IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1060 OF 2014

M/s. Ultratech Cement Ltd. .. Appellant

v/s.

The Additional Commissioner of
Income Tax, Range, 2(2) .. Respondent

Mr. Madhur Agarwal i/b Atul Jasani for the appellant
Mr. Charanjeet Chanderpal a/w Ms. Namita Shirke a/w Ms. Brenda D'Souza for the respondent

CORAM : M.S. SANKLECHA &
S.C. GUPTE, J.J.

RESERVED ON : 5th APRIL, 2017.

PRONOUNCED ON : 18th APRIL, 2017

JUDGEMENT :- (Per M.S. Sanklecha, J)

1] This appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act) challenges the order dated 20th February, 2014 of the Income Tax Appellate Tribunal (hereinafter referred to as the Tribunal). The assessment year involved is A.Y. 2008-09.

2] The appellant assessee has urged only the

following question of law for our consideration :-

> *Whether on the facts and in the circumstances of the case and in law, the Tribunal erred in refusing to admit the additional ground of the appellant of claim of deduction under Section 80IA of the Act on the income earned by the Appellant on operation and maintenance of the Jetty / Port?*

3] On 29th March, 2017, at the request of the parties, the Court while adjourning the appeal had recorded the fact that the appeal itself could be disposed of finally at the stage of admission.

4] We admit the above question at paragraph no.2 above as giving rise to substantial question of law. At the instance and request of the parties, we take up the appeal itself for final disposal.

5] The appellant assessee is engaged in the business of manufacture, sale and trading of cement and cement related products. For the subject

assessment year, the appellant assessee had filed its Return of Income declaring a total income of Rs.1,287 crores. On 20th February, 2011, the Assessing Officer passed an order under Section 143(3) of the Act determining the appellant's income at Rs.1,490 crores.

6] Being aggrieved, the appellant assessee carried the issue in appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. The grounds urged by the appellant – assessee before the CIT(A) were as under :-

(a) The dis-allowance of deduction under Section 80IA of the Act in respect of the Rail System established at Chhatisgarh, Andra Pradesh, Tamil Nadu and West Bengal;

(b) Sales Tax exemption benefit received by the appellant assessee was held to be a revenue receipt when according to the respondent Revenue it was a capital receipt;

(c) The dis-allowance under Section 14A of the Act at a sum higher than that offered for dis-allowance was not justified in law; and

(d) The dis-allowance in respect of the provisions for expenses made for employees

stock option plan (ESOP).

7] The CIT (A) by an order dated 21st December, 2011 partly allowed the appellant assessee's appeal. The appeal was allowed on all issues except on issue of disallowance of expenditure under Section 14A of the Act and on provision for expenses made for ESOP.

8] Being aggrieved, the appellant assessee carried the issue in further appeal to the Tribunal. The appeal as filed urged issues only in relation to dis-allowance under Section 14A of the Act and dis-allowance of provision for expenses made for ESOP. However, before the Tribunal, the appellant assessee sought to raise an additional ground at the time of the hearing of the appeal. The additional ground of appeal which gives rise to this appeal, reads as under :-

> *"(i) The appellant has developed, operated and maintained jetty / port situated at Kovaya in the State of Gujarat under agreement with the Gujarat Maritime board.*

The Jetty / Port commenced its operations in Financial Year 1997-98 i.e. A.Y. 1998-99.

(ii) Under proviso to Sec. 80IA(2), the deduction can be claimed for any ten consecutive years out of twenty years beginning from the year in which the enterprise develops, operates and maintains the infrastructure facility".

9] In support of the above additional ground being entertained, the appellant assessee submitted that the issue of deduction under Section 80IA of the Act with regard to a jetty / port is already on record for the subsequent assessment year i.e. A.Y. 2009-10 when the claim under Section 80IA of the Act in respect of the jetty / port was allowed for the first time. However, the impugned order did not permit the appellant assessee to raise the additional ground as urged by the appellant assessee holding that the relevant facts which would entitle the appellant to claim the benefit of Section 80IA of the Act were not a part of the record for assessment year under consideration i.e. Assessment Year 2008-09. Thus, this issue was not considered.

Further the impugned order holds that reliance upon the order passed for subsequent assessment year allowing the claim under Section 80IA of the Act cannot be considered as evidence for earlier assessment year, when the material facts to support such a claim for the subject assessment year is not on record before the Assessing Officer. This was by placing reliance upon the decision of the Supreme Court in ***National Thermal Power Co. Ltd.(NTPC Ltd.) Vs. Commissioner of Income Tax, 229 ITR 383***. Moreover, the claim under Section 80IA of the Act has to be decided on many factors and the same not having been considered by the Authorities under the Act for the subject assessment year, the above additional ground in respect of deduction under Section 80IA of the Act in respect of Jetty / Port could not be allowed.

