

(2014) 04 GUJ CK 0047

In the Gujarat High Court

Case No : Tax Appeal Nos. 2562, 2560, 2561, 2563, 2567, 2568, 2569, 2570, 2602 and 2607 of 2009

Commissioner of Income Tax

APPELLANT

Vs

Mitesh Impex

RESPONDENT

Date of Decision : 02-04-2014

Acts Referred:

Income Tax Act, 1961 — Section 10AA, 10B, 10B(3), 10B(6), 2(29BA)
Special Economic Zones Act, 2005 — Section 2(r)

Citation : (2014) 270 CTR 66 : (2014) 367 ITR 85

Hon'ble Judges : Sonia Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Pranav G. Desai, Advocate for the Appellant No. 1, Advocate for the Appellant; B.S. Soparkar, Advocate for Mrs. Swati Soparkar for the Opponent No. 1, Advocate for the Respondent

Judgement

Akil Abdul Hamid Kureshi, J.—This group of appeals involves similar questions of law in substantially similar factual background. Since these appeals were admitted at different points of time, it is possible that questions framed in some of the appeals may have been slightly differently worded. In order to achieve uniformity for the purpose of all these appeals to answer common questions of law, we adopt following questions of law, which were framed in Tax Appeal No. 2562 of 2009 while admitting the appeal. For the purpose of all the appeals, therefore such questions shall be answered which are as follows:-

(1). Whether in the circumstances and the facts of the case and in law, the Appellate Tribunal erred in treating the processes employed by the assessee in segregating the metal scrap from cable scrap as "Manufacture or produce" within the meaning of section 10B of the income tax Act?

(2). Whether in the circumstances and the facts of the case and in law, the Appellate Tribunal erred grievously in setting aside the issue relating to DEEMED EXPORT (DTA sales) to the file of the Assessing Officer and thereby not

confirming the concurrent findings of the Assessing Officer and the CIT(A)?

(3). Whether in the circumstances and the facts of the case and in law, the Appellate Tribunal is right in allowing deduction u/s. 80IB of the Income tax Act, 1961?

(4) Whether in the circumstances and the facts of the case and in law, the Appellate Tribunal is right in confirming the order of the CIT (A) in allowing deduction u/s. 80HHC without adjudicating on the ground of appeal taken by the revenue?

2. We would refer to facts arising in Tax Appeal No. 2562 of 2009. It would be convenient to deal with Questions No. (1) and (2) together. First question pertains to Revenue's objection to the assessee's deduction u/s 10B of the Income Tax Act, 1961 ("the Act" for short) on the ground that the activity carried on by the assessee did not amount to manufacturing activity. The assessee being a 100% Export Oriented Unit ("EOU" for short) had sold part of its goods to units situated in Domestic Tariff Area ("DTA" for short), which were also EOUs and claimed deduction qua such profits also u/s 10B of the Act. The Revenue contends that in any case such sales by the assessee in DTA would not qualify for deduction u/s 10B of the Act. This has given rise to the second question noted above.

3. The respondent assessee is a 100% EOU and is engaged in the activity of segregation and processing of metal scrap of various natures. Out of such separate segregated scrap, part of it would be used by the assessee for manufacture of iron ingots. Some parts of the scrap would be reprocessed and resold. With respect to the details of such processing activities carried on by the assessee in order to ascertain whether such activity would amount to manufacture, we would advert at a later stage. The assessing officer, however, believed that such activity would not amount to manufacture barring the process by which the assessee produced ingots. To that extent, the assessing officer granted deduction u/s 10B of the Act, since admittedly the assessee complied with other conditions for grant of the claim. However for the rest of the profit the assessing officer rejected the assessee's claim by his order of assessment dated 31.3.2006 for the assessment year 2003-04. He also held that the assessee's sales to DTA areas are not export sale. Deduction u/s 80IB of the Act would not be available on such sales.

