities, therefore, have jurisdiction to deal not merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. The first part viz. "if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made... "clearly relate to cases where the ground was available when the return was filed and the assessment order was made but "could not have been raised" at that stage. The words are "could not have been raised" and not "were not in existence". Grounds which were not in existence when the return was filed or when the assessment order was made fall within the second category viz. where "the ground became available on account of change of circumstances or law."

14. The facts in Jute Corporation of India Ltd., various judgments referred to therein as well as in subsequent cases, which we will refer to, establishes this beyond doubt. In many of the cases, the grounds were, in fact, available when the return was filed and/or the assessment order was made. In Jute Corporation of India Ltd., the ground was available when the return was filed. The assessee did not claim any deduction of its liability to pay purchase tax as "it entertained a belief that it was not liable to pay purchase tax under the Bengal Raw Jute Taxation Act, 1941". Thus, the ground existed when the return was filed. The assessment order was even made and received by the assessee. It is only after the appeal was filed that the assessee claimed a deduction in respect of the amount paid towards the purchase tax under the said Act. It is also significant to note that the assessee's entitlement to claim deduction had been held to be valid in view of an earlier judgment of the Supreme Court in Kedarnath Jute Manufacturing Company Limited v. Commissioner of Income-tax, (1971) 82 ITR 363. This was, therefore, a case of error in perception/judgment. Despite the same, the Supreme Court upheld the decision of the Appellate Assistant Commissioner in allowing

the deduction. The words "could not have been raised" must, therefore, be construed liberally and not strictly.

15. It is indeed a question of exercise of discretion whether or not to allow an assessee to raise a claim which was not raised when the return was filed or the assessment order was made. As held by the Supreme Court there may be several factors justifying the raising of a new plea in appeal and each case must be considered on its own facts.

However, such cases include those, where the ground though available when the return was filed or the assessment order was made, was not taken or raised for reasons which the appellate authorities may consider valid. In other words, the jurisdiction of the appellate authorities to consider a fresh or new ground or claim is not restricted to cases where such a ground did not exist when the return was filed and the assessment order was made.

16(A). A Full Bench of this Court in Ahmedabad Electricity Limited v. Commissioner of Income-tax, (1993) 199 ITR 351 considered a similar situation. In that case, the appellant/assessee did not claim a deduction in respect of the amounts it was required to transfer to contingencies reserve and dividend and tariff reserve either before the Income Tax Officer or before the Appellate Assistant Commissioner in appeal. Subsequently, this Court had, in Amalgamated Electricity Company Limited v. Commissioner of Income-tax, (1974) 97 ITR 334, held that such amounts represented allowable deductions on revenue account. The appellant, therefore, raised a new claim and additional grounds before the Tribunal in that connection. The Tribunal rejected the same. The second question which was raised in the reference before the Division Bench was as under :-

"(2) Whether, on the facts and in the circumstances of the case, the Tribunal erred in not allowing the assessee leave to raise in its own appeals additional grounds and in the departmental appeals cross objections regarding the deductibility of the sums transferred to contingency reserve and tariff and dividend control reserve?"

(B) The Division Bench which heard the reference, finding that there was a conflict of decisions, placed the papers before the Hon'ble Chief Justice for constituting a larger bench to resolve the controversy.

The Full Bench answered the reference in the affirmative and in favour of the assessee. The Full Bench held :-

"Thus, the Appellate Assistant Commissioner has very wide powers while considering an appeal which may be filed by the assessee. He may confirm, reduce, enhance or annul the assessment or remand the case to the Assessing Officer. This is because, unlike an ordinary appeal, the basic purpose of a tax appeal is to ascertain the correct tax liability of an assessee in accordance with law. Hence an Appellate Assistant Commissioner also has the power to enhance the tax liability of the assessee although the Department does not have a right of appeal before the Appellate Assistant Commissioner. The Explanation to subsection (2), however, makes it clear that for the purpose of enhancement, the Appellate Assistant Commissioner cannot travel beyond the proceedings which were originally before the Income-tax Officer or refer to new sources of income which were not before the Income-tax Officer at all. For this purpose, there are other separate remedies provided under the Income-tax Act."

(C) It is unnecessary to refer to all the judgments that the Full Bench referred to while answering the reference. The Full Bench referred to the observations of the Supreme Court in Jute Corporation of India Limited v. Commissioner of Income-tax (supra) set out

above. It is important to note that even in this case, therefore, the ground existed when the return was filed. The mere fact that a decision of a court is rendered subsequently does not indicate that the ground did not exist when the law was enacted. Judgments are only a declaration of the law. The assessee could have raised the ground in its return itself. It did not have to await a decision of a court in that regard. Indeed, even if a judgment is against an assessee, it is always open to the assessee to claim the deduction and carry the matter higher. The words "could not have been raised", therefore, cannot be read strictly. Neither the Supreme Court nor the Full Bench of this Court meant them to be read strictly. They include cases where the assessee did not raise the claim for a reason found to be reasonable or valid by the appellate authorities in the facts and circumstances of a case.