10] Being aggrieved, the appellant assessee is in appeal before us and Mr. Agarwal in support of the appeal submits as under :-

(a) The power of the Tribunal to admit

additional ground in an appeal is very wide as its basic purpose is to ascertain the correct tax liability of an assessee in accordance with law. Thus, the additional ground ought to have been allowed to be raised, even if the same was not urged before the lower Authorities.

(b) In any case, the primary facts i.e. the evidence of a jetty / port having been in operation since the Assessment Year 1998-99 was known the Revenue. In the above view, the primary facts being on record, the appellant assessee was entitled to raise an additional ground in the appeal; and

(c) In any case, in the present case, the facts in support of the additional ground being urged were already on record before the Tribunal inasmuch as the appellant assessee's claim for benefit of deduction under Section 80IA of the Act in respect of its Jetty / Port was granted in the subsequent assessment year namely Assessment Year 2009-10 and, therefore, there was evidence on record to allow the urging of the additional ground.

11] As against the above, Mr. Chanderpal, learned Counsel appearing for the respondent Revenue in support of the impugned order submits as under :-

(a) An additional ground could be urged by the appellant assessee for the first time in appeal only if it is supported by evidence on record for the year under consideration;

(b) In any case, under Section 80IA(7) of the Act deduction under Sub-Section (1) of Section 80IA of the Act, is allowable only if the accounts of the undertaking have been audited for the period for which deduction is claimed and a report in Form No.10CCB as required under Rule 18BB(3) of the Income Tax Rules is submitted along with Return of Income. In this case, admittedly, for the subject assessment year, the appellant assessee had not filed necessary Form 10CCB and the audit report which would establish whether or not the appellant assessee is entitled to the benefit of Section 80IA(1) of the Act for the subject assessment year; and

(c) In any case, the grant of benefit of Section 80IA of the Act in a subsequent assessment year cannot be evidence on record for an earlier assessment year to grant the benefit of deduction u/s 80IA of the Act. Each year is a separate assessment year and the assessee must satisfy Sub-Section 4 of Section 80IA of the Act in the year for which deduction is claimed. This by production of evidence of the same by filing Form 10CCB for the subject

assessment year.

In the above view, it is submitted that the impugned order calls for no interference.

12] We note that it is an undisputed position before us that for the subject assessment year, the appellant assessee had not claimed benefit of Section 80IA of the Act in respect of its Jetty / Port either before the Assessing Officer or before the CIT(A). A claim for benefit under Section 80IA of the Act can only be made if the infrastructure facility such as Jetty / Port is, among other things, being run on the basis of an agreement for either developing or operating and maintaining or developing, operating and maintaining a new infrastructure facility. The *sine qua non* provided in Sub-Section (7) of Section 80IA of the Act is the furnishing along with its Return of Income, a report of audited accounts in Form 10CCB as required under Rule 18BBB(3) of the Act. The Form 10CCB which is required to be filed along with Return of

Income has various details to be filled in, including the initial assessment year from which the deduction is being claimed, the nature of the activity carried out with regard to the infrastructure facility, namely, whether it is for developing or developing and operating or for developing, operating and maintaining the new infrastructure facility. It is only on examination of those details as submitted by the auditor in Form 10CCB that the claim of deduction can be considered. It is undisputed that for the subject assessment year, no Form 10CCB has been filed by the appellant assessee. Therefore, there is no evidence on record for subject assessment year to allow the claim. The submission of Mr.Agrawal for the appellant that primary evidence in the form of jetty is on record is not acceptable. Mere ownership or existence of jetty is not evidence of eligibility to the benefit of Section 80IA of the Act, which is admittedly conditional upon satisfaction of certain requirements as provided therein.

13] However, Mr. Agarwal, learned Counsel appearing for the appellant assessee contends that in any case for the subsequent assessment year i.e. Assessment Year 2009-10, the appellant assessee had made a claim for benefit of deduction under Section 80IA in respect of its jetty / port and the same was allowed by the Assessing Officer. According to him, there is no difference in the earlier assessment year which would warrant the Assessing Officer from taking a different view in the subject assessment year. This cannot be accepted, more particularly for the reason that in the subsequent assessment year when the benefit of Section 80IA of the Act was granted, the evidence in the form of the Auditor's report in Form 10CCB of the Rules was available. This Form 10CCB of the Rules is not available on record for the subject assessment year. The consideration and the nature of activity may undergo a change from year to year for purposes of claiming deduction under Section 80IA of the Act. This deduction under Section 80IA of the Act cannot be allowed on the basis of the inference / assumption

that satisfaction of conditions for a subsequent assessment year would mean it is even so for the subject assessment year. Neither can one be subjected to tax on the basis of assumption or presumption nor can exemption / deduction be claimed and allowed on the basis of assumption or presumption.