4. The assessee carried the matter in appeal. CIT(Appeals) examined the assessee's process in detail. He held the issue partially in favour of the assessee. Part of the activity was held to be manufacturing activity but to the extent the assessee's process amounted merely to segregation of mix metal scrap, he held that the same was not a manufacturing process. With respect to assessee's DTA sales, he held that the same cannot form part of the assessee's export turnover, and therefore, not eligible for deduction u/s 10B of the Act.

5. The assessee carried the matter in further appeal before the Tribunal. The

Tribunal by the impugned judgment noted at length the assessee's process and referred to the decision of Supreme Court in case of Vijay Ship Breaking Corpn. and Others Vs. Commissioner of Income Tax, to hold that the same amounted to manufacturing activity.

6. With respect to the assessee's claim for deduction on its DTA sales, the Tribunal placed the matter back before the assessing officer in following terms:-

13. Regarding claim u/s. 10B on deemed exports we have already set aside this issue to the file of assessing officer in case of M/s. Siyaram Metals P. Ltd. in ITA No. 377/RJT/2006 for the assessment year 2002-03.

11. This left us with ground of assessee's appeals regarding claim u/s. 10B of deemed exports. Before us, Learned AR has placed written submission pressing for allowance of deduction on deemed export u/s. 10B of the Act. Learned DR relied up on Para no. 2.9 the order of CIT(A). Ld. AO has dealt with the written submission made by assessee vide letter dated 20/10/2004 pressing for the deduction u/s. 10B of the Act. He has rejected this submission that deduction u/s. 10B is allowed only in case goods are exported out of India. He held that deemed export is not mentioned u/s. 10B therefore, deduction is not allowable u/s. 10B on these sales. Learned CIT(A) has also disallowed the claim of the assessee on this ground. In the grounds of appeal assessee has stated that sales consideration is received in foreign currency relating to deemed exports whereas Ld. CIT(A) has held that sales consideration is received in Indian currency. However, before us neither party has put that how deemed exports are defined under Export and Import policies vis a vis condition of deduction u/s. 10B. No facts are also put before us by either party about receipt of sale proceeds vis a vis conditions envisaged u/s. 10B(3) of the IT Act. It is also not clear whether it is third party export or not. These facts are also not clear from the assessment order as well as appellate order of CIT(A). Therefore we set aside claim, of the assessee regarding deduction u/s. 10B on deemed exports to the file of assessing officer to examine in detail about claim of the assessee of deduction u/s. 10B of the Act on this sales and decide issue afresh in accordance with law.

7. On the basis of the material on record learned counsel Mr. Pranav Desai for the Revenue submitted that the assessee did not carry out any manufacturing activity. Deduction u/s 10B of the Act is available only if the assessee manufactures a new article or a thing. Mere segregation of scrap would not amount to manufacturing an article or a thing.

With respect to assessee's DTA sales, counsel contended that such sales do not amount to export and, therefore, the assessing officer rightly declined the claim of deduction.

8. On the other hand, learned counsel Mr. B.S. Soparkar for the respondent assessee took us through the detailed process undertaken by the assessee and contended that the same was not limited to segregation of metal scrap but a detailed manual and mechanical process was involved which resulted in bringing

into existence a new marketable article with a distinct identity and name. Counsel relied on several decisions to which we would refer to at a later stage.

With respect to the assessee's DTA sales, counsel submitted that since the issue is remanded by the Tribunal without any opinion, the assessing officer be permitted to examine the same in accordance with law.

9. From the record, it emerges that the assessee imports three kinds of scrap, namely, mix cable scrap, mix metal scrap and old/used transformers. From such scrap so imported, they undertake different processes for extraction of materials, which are possible to salvage from such scrap. Admittedly, part of the scrap is used for production of iron ingots. To this extent even the assessing officer accepted that the same amounted to manufacturing activity. Production of iron ingots would necessarily require not only segregation of the scrap but also melting at a high temperature and thereafter production of bars. To this aspect, therefore, the Revenue rightly did not raise any issue.