17. The next judgment to which our attention was invited by Mr. Mistri is the judgment of a Bench of three learned Judges of the Supreme Court in National Thermal Power Company Limited v. Commissioner of Income-tax, (1997) 7 SCC 489 = (1998) 229 ITR 383. In that case, the assessee had deposited its funds not immediately required by it on short term deposits with banks. The interest received on such deposits was offered by the assessee itself for tax and the assessment was completed on that basis. Even before the Commissioner of Income-tax (Appeals), the inclusion of this amount was neither challenged by the assessee nor considered by the Commissioner of Income-tax (Appeals). The assessee filed an appeal before the Tribunal. The inclusion of the amount was not objected to even in the grounds of appeal as originally filed before the Tribunal.

Subsequently, the assessee by a letter, raised additional grounds to the effect that the said sum could not be included in the total income. The assessee contended that on a erroneous admission, no income can be included in the total income. It was further contended that the ITO and the Commissioner of Income-tax (Appeals) had erred and failed in their duty in adjudicating the matter correctly and by mechanically including the amount in the total income. It is pertinent to note that the assessee contended that it was entitled to the deduction in view of two orders of the Special Benches of the Tribunal and the assessee further stated that it had raised these additional grounds on learning about the legal position subsequently.

The Tribunal declined to entertain these additional grounds.

The Supreme Court did not answer the question on merits, but framed the following question and held as under :-

"4. The Tribunal has framed as many as five questions while making a reference to us. Since the Tribunal has not examined the additional grounds raised by the assessee on merit, we do not propose to answer the questions relating to the merit of those contentions. We reframe the question which arises for our consideration in order to bring out the point which requires determination more clearly. It is as follows:

"Where on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of the assessee, whether the Tribunal has jurisdiction to examine the same."

Under Section 254 of the Income Tax Act the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with the appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising

that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income Tax (Appeals). Both the assessee as well as the Department have a right to file an appea1/cross- objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier."

18. In the case before us, the CIT(A) and the Tribunal have held the omission to claim the deduction of Rs.40,00,000/- to be inadvertent. Both the appellate authorities held, after considering all the facts, that the assessee had inadvertently claimed a deduction of Rs.20,00,000/- paid after the end of the year in question. We see no reason to interfere with this finding. We see less reason to interfere with the exercise of discretion by the appellate authorities in permitting the respondent to raise this claim. That the respondent is entitled to the deduction in law is admitted and, in any event, clearly established. In the circumstances, the respondent ought not be prejudiced.

19. The orders of the CIT(A) and the Tribunal clearly indicate that both the appellate authorities had exercised their jurisdiction to consider the additional claim as they were entitled to in view of the various judgments on the issue, including the judgment of the Supreme Court in National Thermal Power Corporation Limited. This is clear from the fact that these judgments have been expressly referred to in detail by the CIT(A) and by the Tribunal.

20. We wish to clarify that both the appellate authorities have themselves considered the additional claim and allowed it. They have not remanded the matter to the Assessing Officer to consider the same. Both the orders expressly direct the Assessing Officer to allow the deduction of Rs.40,00,000/- under section 43B of the Act. The Assessing Officer is, therefore, now only to compute the respondent's tax liability which he must do in accordance with the orders allowing the respondent a deduction of Rs.40,00,000/- under section 43B of the Act.

21. The conclusion that the error in not claiming the deduction in the return of income was inadvertent cannot be faulted for more than one reason. It is a finding of fact which cannot be termed perverse. There is nothing on record that militates against the finding. The appellant has not suggested, much less established that the omission was deliberate, mala-fide or even otherwise. The inference that the omission was inadvertent is, therefore, irresistible.

22. It was then submitted by Mr. Gupta that the Supreme Court had taken a different view in Goetze (India) Limited v. Commissioner of Income-tax. We are unable to agree. The decision was rendered by a Bench of two learned Judges and expressly refers to the judgment of the Bench of three learned Judges in National Thermal Power Company Limited vs. Commissioner of Income-tax (supra). The question before the Court was whether the appellant-assessee could make a claim for deduction, other than by filing a revised return. After the return was filed, the appellant sought to claim a deduction by way of a letter before the Assessing Officer.

The claim, therefore, was not before the appellate authorities. The deduction was disallowed by the Assessing Officer on the ground that there was no provision under the Act to make an amendment in the return of income by modifying an application at the assessment stage without revising the return. The Commissioner of Income-tax (Appeals) allowed the assessee's appeal. The Tribunal, however, allowed the department's appeal. In the Supreme Court, the assessee relied upon the judgment in National Thermal Power Company Limited contending that it was open to the assessee to raise the points of law even before the Tribunal. The Supreme Court held :-

"4. The decision in question is that the power of the Tribunal under section 254 of the Income-tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the Assessing Officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income- tax Act, 1961. There shall be no order as to costs." [emphasis supplied]"

23. It is clear to us that the Supreme Court did not hold anything contrary to what was held in the previous judgments to the effect that even if a claim is not made before the assessing officer, it can be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim has not been negated by the Supreme Court in this judgment. In fact, the Supreme Court made it clear that the issue in the case was limited to the power of the assessing authority and that the judgment does not impinge on the power of the Tribunal under section 254.

24. A Division Bench of the Delhi High Court dealt with a similar submission in Commissioner of Income-tax v. Jai Parabolic Springs Limited, (2008) 306 ITR 42. The Division Bench, in paragraph 17 of the judgment held that the Supreme Court dismissed the appeal making it clear that the decision was limited to the power of the assessing authority to entertain a claim for deduction otherwise than by a revised return and did not impinge on the powers of the Tribunal. In paragraph 19, the Division Bench held that there was no prohibition on the powers of the Tribunal to entertain an additional ground which, according to the Tribunal, arises in the matter and for the just decision of the case.