14] Therefore, we do not agree with the contention of Mr. Agarwal that once benefit under Section 80IA of the Act has been granted to the appellant assessee's jetty / port it must *ipso facto* follow that for the earlier years also the benefit must be granted on the mere say of the assessee that there is no change in the facts and circumstances of the case. Admittedly, for the subject assessment year, there is no claim made for the benefit of deduction under Section 80IA of the Act before the lower authorities and the evidence of an Auditor as required by law in Form 10CCB of the Rules for eligibility of deduction under Section 80IA of the Act is not on record. This would be the evidence

which would be subject to enquiry/examination by the Assessing Officer and/or the C.I.T. (A) before allowing the deduction claimed. This is a factual enquiry to be done at the time of assessment before the claim can be allowed. Thus the view of the Tribunal that the new ground urged could not be allowed to be raised as the same is dependent upon leading of evidence and verification of the same by the Authority before the claim under Section 80IA of the Act can be allowed, cannot be faulted.

15] Mr.Agarwal then contended that once the additional ground is allowed, he would lead evidence in support. This submission seeks to unsettle the settled position as laid down in *NTPC Ltd*. (supra) that additional ground can be urged before the appellate authorities provided the evidence is on record. If the submission of Mr.Agarwal is accepted, that a new ground alongwith fresh evidence can be urged before the appellate authorities, even if not raised earlier without anything more (such as decision of Court or valid

reasons for not raising the claim earlier) would unsettle the settled law. Accepting above submission would lead to great uncertainty and fall foul of one of the basic tenets of good tax administration i.e. finality to assessments.

16] It was then contended by Mr.Agarwal that evidence for the subject assessment year is on record in the form of an assessment order for the subsequent assessment year. Therefore, the additional ground raised should have been admitted for consideration.

17] In support, he placed reliance upon the decision of the Punjab & Haryana High Court in *Atlas Cycle Industries Ltd. v. C.I.T., Patiala* **(133 ITR 231)** and the decision of the Calcutta High Court in *Indra Singh & Sons Pvt.Ltd. v. Union of India & another* **(LXIV ITR 501).** Both the aforesaid decisions arise out of rectification applications filed before the authorities and the words for consideration were "mistake apparent on the record". In this case, we

are not dealing with mistake apparent on record but with the raising of additional grounds in the absence of evidence on record for the subject assessment years. Therefore, it would have no application to the present facts.

18] In the present facts, the necessary evidence entitling the appellant to claim deduction u/s 80IA of the Act for the subject assessment year is not on record. As pointed out hereinabove, the benefit of deduction u/s 80IA of the Act is available only when Form 10CCB is filed duly certified by the auditors. This Form 10CCB requires detailed information to be provided, which would then be a subject of examination by the Assessing Officer before extending the benefit of deduction u/s 80IA of the Act.

19] Mr.Agarwal then placed reliance upon the decision of the Apex Court in *Hukumchand Mills Ltd. v. CIT* **(62 ITR 232).** The issue before the Tribunal was the question as to what should be the proper

written down value of the buildings and machinery for calculating depreciation u/s 10(2)(vi) of the Indian Income Tax Act, 1922 (1922 Act). The assessment year involved was 1950-51 to 1952-53. In the above case, the assessee was incorporated in the native State of Indore. Therefore, it was assessed to tax in British India as non-resident. After the Constitution came into force and the assessee became a resident, the question which arose was determination was the written down value of the building and machinery for calculating depreciation u/s 10(2)(vi) of the 1922 Act. The Assessing Officer as well as the first appellate authority did not accept the assessee's contention that the original cost of the buildings and machinery be taken as written down value for the purpose of computing depreciation. It held that only that part of the depreciation which was actually allowed under the 1922 Act could be considered while arriving at the written down value of the fixed assets. The Tribunal remanded the entire issue to the Income Tax Officer to hold further enquiry with regard to

whether or not the depreciation which was paid under the Industrial Tax Rules should be taken into account for the purpose of computing the written down value. In the aforesaid case, the Apex Court held that no objection with regard to the revenue raising the additional ground for the first time was raised before the Tribunal or before the High Court. Notwithstanding the above, the Apex Court held that even if it is assumed that such an issue of additional ground was raised before the Tribunal, it was open to the Tribunal to consider the additional ground and for that purpose, remand the issue. The Court held that the question for consideration in appeal from orders of lower authorities was the proper written down value of the buildings and machinery. Therefore the additional ground to determine the above issue could be raised.