10. The process undertaken by the assessee was explained before the authorities as under:-

a) Mix Cable Scrap

Principle raw material being mix metal copper cable scrap is imported. This material when received in factory is sorted and segregated in different diameters and of various lengths. This process is done manually or most of the times mechanically to remove jackets, upper layer and paper and for making them suitable for feeding in different cable cutting machines and stripping machines. After a process various strips in the cables are removed, the sorted cable scraps put in to cable cutting machine for cutting and stripping. Out of this process, several types of copper wire are generated. This process also generates several types of impurities such as plastic, dust and other metals. Clean copper material emerges out of this process, which is different and distinct from the cable wire scrap. The pure copper obtained from this process is then bailed in bailing machine. This makes this metal in different sizes and weights as required. Then this material is packed and exported.

a) Mix Metal Scrap

Mix metal scrap is imported from various countries. This scrap is consisting of several substances such as stones, rubber, steel, metal-ferrous as well as non-ferrous etc. It is generally the scrap generated from dismantling of buildings or other structures and plants etc. after importing them several processes are being carried out manually and mechanically through various machines and Metal is derived from the whole process. The scrap on which manufacturing process is carried out is of no use but subject to this manufacturing process. The mix metal was used as a raw material and a further manufacturing process was carried out namely segregation, removal of attachments and sorting of various metals in various grade/categories. In the entire process of manufacturing the raw

material was mix material, which has not any direct commercial usage for other industries. In the course of manufacturing process metals having different identity and usability are generated from the mix metal. The mix metal loses its identity and results in production of non-ferrous metal, ferrous metal, other non-metallic parts, slag or ingots by using such manufacturing metals.

b) Old/Used Transformer

The firm has imported old & used machinery. Gadgets etc. after the completion of their useful life. The nature of the raw material was machinery, gadgets etc, distinct and identifiable articles. The machinery, gadgets etc. were used as raw material and a further manufacturing process was carried out namely opening of gadgets for removal of clean metal by machine or hand for manufacturing different metals. In the entire process of manufacturing the raw material was old and used, discarded machinery, gadgets and in the course of manufacturing process of nonferrous metal, ferrous metal, non-metallic material or ingots by using such manufactured metals.

11. On the basis of such process, the Tribunal held and observed as under:-

21. We have gone through the above process and final product which is ferrous and non ferrous metal scrap and other type of scrap was quite different from the raw material. The final products of raw material were further used for industrial uses. While the raw material of the assessee is of no use in foundry or industries. The final products being the scrap of specific metal/non-metal material had distinct identity, use, character and name. The final products had been obtained after applying one or more process may be manually or mechanically and thereafter the different commodity has come into existence. Therefore the process employed by the assessee unit is falling in the four corners of manufacture or produce.

22. We find that concept of EOU is covered by Excise, Customs and Foreign Trade Rules. One of the requirements for getting EOU status was that a person should be engaged in manufacturing or production. Anybody not doing manufacturing is not granted EOU status. During the course of hearing the Id. AR drawn out attention to section 10AA in IT Act granting tax benefits to SEZ (Special Economic Zone) units and the definition of manufacture was same as section 2(r) of SEZ Act, 2005. That definition was very wide and included the process of cutting, repair; assemble etc, within the meaning of manufacture. As per section 10B has to be understood as per Income Tax Act. We find that the word "Manufacturing" is also defined in DGFT and similarly, about the definition of manufacturing in SEZ Act, 2005. We find that the definition used in section 10B has to be read altogether and what shown in the definition of manufacturing in Custom Act cannot be same while examining the claim of the assessee u/s. 10B of the Act.