Further, the Hon'ble High Court of Madras in the case of CIT, Chennai Vs. Abhinitha Foundations (Pvt.) Ltd. (2017) 396 ITR 251 (Mad), had observed, that even if a claim made by an assessee company does not form part of its original return or even the revised return, it can still be considered by the A.O as well as the appellate authorities in case the relevant material is available on record. In both the aforesaid judgments the Hon'ble High Courts had referred to the judgment of the Hon'ble Apex Court in the case of Goetze (India) Ltd. (supra) Accordingly, in the backdrop of the aforesaid judgment of the Hon'ble High Court of Bombay in the case of Pruthvi Brokers & Shareholders (Pvt). Ltd. (supra) and that of the Hon'ble High Court of Madras in the case of Abhinitha Foundations (Pvt.) Ltd. (supra), we are of the considered view, that now when the CIT(A) relying on the judgment in the case of HDFC Bank Ltd. (supra) had principally concurred with the assessee that as the interest-free funds available with it were more than the investments made in securities which have yielded exempt income, therefore, it had to be presumed that such

investments were made out of the interest free funds, and thus, there was no justification on his part in sustaining any part of the disallowance relatable to the interest expenditure unde Sec. 14A r.w Rule 8D(2)(ii). We, thus, in the backdrop of the admitted fact that the assessee had significant interest-free funds to make the investments in the exempt income yielding securities, thus, are of the considered view that no part of the interest expenditure could have been disallowed under Sec. 14A r.w. Rule 8D(2)(ii). Accordingly, in the backdrop of our aforesaid deliberations we vacate the disallowance of the interest expenditure under Sec. 14A r.w Rule 8D(2)(ii) of Rs. 46.92 lac that was offered by the assessee in its return of income. The **Grounds of appeal nos. 1 to 3** are allowed in terms of our aforesaid observations.

10. We shall now advert to the assessee's grievance that though the CIT(A) had principally agreed qua its claim that the amount of deduction u/s 36(1)(vii) would be the actual bad debts written off over and above the 'opening balance' of the provision for bad and doubtful debts u/s 36(1)(viia) of the Act, however, he had erroneously declined to allow the consequential relief thereof. Elaborating further, it was submitted by the ld. A.R that the standalone reason that had weighed in the mind of the CIT(A) for declining the incremental/additional claim of deduction raised by the assessee under Sec. 36(1)(vii), was that the said claim was neither raised by the assessee in its original return of income nor by way of filing of a revised return. Briefly stated, as observed by us at length hereinabove, the assessee which is a scheduled bank had by wrongly construing the scope of Sec. 36(1)(vii) limited its claim for deduction of the bad debts written off to the extent the same exceeded the 'closing balance' in the provision for bad and doubtful debts. Observing, that the CBDT Circular No. 17/2008, dated 26.11.2008 had spelt out that the 'opening balance' in the provision for bad and doubtful debts was to be considered for the purpose of making the claim u/s 36(1)(vii) of the Act, the assessee, thus, had raised an "additional ground" before the CIT(A), and based on his correct working had sought an incremental/additional claim of

deduction of Rs. 27.66 crore. Although the CIT(A) in all fairness admitted the "additional ground" qua the issue in question and also principally agreed with the contention of the assessee as regards the correct quantification of its claim for deduction u/s 36(1)(vii) r.w.s 36(1)(viia), however, considering the fact that such claim was neither raised by the assessee in its original return of income nor by way of filing a revised return of income, declined the same. Before us, the assessee has assailed the declining on the part of the CIT(A) to allow its aforesaid claim for deduction for the standalone reason that the same was neither raised in the original return of income nor in the revised return.

11. We have given a thoughtful consideration to the aforesaid issue and are unable to persuade ourselves to subscribe to the view taken by the CIT(A). As observed by us hereinabove, an A.O is though divested of his jurisdiction to allow any relief which had not been claimed by the assessee in its return of income, except for where such claim had been raised by filing of a revised return, however, the said embargo in no way is applicable to the appellate authorities. As deliberated by us at length hereinabove, a question of law as long as the same is based on the facts available on the record can be raised for the first time before an appellate authority. Once again, in order to drive home our view that a 'fresh claim' can be raised by an assessee before the appellate authorities, as long as the same arises from the facts borne on record, we draw support from the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Pruthvi Brokers & Shareholders (P) Ltd. (2012) 349 ITR 336 (Bom) and that of the Hon'ble High Court of Madras in the case of CIT, Chennai Vs. Abhinitha Foundations (Pvt.) Ltd. (2017) 396 ITR 251 (Mad). The observation of the CIT(A) that the amount of deduction u/s 36(1)(vii) would be the actual bad debts written off over and above the "opening balance" of the provision for bad and doubtful debts account created under Sec. 36(1)(viia) of the Act had not been assailed before us by the revenue, and thus, the same had attained finality. However, for the sake of completeness and in order to dispel all doubts, we may herein observe that

the said claim of the assessee is duly supported by the CBDT Circular No. 17/2008, dated 26.11.2008; and the judgment of the Hon'ble High Court of Gujarat in the case of CIT Vs. UTI Bank Ltd., 2013, 29 taxman.com 9 (Guj). Accordingly, in the backdrop of our aforesaid deliberations, we herein direct the A.O to allow the assessee's revised claim for deduction u/s 36(1)(vii) r.w.s 36(1)(viia) of the Act. The **Grounds of appeal Nos. 4 & 5** are allowed in terms of our aforesaid observations.