20] In this case, the issue of claim for deduction u/s 80IA of the Act was not the issue raised before the lower authorities. In the above case of *Hukumchand Mills Ltd*. (supra), it was not

the case of the Assessing Officer that the evidence was not on record. In fact the order was passed on the basis of the evidence being already on record, but a new ground was being urged by the revenue. Thus, the aforesaid decision would not be of any assistance to the appellant. In the present facts, the evidence which would entitle the appellant to raise the issue of deduction under Section 80IA of the Act in respect of port / jetty by way of an additional ground before the Tribunal is not on record.

21] Mr.Agarwal next placed reliance upon the decision of the Apex Court in *CIT v. Mahalaxmi Textile Mills Ltd.* **(66 ITR 710).** In this case, the assessee had claimed an expenditure of Rs.93,000/- for introduction of the "Casablanca conversion system" in its spinning plant. This involved replacement of certain rollers to the spinning machinery, removal of ring frames from certain existing parts and introduction of new parts so as to make the machines more effective. The assessee

claimed development rebate on the ground of introduction of "Casablanca conversion system" involved in the installation of new machinery. Before the Tribunal, in the alternative, for the first time, the assessee claimed that in any event the expenditure incurred for introduction of the "Casablanca conversion system" should be allowed as current repairs u/s 10(2)(v) of the 1922 Act. The Apex Court held that the Tribunal had evidence before it from which it could conclude that the expenditure of Rs.93,000/- was allowable as current repairs even if the claim for development rebate was disallowed. In the aforesaid facts, it would be noted that all the evidence was available before the Tribunal entitling the appellant – assessee to raise an additional alternative ground. In these circumstances, the above decision would also not assist the appellant – assessee. In the present facts, the evidence was not on record for the subject assessment year.

22] Mr.Agarwal then placed reliance upon the

Full Bench decision of this Court in *Ahmedabad Electricity Company Ltd. v. CIT* **(199 ITR 351).** In the above case, the issue involved was whether an additional ground could be raised before the Tribunal with regard to deductibility of the sums transferred to the contingency reserve and dividend control reserve. During the proceedings before the Assessing Officer for the AY 1962-63 to 1971-72, the appellant – assessee did not claim the deductions on account of sums transferred to contingency reserve and dividend control reserve. However, when the matter was pending before the Tribunal, this Court in the case of *Amalgamated Electricity Co.Ltd. v. CIT* **(97 ITR 334)** held that the amounts transferred to contingency reserve and dividend control reserve are allowed as deductions on revenue account. It is in view of the decision of this Court in the case of *Amalgamated Electricity Co. Ltd.* (supra) that the assessee sought to raise additional grounds before the Tribunal. However, the Tribunal refused to grant leave to the assessee to raise such an additional ground. As there was difference of

opinion between various decisions of this Court, the matter was placed before the Full Bench to resolve the controversy. The Full Bench of this Court held that the parties are allowed to raise additional grounds before the Tribunal so long as they arise from the subject matter of the proceedings and not necessarily from the subject matter raised in the memo of appeal. The reliance was also placed upon the decision of the Apex Court in *Jute Corporation of India Ltd. v. CIT* **(187 ITR 688)** wherein the Apex Court permitted the appellant to raise an additional ground for the first time before the appellate authority claiming deduction of purchase tax liability because the same had become liable to payment subsequent to the assessment order. The Full Bench observed that the Apex Court in *Jute Corporation of India Ltd.* (supra) made reference to the decision of the Apex Court in *Additional Commissioner of Income Tax Vs. Gurjargravures P. Ltd.* **(111 ITR 1)**, and held that it does not prohibit the raising of an additional ground before the appellate authority, when the ground so raised could

not have been raised before the Assessing Officer or the ground now becomes available in view of changed circumstances such as a decision of a Court allowing a particular deduction.

23] Therefore, before an additional ground is allowed to be raised, the appellate authority must be satisfied that the ground raised could not have been raised earlier for good reasons. The underlying basis for allowing the raising the additional ground in the case of *Ahmedabad Electricity Co.Ltd.* (supra) was the subsequent decision rendered by this Court in *Amalgamated Electricity Co.Ltd.* (supra) when appeal was pending. As held by the subsequent decisions of the Apex Court in *NTPC Ltd.* (supra), a judicial decision when an appeal is pending will entitle raising of additional ground.