23. We have examined the basic requirement of word "Manufacturing and Production". The assessee has used three types of raw material viz. mixed cable

scrap, mixed metal scrap and old/used transformers. An electric cable is a product which contains a plastic cover, a protecting access sheet or wire mesh, below that there are further insulating and protecting sheets which in term contain one or more insulated copper/aluminum wire which carries electric current. We find that after its useful life is over, such cable may be sold as scrap. Such cable is one type of raw material for the appellant. In order separate different types of materials available in the cable, different processes like cable cutting, cable stripping (removal of rubber/plastic cover) are to be employed. We find that it is only after employing different manual/mechanical processes it results into production of scrap of various metal/material like aluminum, copper lead, mild steel, stainless steel, rubber zinc, paper and waste. We find that the input raw material was a cable scrap and the output of the processes is different kinds of material in the form of scraps. Both these commodities are commercially distinct and separate. Their identity, name usability is different. Therefore, we find that the process employed by the appellant has resulted into production of different commodity. Similarly, the transformer also contains different kinds of material in the outside steel body. There again various processes like cutting, stripping etc. have to be applied to obtain in a scrap form, aluminum, copper, bead MS etc. Hence, this process can also be treated as manufacturing or production because the final product is commercially distinct and different from raw material.

24. We find that the third material being mixed metal scrap is just a mixture of different scrap material which may include used parts, fittings, shredded industrial waste of various non-ferrous metal/non-metal items. From this mixed scrap, different types of scrap material are segregated and separately collected. We find that the raw material was simply mixture of different scrap material which has been separated.

25. We find that there is difference in the raw material and final product and the process was segregation of mixed scrap. Based on the decision of the Hon SC in the case of Vijay Ship Breaking Corpn. and Others Vs. Commissioner of Income Tax, and India Cine Agencies Vs. Commissioner of Income Tax, Madras, where production is also eligible for deduction. Therefore, out of the processes of three different types of raw material, the segregation of mixed metals scrap can be held as the Production. There is one more activity which the appellant is doing which is melting the final scrap material obtained from any of these processes and foundry to make ingots. We find that this activity there is no doubt that it amounts to production. Although the AO has denied the entire claim, it is submitted by the learned AR of the assessee that in some other cases, the AO has considered the activity of making ingots as manufacturing.

12. The term "manufacture" was not defined in the Act till the year 2009. Currently u/s 2(29BA) introduced with effect from 1.4.2009, the term "manufacture" is defined as under:-

2(29BA)"manufacture", with its grammatical variations, means a change in a non-

living physical object or article or thing,-

(a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or

(b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure;

13. The Central Excise Act, 1944 contains definition of the term "manufacture" in section 2(f) as under:-

2(f)"manufacture" includes any process-

(i) incidental or ancillary to the completion of a manufactured product;

(ii) which is specified in relation to any goods in the section or Chapter notes of The First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or

(iii) which in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer;

and the word " manufacture" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;

14. The Special Economic Zones Act, 2005 also defines the term "manufacture" but in a slightly different manner. Such definition contained in section 2(r) reads as under:-

2(r) "manufacture" means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine, a new product having a distinctive name, character or use and shall include processes such as refrigeration, cutting, polishing, blending, repair, remaking, re-engineering and includes agriculture, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining;

15. Though the three Acts mentioned above contain definitions of the term "manufacture", which definitions are worded slightly differently, the Courts have accepted the principle of fairly universal application that where the change or series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognised as a distinct and new article that has emerged as a result of the process, it would amount to manufacture of an article or thing. Reference in this respect may be made to the decision of the Supreme Court in the case of Ujagar Prints Vs. Union of India (UOI) and Others

etc. etc., .

16. At the same time, it is also well settled that the word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinct name, character or use. Reference may be made in this respect to the decision of the Supreme Court in the case of Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool, .

17. In the present case, as pointed out by the counsel for the assessee, in case of mix cable scrap the material would be sorted and segregated in the factory in different diameters of various lengths. Thereafter, jackets and upper layers would be removed mechanically in order to make them suitable for feeding in different cable cutting machines and stripping machines. Thereafter various strips in the cables are removed and sorted cable scrap would be put in cable cutting machines for cutting and stripping. In the process, several types of copper wires would be generated. Impurities such as plastic, dust and other metals would be separated through this detailed process and clean copper material would be sold after baling them on the baling machines and packing for export sale.