12. We shall now advert to the "additional ground of appeal" raised by the assessee before us, wherein it has sought a direction to the A.O to allow deduction in respect of education cess paid on income tax amounting to Rs. 2,90,37,888/- for the year under consideration. As the assessee by raising the aforesaid "additional ground of appeal" has sought our indulgence for adjudicating an issue involving purely a question of law based on the facts available on record, we, thus, admit the same.

13. Insofar the claim of the Ld. A.R that unlike "rates" and "taxes" the amount paid by an assessee towards "Education Cess" or any "other cess" viz. the Secondary and Higher Education Cess is not a disallowable expenditure u/s 40(a)(ii) of the Income-tax Act, 1961, we find that the said issue is squarely covered by the recent order of the **Hon'ble High Court of Bombay** in the case of **Sesa Goa Limited vs. Joint Commissioner of Income-tax (2020) 107 CCH 375 (Bom).** In the case before the Hon'ble High Court the following substantial question of law was inter alia raised :

> "iii. Whether on the facts and in the circumstances of the case and in law, the Education Cess and Higher and Secondary Education Cess is allowable as a deduction in the year of payment."

After exhaustive deliberations, the Hon'ble High Court had observed that the legislature in Sec. 40(a)(ii) had though provided that "any rate or tax levied" on "profits and gains of business or profession" shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession", but then there was no reference to any "cess". Also,

the High Court observed that there was no scope to accept that "cess" being in the nature of a "tax" was equally not deductible in computing the income chargeable under the head "profits and gains of business or profession". It was further observed that if the legislature would had intended to prohibit the deduction of amounts paid by an assessee towards say, "education cess" or any other "cess", then, it could have easily included a reference to "cess" in clause (ii) of Section 40(a). On the basis of its aforesaid observations, the Hon'ble High Court had concluded that now when the legislature had not provided for any prohibition on the deduction of any amount paid towards "cess" in clause (ii) of Sec. 40(a), therefore, holding to the contrary would amount to reading something which is not to be found in the text of the provision of Sec. 40(a)(ii). Accordingly, the Hon'ble High Court had concluded that there was no prohibition on the deduction of any amount paid towards "cess" in Sec. 40(a)(ii), while computing the income chargeable under the head "profits and gains of business or profession", observing as under :

> "16. The aforesaid question arises in the context of provisions of Section 40(a)(ii) which inter alia provides that notwithstanding anything to the contrary in sections 30 to 38 of the IT Act, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession", -
>
> (a) in the case of any assessee –
> (ia).....
> (ib).....
> (ic) .....
> **(ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains.**
>
> [Explanation 1.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under section 90 or, as the case may be, deduction from the Indian income-tax payable under section 91.]
>
> [Explanation 2.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any 9 TXA17&18-13 dt.28.02.2020 sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under section 90A;]
>
> 17. Therefore, the question which arises for determination is whether the expression "any rate or tax levied" as it appears in Section 40(a)(ii) of the IT Act includes "cess". The Appellant – Assessee contends that the expression does not include "cess" and therefore,

the amounts paid towards "cess" are liable to be deducted in computing the income chargeable under the head "profits and gains of business or profession".

However, the Respondent – Revenue contends that "cess" is also included in the scope and import of the expression "any rate or tax levied" and consequently, the amounts paid towards the "cess" are not liable for deduction in computing the income chargeable under the head "profits and gains of business or profession".

18. In relation to taxing statute, certain principles of interpretation are quite well settled. In New Shorrock Spinning and Manufacturing Co. Ltd. Vs Raval, 37 ITR 41 (Bom.), it is held that one safe and infallible principle, which is of guidance in these matters, is to read the words through and see if the rule is clearly stated. If the language employed gives the rule in words of sufficient clarity and precision, nothing more requires to be done. Indeed, in such a case the task of interpretation can hardly be said to arise : Absoluta sententia expositore non indiget. The language used by the Legislature best declares its intention and must be accepted as decisive of it.

19. Besides, when it comes to interpretation of the IT Act, it is well established that no tax can be imposed on the subject without words in the Act clearly showing an intention to lay a burden on him. The subject cannot be taxed unless he comes within the letter of the law and the argument that he falls within the spirit of the law cannot be availed of by the department. [See CIT vs Motors & General Stores 66 ITR 692 (SC)].

20. In a taxing Act one has to look merely at what is clearly said.

There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied, into the provisions which has not been provided by the legislature [See CIT Vs Radhe Developers 341 ITR 403]. One can only look fairly at the language used. No tax can be imposed by inference or analogy. It is also not permissible to construe a taxing statute by making assumptions and presumptions [See Goodyear Vs State of Haryana 188 ITR 402(SC)].

21. There are several decisions which lay down rule that the provision for deduction, exemption or relief should be interpreted liberally, reasonably and in favour of the assessee and it should be so construed as to effectuate the object of the legislature and not to defeat it. Further, the interpretation cannot go to the extent of reading something that is not stated in the provision [See AGS Tiber Vs CIT 233 ITR 207].