24] In any view of the matter, the aforesaid decision does not deal with the situation which arises for consideration in this case viz. relying

upon the evidence on record for a subsequent assessment year to hold that the assessee is entitled to a benefit of deduction u/s 80IA of the Act for an earlier assessment year. A deduction under Chapter VIA of the Act under which Section 80IA of the Act falls would depend, as pointed out above, upon the satisfaction of the facts necessary for claiming a deduction. The allowing of a deduction in a subsequent year's assessment order cannot determine the facts as existing in the earlier assessment year, such as in this case so as to allow the deduction.

25] In fact, the issue with regard to the raising of new grounds in the absence of any evidence on record is no longer *res integra* in view of decision of the Apex Court in ***Addl. Commissioner of Income Tax Vs. Gurjargravures Pvt. Ltd.,(supra).*** In the above case, it has been held that an additional ground cannot be raised before the appellate Authority when no claim for a particular deduction was made before the original authority nor

was there any material on record to support such a claim. Further the Court held that merely by allowing the deduction for a subsequent assessment year, it could not be held that conditions for availing the deduction in the subject assessment were also satisfied. In the present facts also, the claim for deduction under Section 80IA of the Act was not made before the Assessing Officer or the CIT(A) but was made for the first time only before the Tribunal nor was there any evidence in support of the claim for the subject assessment year on record. Thus it stands covered by the above decision in *Gurjargravures Pvt. Ltd.* (supra). The aforesaid decision of the Apex Court was subject matter of consideration in ***Jute Corporation of India Ltd.(supra)*** wherein the Court while distinguishing *Gurjargravures Pvt. Ltd.* (supra) held that the additional ground could also be raised before the appellate Authority if such ground could not have been raised at the earlier stage i.e. when the return of income was filed. This is only when the assessee is able to satisfy the appellate Authority

that the ground now raised was bona fide and the same could not have been raised earlier for good reasons. In such cases, the raising of additional ground could be allowed. In this case, there is nothing on record to indicate as to what was the reason which prevented the appellant assessee from raising a claim for deduction under Section 80IA of the Act for subject assessment year during the proceedings before the Assessing Officer and the CIT(A). Therefore, in the above facts , the view taken by the Tribunal in not allowing the appellant to raise additional ground in appeal is in line with the decision of the Apex Court in **Gurjargravures Pvt.Ltd.** (supra), **NTPC Ltd.** (supra) **and Jute Corporation of India Ltd.**

26] None of the decisions cited by the appellant would render the decision of the Supreme Court in *Gurjargravures Pvt.Ltd.* (supra), read with *Jute Corporation of India Ltd.* and *NTPC Ltd.* (supra) inapplicable to the present facts.

27] There can be no dispute that whether or not to allow an additional ground to be raised before the appellate authority is to be decided by the appellate authority in exercise of its discretion considering the facts and circumstances of the case before it. Where only a pure question of law arises from facts which are already on record, then there is no reason why the appellate authority should not consider the question of law so as to determine the correct tax liability of an assessee in accordance with law. However, where evidence is to be examined and that is not on record, then it will be considered only if the parties seeking to raise the additional ground satisfies the authority concerned that for good and sufficient reasons, the ground could not be raised before the lower authorities. In the present facts, no such ground has been made out by the assessee before the Tribunal. 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 80IA of the Act. The additional ground is being raised for the first time before the Tribunal without relevant evidence being on record.

28] In the above view, the substantial question of law is answered in the negative i.e. in favour of the respondent – revenue and against the appellant – assessee.

29] Appeal is disposed of in above terms.

30] It may be pointed out that presently one of us (Sanklecha,J.) is a Visiting Judge to the Aurangabad Bench of this Court with effect from 10.4.2017. Therefore, a draft order of this petition (partly dictated) was received on his e-mail account from the Stenographer at Mumbai. On 15.4.2017, he sought to send the draft order on his e-mail account to his Stenographer at Aurangabad to obtain print out to carry out corrections and also

dictate further. However, while doing so, he omitted putting in the suffix to the name of the Stenographer, which was a part of his e-mail address. Therefore, the draft order was forwarded to an incorrect e-mail account rather than to the correct e-mail account of his Stenographer. Thereafter (Sanklecha,J.) forwarded another e-mail to the wrong addressee clearly indicating that it was sent by mistake and not meant for him. The aforesaid facts have been recorded only to ensure transparency.

(S.C. GUPTE, J.) **(M.S. SANKLECHA, J.)**