18. Likewise, mix metal scrap would consist of several substances such as stones, rubber, steel, ferrous as well as non-ferrous metals. This would be derived mostly from dismantling of buildings and other structures and plants. Scrap as such would have no other use or marketability before subjecting to manufacturing process. Assesseees would segregate and remove attachments, sorting out various metals in categories from the mix metals. This process would derive ferrous metal, other non-metallic parts etc.

19. In the case of old/used transformers the assesseees would import used old gadgets and machines once their useful life is over. From such used machines and gadgets the assesseees would remove metal and other parts and ultimately segregate non-ferrous and ferrous metals, non-metallic material or ingots by using such metals extracted from the gadgets.

20. It can thus be seen that in all three cases the assesseees would put the imported material to series of manual and mechanical processes and through such exercise so undertaken, bring into existence entirely new, distinct and different commodities which are marketable. Thus, the Tribunal, in our opinion, correctly came to the conclusion that this process amounted to manufacturing. In the case of Vijay Ship Breaking Corporation and others vs. Commissioner of income tax (supra), the Supreme Court considered a question where activity of ship breaking amounted to manufacture and observed as under:-

8. Firstly, in the case of Ship Scrap Traders, Ispat Traders and Bansal Brothers Vs. Commissioner of Income Tax, , the Bombay High Court has analysed the entire ship breaking activity, the articles which emerged from that activity, the various steps which are required to be undertaken for ship breaking activity and, consequently, after placing reliance on the judgment of this Court in

Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, , it has held that the ship breaking activity resulted in production of articles which emerged when the ship breaking activity stood undertaken. In our view, the important test which distinguishes the word "production" from "manufacture" is that the word "production" is wider than the word "manufacture" as held in Budharaja's case. Further, it is true that in Budharaja's case, the Division Bench has used the word "new article". However, what the Division Bench meant was that a distinct article emerges when the process of ship breaking is undertaken. Further, the Legislature has used the words "manufacture" or "production". Therefore, the word "production" cannot derive its colour from the word "manufacture". Further, even according to the dictionary meaning of word "production", the word "produce" is defined as something which is brought forth or yielded either naturally or as a result of effort and work (see Webster's new international dictionary). It is important to note that the word "new" is not used in the definition of the word "produce".

21. In the case of Income Tax Officer, Udaipur Vs. Arihant Tiles and Marbles (P) Ltd., in the context of the assessee's claim for deduction u/s 80IA of the Act on its activity of cutting and polishing marbles, the Apex Court held and observed as under:-

22. Applying the above tests laid down by this Court in Commissioner of Income Tax, Orissa and Others Vs. N.C. Budharaja and Company and Others, to the facts of the present cases, we are of the view that blocks converted into polished slabs and tiles after undergoing the process indicated above certainly results in emergence of a new and distinct commodity. The original block does not remain the marble block, it becomes a slab or tile. In the circumstances, not only is there manufacture but also an activity which is something beyond manufacture and which brings a new product into existence and, therefore, on the facts of these cases, we are of the view that the High Court was right in coming to the conclusion that the activity undertaken by the respondents-assesseees did constitute manufacture or production in terms of Section 80IA of the Income Tax Act, 1961.