22. Applying the aforesaid principles, we find that the legislature, in Section 40(a)(ii) has provided that "any rate or tax levied" on "profits and gains of business or profession" shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession". There is no reference to any "cess". Obviously therefore, there is no scope to accept Ms. Linhares's contention that "cess" being in the nature of a "Tax" is equally not deductable in computing the income chargeable under the head "profits and gains of business or profession". Acceptance of such a contention will amount to reading something in the text of the provision which is not to be found in the text of the provision in Section 40(a)(ii) of the IT Act.

23. If the legislature intended to prohibit the deduction of amounts paid by a Assessee towards say, "education cess" or any other "cess", then, the legislature could have easily included reference to "cess" in clause (ii) of Section 40(a) of the IT Act. The fact that the

legislature has not done so means that the legislature did not intend to prevent the deduction of amounts paid by a Assessee towards the “cess”, when it comes to computing income chargeable under the head “profits and gains of business or profession”.

24. The legislative history bears out that the Income Tax Bill, 1961, as introduced in the Parliament, had Section 40(a)(ii) which read as follows :

> “(ii) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains”

25. However, when the matter came up before the Select Committee of the Parliament, it was decided to omit the word “cess” from the aforesaid clause from the Income Tax Bill, 1961. The effect of the omission of the word “cess” is that only any rate or tax levied on the profits or gains of any business or profession are to be deducted in computing the income chargeable under the head “ profits and gains of business or profession”. Since the deletion of expression “cess” from the Income Tax Bill, 1961, was deliberate, there is no question of reintroducing this expression in Section 40(a)(ii) of IT Act and that too, under the guise of interpretation of taxing statute.

26. In fact, in the aforesaid precise regard, reference can usefully be made to the Circular No. F. No.91/58/66-ITJ(19), dated 18th May, 1967 issued by the CBDT which reads as follows :-

> “Interpretation of provision of Section 40(a)(ii) of IT Act, 1961–Clarification regarding. “Recently a case has come to the notice of the Board where the Income Tax Officer has disallowed the ‘cess' paid by the assessee on the ground that there has been no material change in the provisions of section 10(4) of the Old Act and Section 40(a)(ii) of the new Act.
>
> 2. The view of the Income Tax Officer is not correct. Clause 40(a)(ii) of the Income Tax Bill, 1961 as introduced in the Parliament stood as under:-
>
> > "(ii) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains".
>
> When the matter came up before the Select Committee, it was decided to omit the word ‘cess' from the clause. The effect of the omission of the word ‘cess' is that only taxes paid are to be disallowed in the assessments for the years 1962-63 and onwards.
>
> 3. The Board desire that the changed position may please be brought to the notice of all the Income Tax Officers so that further litigation on this account may be avoided.[Board's F. No.91/58/66-ITJ(19), dated 18-5-1967.]”

27. The CBDT Circular, is binding upon the authorities under the IT Act like Assessing Officer and the Appellate Authority. The CBDT Circular is quite consistent with the principles of interpretation of taxing statute. This, according to us, is an additional reason as to why the expression “cess” ought not to be read or included in the expression “any rate or tax levied” as appearing in Section 40(a)(ii) of the IT Act.

28. In the Income Tax Act, 1922, Section 10(4) had banned allowance of any sum paid on account of 'any cess, rate or tax levied on the profits or gains of any business or profession'. In the corresponding Section 40(a)(ii) of the IT Act, 1961 the expression “cess” is quite conspicuous by its absence. In fact, legislative history bears out that this expression was in fact to be found in the Income Tax Bill, 1961 which was introduced in the Parliament. However, the Select Committee recommended the omission of expression “cess” and consequently, this expression finds no place in the final text of the provision in Section 40(a)(ii) of the IT Act, 1961. The effect of such omission is that the provision in Section 40(a)(ii) does not include, “cess” and consequently, “cess” whenever paid in relation to business, is allowable as deductable expenditure.

29. In Kanga and Palkhivala's “The Law and Practice of Income Tax” (Tenth Edition), several decisions have been analyzed in the context of provisions of Section 40(a)(ii) of the IT Act, 1961. There is reference to the decision of Privy Council in CIT Vs Gurupada Dutta 14 ITR 100, where a union rate was imposed under a Village Self Government 15 TXA17&18-13 dt.28.02.2020 Act upon the assessee as the owner or occupier of business premises, and the quantum of the rate was fixed after consideration of the 'circumstances' of the assessee, including his business income. The Privy Council held that the rate was not 'assessed on the basis of profits' and was allowable as a business expense. Following this decision, the Supreme Court held in Jaipuria Samla Amalgamated Collieries Ltd Vs CIT [82 ITR 580] that the expression 'profits or gains of any business or profession' has reference only to profits and gains as determined in accordance with Section 29 of this Act and that any rate or tax levied upon profits calculated in a manner other than that provided by that section could not be disallowed under this sub-clause. Similarly, this sub-clause is inapplicable, and a deduction should be allowed, where a tax is imposed by a district board on business with reference to 'estimated income' or by a municipality with reference to 'gross income'. Besides, unlike Section 10(4) of the 1922 Act, this sub-clause does not refer to 'cess' and therefore, a 'cess' even if levied upon or calculated on the basis of business profits may be allowed in computing such profits under this Act.