22. Additionally we also notice that the assessee, as an EOU is required to carry out manufacturing activity and on its DTA sales is also required to pay excise duty which admittedly, the assessee paid and excise department collected. It would be a dichotomy if on the same activity the assesseees were to pay excise duty on the ground that the same amounted to manufacturing activity but would be declined deduction under the Income Tax Act on the ground that the same did not. In this context, in the case of income tax officer vs. Arihant Tiles and Marbles P. Ltd. (supra) the Supreme Court had observed as under:-

23. Before concluding, we would like to make one observation. If the contention of the Department is to be accepted, namely that the activity undertaken by the respondents herein is not a manufacture, then, it would have serious revenue consequences. As stated above, each of the respondents is paying excise duty,

some of the respondents are job workers and the activity undertaken by them has been recognised by various Government Authorities as manufacture. To say that the activity will not amount to manufacture or production u/s 80IA will have disastrous consequences, particularly in view of the fact that the assessee in all the cases would plead that they were not liable to pay excise duty, sales tax etc. because the activity did not constitute manufacture. Keeping in mind the above factors, we are of the view that in the present cases, the activity undertaken by each of the respondents constitutes manufacture or production and, therefore, they would be entitled to the benefit of Section 80IA of the Income Tax Act, 1961.

23. Under the circumstances Question No. (1) is answered in favour of the assessee and against the Revenue. Insofar as second question is concerned, since the Tribunal has merely remanded the entire issue before the assessing officer for fresh consideration of the entire issue without any observations and/or directions, we do not see any reason to interfere. The assessing officer shall examine whether on DTA sales by the assessee, claim of deduction u/s 10B of the Act would be allowable. It is clarified that whether the remittances on such sales have been received in foreign exchange or not would be just one of the additional aspects of the matter.

24. It would be useful to club Questions (3) and (4) for common consideration. Both questions pertain to Revenue's stand that the assessee could not have raised a new claim for the first time before CIT(Appeals) without revising return before the assessing officer.

25. Question (3) pertains to such fresh claim u/s 80IB of the Act. Question No. (4) pertains to the assessee's claim u/s 80HHC of the Act. Legal issue is, however, common.

26. Brief facts are that in the return filed, the assessee did not raise any claims u/s 80IB or 80HHC of the Act. (In the case of Mitesh Implex Tax Appeal No. 2562 of 2009, such claim was though initially made but later on dropped by filing revised return). In appeal before CIT(Appeals) such claims were made. In the case of Mitesh Implex, CIT(Appeals) entertained both the claims ignoring Revenue's objection. The assessing officer was granted opportunity to oppose the claims on merits. After examination of facts on record, he disallowed the assessee's claim u/s 80IB on the ground that the manufacturing activity had not commenced during the year under consideration to enable the assessee to make such a claim. He however, accepted the assessee's claim on merits u/s 80HHC of the Act. In appeal, the Tribunal rejected the Revenue's contention that in view of the judgment of the Supreme Court in the case of Goetze (India) Ltd. Vs. Commissioner of Income Tax, , such claims could not have been made without filing revised return. There is some ambiguity whether the Tribunal had allowed the assessee's claim u/s 80IB of the Act on merits also or not. Counsel for the assessee, however, clarified that in the case of Mitesh Implex since CIT(Appeals) had rejected the claim on merits, the assessee would not contend that the judgment should be read as also granting such claim on merits.

27. In the case of all other assessees similar facts emerge. The claims u/s 80IB/80HHC were made for the first time before CIT(Appeals) and from facts on record granted to the extent found allowable. The Tribunal had confirmed the view of CIT(Appeals). We may record the Tribunal's discussion on this aspect.

36. We have heard the rival contention of both the parties. We relied upon the decision of Hon Punjab and Haryana High Court in the case of Ramco Industries reported in 17 DTR 241, wherein it is held as under:-

When the assessee having fully furnished the documents and submitted form no. 10CCB during the assessment proceedings, claiming the deduction under 80IB which was not claimed in the return, the deduction is admissible even in absence of revised return. The Hon. High Court held that there was no requirement for filing of any revised return. Hon. High Court has further considered the decision of the Goetze (India) Ltd. Vs. Commissioner of Income Tax, and after considering the decision of SC the High Court has held that when the assessee has filed form no. 10CCB during the assessment proceedings, the claim is admissible and CIT(A) has rightly allowed the claim of the assessee and we find that there is no requirement of filing any revised return.

37. In the instant case, on hand, the assessee has filed all the required documents before AO. We find that in support of the claim, audit report in form no. 10CCAC was also submitted and that claim was also forwarded to the AO. Therefore, we are of the view that CIT(A) is justified in allowing the claim. As about the deduction u/s. 80IB, the condition required for being eligible to the deduction are similar to that of the conditions applicable for section 10B. Moreover, there is specific bar in granting two benefits. The audit report in form no. 10CCB was furnished in support of the claim. The provision of section 10B(6) applied to post holiday period applicable for section 10B. Therefore, when the assessee is eligible for deduction u/s 80IB. However, first part of production of assessee held not to be from manufacturing activities, the profit derived from the undertaking is eligible for deduction is to be proportionately reduced. Secondly, the quantum of deduction u/s 10B is to be reduced from the business profit from the eligible profit for undertaking for computing the deduction u/s 80IB. Accordingly, the deduction under 80IB has to be recomputed and the CIT(A) has already given the direction and the re-recomputation of deduction u/s. 80IB is shown in the CIT(A)'s order, therefore, we are of the view that our interference is not required. We therefore Ground No. 2 of revenue's appeal is dismissed.

28. Learned counsel Mr. Pranav Desai for the department submitted that in view of the decision of the Supreme Court in the case of Goetze (India) Ltd. vs. Commissioner of income tax(supra), the assessee could not have maintained additional claim that too at an appellate stage without revising the return.

29. On the other hand learned counsel Mr. B.S. Soparkar for the assessee referring to various decisions of High Courts and Supreme Court contended that the Tribunal committed no error. We would refer to his citations at an appropriate

stage.

30. In what manner and to what extent, a ground, a legal contention or a fresh claim can be made at an appellate stage are vexed questions and have occupied the minds of the Courts in numerous occasions.

31. In the case of Jute of Corporation of India Ltd. Vs. Commissioner of Income Tax and another, the Supreme Court noted with approval observation of the Court in the case of Commissioner of Income Tax, U.P., Lucknow Vs. Kanpur Coal Syndicate, to the effect that " The Appellate Assistant Commissioner, therefore, has plenary powers in disposing of 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." It was observed that there was no reason why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income Tax Officer. The Act does not place any restriction or limitation on the exercise of appellate power. It was observed that:-

The above observations are squarely applicable to the interpretation of s. 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.

32. In case of National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax, when the question of law was raised for the first time before the Tribunal though facts were already on record, the Supreme Court observed that there is no reason why the assessee should be prevented from raising such a question before the Tribunal for the first time so long as the relevant facts are on record in respect of the item concerned. There is no reason to restrict the power of the Tribunal in such appeal only to decide the grounds which arise from the order of Commissioner (Appeals). The Tribunal should not be prevented from considering the questions of law arising in assessment proceedings although not raised earlier.

33. In case of Goetze (India) Ltd. vs. Commissioner of income tax(supra) the Supreme Court distinguished the judgment in the case of National Thermal Power Co. Ltd. vs. Commissioner of income tax (supra) on the ground that the same pertained to the power of the Tribunal u/s 254 of the Act to entertain a point of law for the first time and commented that such decision does not relate to the power of the assessing officer to entertain a claim for deduction otherwise than by filing a revised return. In the process the Supreme Court recognized that a new claim could not be entertained by the assessing officer without the assessee revising the return. While doing so it was clarified that:-

4...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 u/s 254 of the income tax Act, 1961. There shall be no order as to costs.

34. In the case of Commissioner of Income Tax Vs. Jai Parabolic Springs Ltd., , the Delhi High Court held that there is no prohibition on the powers of the Tribunal to entertain an additional ground which according to the Tribunal arose in the matter and for just decision of the case.