30. The Division Bench of the Rajasthan High Court (Jaipur Bench) in Income Tax Appeal No.52/2018 decided on 31st July, 2018 (Chambal Fertilisers and Chemicals Ltd. Vs CIT Range-2, Kota), by reference to the aforesaid CBDT Circular dated 18th May, 1967 has held 16 TXA17&18-13 dt. 28.02.2020 that the ITAT erred in holding that the “education cess” is a disallowable expenditure under Section 40(a)(ii) of the IT Act. Ms. Linhares was unable to state whether the Revenue has appealed this decision. Mr. Ramani, learned Senior Advocate submitted that his research did not suggest that any appeal was instituted by the Revenue against this decision, which is directly on the point and favours the Assessee.

31. Mr. Ramani, in fact pointed out three decisions of ITAT, in which, the decision of the Rajasthan High Court in Chambal Fertilisers and Chemicals Ltd.(supra) was followed and it was held that the amounts paid by the Assessee towards the 'education cess' were liable for deduction in computing the income chargeable under the head of “profits and gains of business or profession”. They are as follows :- (i) DCIT Vs Peerless General Finance and Investment and Co. Ltd. (ITA No.1469 and 1470/Kol/2019 decided on 5th December, 2019 by the ITAT, Calcutta; (ii) DCIT Vs Graphite India Ltd. (ITA No.472 and 474 Co. No.64 and 66/Kol/2018 decided on 22nd November, 2019)by the ITAT, Calcutta; (iii) DCIT Vs Bajaj Allianz General Insurance (ITA No.1111 and 1112/PUN/2017 decided on 25th July, 2019) by the ITAT, Pune.

32. Again, Ms. Linhares, learned Standing Counsel for the Revenue was unable to say whether the Revenue had instituted the appeals in the aforesaid matters. Mr. Ramani, learned Senior Advocate for the Appellant submitted that to the best of his research, no appeals were instituted by the Revenue against the aforesaid decisions of the ITAT.

33. The ITAT, in the impugned judgment and order, has reasoned that since "cess" is collected as a part of the income tax and fringe benefit tax, therefore, such "cess" is to be construed as "tax". According to us, there is no scope for such implications, when construing a taxing statute. Even, though, "cess" may be collected as a part of income tax, that does not render such "cess", either rate or tax, which cannot be deducted in terms of the provisions in Section 40(a)(ii) of the IT Act. The mode of collection, is really not determinative in such matters.

34. Ms. Linhares, has relied upon M/s Unicorn Industries Vs Union of India and others, 2019 SCC Online SC 1567 in support of her contention that "cess" is nothing but "tax" and therefore, there is no question of deduction of amounts paid towards "cess" when it comes to computation of income chargeable under the head profits or gains of any business or profession.

35. The issue involved in Unicorn Industries (supra) was not in the context of provisions in Section 40(a)(ii) of the IT Act. Rather, the issue involved was whether the 'education cess, higher education cess and National Calamity Contingent Duty (NCCD)' on it could be construed as "duty of excise" which was exempted in terms of Notification dated 9th September, 2003 in respect of goods specified in the Notification and cleared from a unit located in the Industrial Growth Centre or other specified areas with the State of Sikkim. The High Court had held that the levy of education cess, higher education cess and NCCD could not be included in the expression "duty of excise" and consequently, the amounts paid towards such cess or NCCD did not qualify for exemption under the exemption Notification. This view of the High Court was upheld by the Apex Court in Unicorn Industries (supra).

36. The aforesaid means that the Supreme Court refused to regard the levy of education cess, higher education cess and NCCD as "duty of excise" when it came to construing exemption Notification. Based upon this, Mr. Ramani contends that similarly amounts paid by the Appellant – Assessee towards the "cess" can never be regarded as the amounts paid towards the "tax" so as to attract provisions of Section 40(a)(ii) of the IT Act. All that we may observe is that the issue involved in Unicorn Industries (supra) was not at all the issue involved in the present matters and therefore, the decision in Unicorn Industries (supra) can be of no assistance to the Respondent – Revenue in the present matters.

37. Ms. Linhares, learned Standing Counsel for the Revenue however submitted that the Appellant – Assessee, in its original return, had never claimed deduction towards the amounts paid by it as "cess". She submits that neither was any such claim made by filing any revised return before the Assessing Officer. She therefore relied upon the decision of the Supreme Court in Goetze (India) Ltd. Vs Commissioner of Income Tax (2006) 284 ITR 323 (SC) to submit that the Assessing Officer, was not only quite right in denying such a deduction, but further the Assessing Officer had no power or jurisdiction to grant such a deduction to the Appellant – Assessee. She submits that this is what precisely held by the ITAT in its impugned judgments and orders and therefore, the same, warrants no interference.

38. Although, it is true that the Appellant – Assessee did not claim any deduction in respect of amounts paid by it towards "cess" in their original return of income nor did the

Appellant – Assessee file any revised return of income, according to us, this was no bar to the Commissioner (Appeals) or the ITAT to consider and allow such deductions to the Appellant – Assessee in the facts and circumstances of the present case. The record bears out that such deduction was clearly claimed by the Appellant – Assessee, both before the Commissioner (Appeals) as well as the ITAT.