35. In case of Commissioner of Income Tax, Central-I, Room No. 1001, Old CGO Building Annexure, Maharshi Karve Marg, Mumbai - 400 020 Vs. M/s. Pruthvi Brokers and Shareholders Pvt. Ltd., PS/19, Rotunda Building, B.S. Marg, Fort, Mumbai - 400 023, the Bombay High Court considered the issue at considerable length and held that Commissioner (Appeals) as well as the Tribunal have the jurisdiction to consider the additional claim and not merely additional legal submissions. The appellate authorities have discretion to permit such additional claims. Such claims need not be those which became available on account of change of circumstances of law but which were even available when the return was filed.

36. The Delhi High Court once again in recent judgment in the case of Commissioner of Income Tax Vs. Sam Global Securities Ltd., observed that the Courts have taken a pragmatic view and not a technical one as to what is required to be determined in taxable income. In that sense assessment proceedings are not adversarial in nature. With these observations Court confirmed the view of the Tribunal reversing the decision of the assessing officer rejecting the claim of the assessee on the ground that no revised return was filed.

37. In case of Commissioner of Income Tax, Gujarat-I Vs. Cellulose Products of India Ltd., , full Bench of this Court held that merely because a ground has not been raised though it could have been raised in support of the relief sought in the appeal, it cannot be said that such ground cannot be raised before the Tribunal. Such ground can be raised provided it falls within the contours of the subject matter of the appeal.

38. It thus becomes clear that the decision of the Supreme Court in the case of Goetze (India) Ltd. vs. Commissioner of income tax (supra) is confined to the

powers of the assessing officer and accepting a claim without revised return. This is what Supreme Court observed in the said judgment while distinguishing the judgment in the case of National Thermal Power Co. Ltd. vs. Commissioner of income tax (supra) and that is how various High Courts have viewed the dictum of the decision in the case of Goetze (India) Ltd. vs. Commissioner of income tax (supra). When it comes to the power of Appellate Commissioner or the Tribunal, the Courts have recognized their jurisdiction to entertain a new ground or a legal contention. A ground would have a reference to an argument touching a question of fact or a question of law or mixed question of law or facts. A legal contention would ordinarily be a pure question of law without raising any dispute about the facts. Not only such additional ground or contention, the Courts have also, as noted above, recognized the powers of the Appellate Commissioner and the Tribunal to entertain a new claim for the first time though not made before the assessing officer. Income Tax proceedings are not strictly speaking adversarial in nature and the intention of the Revenue would be to tax real income.

39. This is primarily on the premise that if a claim though available in law is not made either inadvertently or on account of erroneous belief of complex legal position, such claim cannot be shut out for all times to come, merely because it is raised for the first time before the appellate authority without resorting to revising the return before the assessing officer.

40. Therefore, any ground, legal contention or even a claim would be permissible to be raised for the first time before the appellate authority or the Tribunal when facts necessary to examine such ground, contention or claim are already on record. In such a case the situation would be akin to allowing a pure question of law to be raised at any stage of the proceedings. This is precisely what has happened in the present case. The Appellate Commissioner and the Tribunal did not need to nor did they travel beyond the materials already on record, in order to examine the claims of the assesseees for deductions u/s 80IB and 80HHC of the Act.

41. In the decisions that we have noted above, the Courts have considered such questions when a legal contention or a claim was based on material already on record but raised at an appellate stage. On such premise we wholeheartedly agree that the appellate authority and the Tribunal would have the power to entertain any such new ground, legal contention or claim. However, it is only the Bombay High Court in the case of Commissioner of income tax vs. Pruthvi Brokers and Shareholders P. Ltd. (supra), which has traveled a little beyond this preposition and come to the conclusion that even if facts necessary to examine such a claim are not placed before the assessing officer and, therefore, not on record, there would be no impediment in the Commissioner (Appeals) entertaining such a claim. Such an issue does not arise in these appeals. We would, therefore, reserve our opinion on this limited aspect of the matter if and when in future the question presents before us in such form. For the present, we answer Questions (3) and (4) against the Revenue and in favour of the assesseees

in manner described above.

42. In the result all appeals are dismissed.