39. In CIT Vs Pruthvi Brokers & Shareholders Pvt. Ltd. 349 ITR 336, one of the questions of law which came to be framed was whether on the facts and circumstances of the case, the ITAT, in law, was right in holding that the claim of deduction not made in the original returns and not supported by revised return, was admissible. The Revenue had relied upon Goetze (supra) and urged that the ITAT had no power to allow the claim for deduction. However, the Division Bench, whilst proceeding on the assumption that the Assessing Officer in terms of law laid down in Goetze (supra) had no power, proceeded to hold that the Appellate Authority under the IT Act had sufficient powers to permit such a deduction. In taking this view, the Division Bench relied upon the Full Bench decision of this Court in Ahmedabad Electricity Co. Ltd Vs CIT (199 ITR 351) to hold that the Appellate Authorities under the IT Act have very wide powers while considering an appeal which may be filed by the Assessee. The Appellate Authorities may confirm, reduce, enhance or annul the assessment or remand the case to the Assessing Officer. This is because, unlike an ordinary appeal, the basic purpose of a tax appeal is to ascertain the correct tax liability of the Assessee in accordance with law.

40. The decision in Goetze (supra) upon which reliance is placed by the ITAT also makes it clear that the issue involved in the said case was limited to the power of the assessing authority and does not impinge on the powers of the ITAT under section 254 of the said Act. This means that in Goetze (supra), the Hon'ble Apex Court was not dealing with the extent of the powers of the appellate authorities but the observations were in relation to the powers of the assessing authority. This is the distinction drawn by the division Bench in Pruthvi Brokers (supra) as well and this is the distinction which the ITAT failed to note in the impugned order.

41. Besides, we note that in the present case, though the claim for deduction was not raised in the original return or by filing revised return, the Appellant – Assessee had indeed addressed a letter claiming such deduction before the assessment could be completed. However, even if we proceed on the basis that there was no obligation on the Assessing Officer to consider the claim for deduction in such letter, the Commissioner (Appeals) or the ITAT, before whom such deduction was specifically claimed was duty bound to consider such claim. Accordingly, we are unable to agree with Ms. Linhare's contention based upon the decision in Goetze (supra).

42. For all the aforesaid reasons, we hold that the substantial question of law No.(iii) in Tax Appeal No.17 of 2013 and the sole substantial question of law in Tax Appeal No.18 of 2013 is also required to be answered in favour of the Appellant – Assessee and against the Respondent-Revenue. To that extent therefore, the impugned judgments and orders made by the ITAT warrant interference and modification.

43. Thus, we answer all the three substantial questions of law framed in Tax Appeal No.17 of 2013 in favour of the Appellant – Assessee and against the Respondent -Revenue. Similarly, we answer the sole substantial question of law framed in Tax Appeal No.18 of 2013, in favour of the Appellant – Assessee and against the Respondent – Revenue."

Accordingly, we respectfully follow the aforesaid judgment of the Hon'ble High Court of Bombay in the case of Sesa Gold Limited (supra) and therein conclude that "Education Cess" and the Secondary and Higher Education Cess is not disallowable as a deduction u/s 40(a)(ii) of the Act. We, thus, restore the issue to the file of the A.O for the limited purpose of giving consequential effect. The "additional ground of appeal" raised by the assessee is allowed for statistical purpose in terms of our aforesaid observations.

14. Resultantly, the appeal of the assessee is allowed in terms of our aforesaid observations.

ITA. No.6610/Mum/2019
(Assessment Year: 2014-15)

15. We shall now advert to the assessee's appeal for A.Y. 2014-15. The impugned order has been assailed by the assessee on the following grounds of appeal before us:

> "1. The learned Commissioner of Income Tax (Appeals) erred in facts and in law in not deleting the disallowance under section 14A of the Act to the extent of Rs. 16,10,205/- which was offered by the appellant in the return of income, on the ground that such claim would amount to an additional claim which could only have been made by way of filing a revised return of income and not otherwise.
>
> 2. The learned Commissioner of Income Tax (Appeals) erred in facts and in law in not appreciating that there is no restriction on the powers of an appellate authority to admit an additional claim raised otherwise than by way of filing a revised return.
>
> 3. The learned Commissioner of Income Tax (Appeals) should have deleted the entire disallowance of Rs. 16,10,205/- under section 14A of the Act, having held that the investments in exempt income yielding securities were made out of own funds.
>
> 4. The learned Commissioner of Income Tax (Appeals) erred in facts and in law in not allowing appellants claim of deduction under section 36(1)(vii) r.w.s. 36(1) (viia) of the Act to the extent of Rs. 24.46 crores on the ground that such claim would amount to an additional claim which could only have been made by way of filing a revised return of income and not otherwise.
>
> 5. The learned Commissioner of Income Tax (Appeals) should have allowed the claim of Rs. 24.46 crores under section 36(1)(vii) r.w.s. 36(1) (viia) of the Act, having held that the amount of deduction under section 36(1)(vii) would be

the excess of actual debts written off over the "opening balance" of provision created under section 36(1)(viia) as laid down in circular no. 17/2008 of CBDT.

6. The learned Commissioner of Income Tax (Appeals) erred in mentioning the amount of Rs. 10 lakhs instead of Rs. 10 crores while adjudicating the grounds pertaining to deduction under section 36(1)(viii) of the Act.

7. The Appellant craves leave to add alter or Not Applicable amend any of the grounds of appeal at any time before or at the time of hearing."

Further, the assessee has raised the following "additional grounds of appeal" before us :

"8. Based on the facts and the circumstances of the case and in law, the Assessing Officer be directed to allow the deduction in respect of education cess paid on income-tax amounting to 1,62,86,196/- for the year under consideration.

Without prejudice to the above, where your Honours decide the aforesaid Ground No. 7 in favour of the appellant and any other grounds against the appellant, then the Appellant humbly request your Honours to allow the deduction of total education cess paid on income-tax after considering the additional education cess payable on the tax effect relating to the ground(s) which is/are decided against the Appellant.

The Appellant craves leave to add, alter, amend or withdraw all or any above Grounds of appeal hereinabove and to submit such statements, documents and papers as may be considered necessary either at or before the hearing of this appeal as per law."

16. Briefly stated, the assessee had e-filed its return of income for A.Y 2014-15 on 24.09.2014, declaring a total income of Rs. 208,57,58,150/-. Subsequently, the assessee filed a revised return of income on 24.02.2015; declaring an income of Rs. 166,13,66,510/-. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

17. Assessment order was passed by the A.O u/s 143(3) of the Act, dated 19.12.2016 and the income of the assessee bank was assessed at Rs. 176, 23,66,520/-. During the course of the assessment proceedings the A.O made certain additions/disallowances, viz. (i). disallowance u/s 14A was enhanced by an amount of Rs. 10 lac; and (ii). disallowance of the assessee's claim of deduction u/s 36(1)(viii) of Rs. 10 crore.

18. On appeal, the CIT(A) though allowed the "additional ground of appeal" raised by the assessee, and principally agreed with him that as it had sufficient interest-free funds to make investment in the exempt income yielding securities, therefore, no disallowance of interest expenditure was called for in its hands u/s 14A r.w. Rule 8D. However, relying on the view taken by him while disposing off the assessee's appeal for A.Y 2013-14, he restricted such relief to the extent the disallowance was made by the A.O. Accordingly, the CIT(A) sustained the disallowance u/s 14A to the extent of Rs. 16,10,205/- i.e the amount that was suo motto offered by the assessee in its return of income. As regards the assessee's additional claim for deduction under Sec. 36(1)(vii) r.w.s 36(1)(viia), the CIT(A) following the view taken by him while disposing off the assessee's appeal for A.Y 2013-14, therein dismissed the same. Further, the CIT(A) allowed the assessee's claim for deduction u/s 36(1)(viii) of Rs. 10 crore (wrongly mentioned by him in his order as Rs. 10 lac). Accordingly, the CIT(A) partly allowed the assessee's appeal.

19. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. Both the ld. Authorised Representatives were in agreement that the issues involved in the present appeal were the same as were there before us in the appeal of the assessee for the immediately preceding year i.e A.Y 2013-14.

20. As the issue involved in the grounds of appeal 1 to 3 pertaining to assesses claim for vacating of the disallowance u/s 14A remains the same as was there before us in the assessee's appeal for the immediately preceding year i.e A.Y. 2013-14 in ITA No. 6609/Mum/2019, therefore, our order therein passed shall apply *mutatis mutandis* for the purpose of disposing off the said issue. The **Grounds of appeal Nos. 1 to 3** are allowed in terms of our aforesaid observations.

21. As the issue involved in the grounds of appeal 4 & 5 pertaining to assesses claim for incremental/additional claim of deduction under Sec.

36(1)(vii) r.w Sec. 36(1)(viia) remains the same as was there before us in the assessee's appeal for the immediately preceding year i.e A.Y. 2013-14 in ITA No. 6609/Mum/2019, therefore, our order therein passed shall apply *mutatis mutandis* for the purpose of disposing off the said issue. The **Grounds of appeal Nos. 4 & 5** are allowed in terms of our aforesaid observations.

22. The assessee had by way of raising the ground of appeal No. 6 assailed the order of the CIT(A), on the ground, that while adjudicating the issue qua the assessee's claim for deduction u/s 36(1)(viii), the CIT(A) had wrongly mentioned the amount of Rs. 10 lac (instead of the correct amount of Rs.10 crore). We have perused the order of the CIT(A), and find, that as claimed by the assessee, and rightly so, the assessee had by way of a ground of appeal No. 6-9 so raised before the CIT(A) therein assailed the disallowance of its claim of deduction u/s 36(1)(viii) of Rs. 10 crore, which however, had wrongly been referred by him as Rs.10 lac. Considering the aforesaid mistake, we herein direct the CIT(A) to rectify the same and therein substitute the amount of Rs. 10 lac as mentioned by him at Page 10 – Para 5.2 of his order by the correct amount of Rs.10 Crore. The **Ground of appeal No. 6** is allowed in terms of our aforesaid observations.

23. Before us, the assessee had by way of an "additional ground of appeal" sought deduction of 'education cess' paid on income tax amounting to Rs. 1,62,86,196/- for the year under consideration. As we have admitted the similarly placed "additional ground of appeal" that was raised by the assessee qua the aforesaid issue while disposing off its appeal for A.Y. 2013-14 in ITA No. 6609/Mum/2019, therefore, our order therein passed shall apply *mutatis mutandis* for the purpose of disposal of the present appeal.

24. The appeal of the assessee for A.Y. 2014-15 in ITA No. 6610/Mum/2019 is allowed in terms of our aforesaid observations.

25. Resultantly, both the appeals of the assessee i.e ITA No. 6609/Mum/2019 and ITA No. 6610/Mum/2019 are allowed in terms of our aforesaid observations.

Order pronounced in the open court on 28.06.2021

Sd/-	Sd/-
(S.Rifaur Rahman)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai;
Dated: 28.06.2021
PS: Rohit

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai