आयकर अपीलीय अधिकरण, पुणे **न्यायपीठ "बी"** पुणे **में**

IN THE INCOME TAX APPELLATE TRIBUNAL PUNE BENCH "B", PUNE

श्री आर. के. पांडा, लेखा सदस्य
एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष

BEFORE SHRI R.K. PANDA, AM
AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / **ITA Nos.1148 to 1154/PN/2013**
निर्धारण वर्ष / **Assessment Years : 2004-05 to 2010-11**

M/s. D.J. Malpani,
Malpani Estate,
Kasara Dumala, Akole Road,
Sangamner – 422605
Dist : Ahmednagar
PAN No.AACFD1713B

……… अपीलार्थी / Appellant

बनाम v/s

ACIT, Central Circle-1(1), Pune

……… प्रत्यर्थी / Respondent

आयकर अपील सं. / **ITA Nos.1183 to 1188/PN/2013**
निर्धारण वर्ष / **Assessment Years : 2005-06 to 2010-11**

ACIT, Central Circle-1(1), Pune

……… अपीलार्थी / Appellant

बनाम v/s

M/s. Damodar Jaganath Malpani,
Malpani Estate, Sr.No.50/1
Kasara Dumala,
Sangamner – 422605
PAN No.AACFD1713B

……… प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Nikhil Pathak
प्रत्यर्थी की ओर से / Department by : Smt. Harshavardhini Buty

सुनवाई की तारीख / Date of Hearing :02.09.2015		घोषणा की तारीख / Date of Pronouncement:30.10.2015

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आदेश / ORDER

PER R.K. PANDA, AM:

ITA No.1148/PN/2013 filed by the assessee is directed against the order dated 18-03-2013 of the CIT(A)-I, Pune relating to Assessment Year 2004-05. ITA No.1149/PN/2013 to ITA No. 1154/PN/2013 filed by the assessee and ITA No.1183/PN/2013 to 1188/PN/2013 filed by the Revenue are cross appeals and are directed against separate orders dated 18-03-2013 of the of the CIT(A)-I, Pune relating to Assessment Years 2005-06 t0 2010-11. For the sake of convenience all these appeals were heard together and are being disposed of by this common order.

ITA No.1148/PN/2013 (A.Y. 2004-05) (By Assessee) :

2. Facts of the case, in brief, are that the assessee is a partnership firm engaged in the business of manufacturing, packing and selling of Tobacco Jarda, allied by-products, Lime and Generation of power through windmill. It filed the return of income on 31-10-2004 declaring total income of Rs.26,22,35,980/-. A search action u/s.132 of the Act was conducted in the Malpani group of cases on 06-10-2009. In response to notice u/s.153A, the assessee filed the return of income on 24-06-2010 disclosing total income of Rs.23,95,15,482/- after claiming deduction of Rs.2,27,20,498 u/s.80IA(4) of the Act. During the course of assessment proceedings, the AO noted that the assessee has claimed deduction of Rs.2,27,20,498/- u/s.80IA(4)(iv)(a) towards profit earned from wind power generation from its windmill. However, no such claim was made by the assessee in its original return. The assessee has claimed the

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benefit of deduction of Rs.2,27,20,498/- by way of claiming deduction u/s.80IA(4) in the return filed in response to notice u/s.153A. He, therefore, asked the assessee to explain as to why such allowance should be given to the assessee especially when there was no claim in the original return of income filed on 31-10-2004. Rejecting the various explanations given by the assessee and relying on various decisions the AO disallowed the claim of deduction u/s.80IA(4) of the Act.

3. In appeal the Ld.CIT(A) upheld the action of the AO. Aggrieved with such order of the CIT(A) the assessee is in appeal before us with the following grounds :

> The following grounds are taken without prejudice to each other
> On facts and in law,
>
> 1] The learned CIT(A) erred in denying the deduction claimed u/s. 80IA(4) of Rs.2,27,20,498/-.
>
> 2] The learned CIT(A) erred in holding that the assessee was not entitled to make a fresh claim in the return filed u/s. 153A on the ground that in the asst. u/s 153A, only income which had escaped asst. could be taxed and the assessee could not be placed in a better position vis-a-vis the income declared in the original return.
>
> 3] The learned CIT(A) erred in holding that in the asst. u/s. 153A, the issues which have already attained finality in the original asst. cannot be disturbed unless any incriminating evidence is found in respect of the same and since no such material was found in respect of the deduction u/s. 80IA(4) claimed in respect of windmills, the said claim of the assessee made in the asst. u/s. 153A was not allowable.
>
> 4] The learned CIT(A) failed to appreciate that in the asst. u/s. 153A, the assessee could make a fresh claim which was not made in the original return and there was no such bar that no new claim could be made by the assessee in the return filed u/s 153A.
>
> 5] The learned CIT(A) ought to have appreciated that the asst. u/s. 143(3) had not taken place for this year and hence, in the asst. u/s 153A, the A.O. was bound to assess the total income of the assessee and therefore, even the issues in respect of which no incriminating evidence was found during search should have been considered in the asst. u/s. 153A and thus, the deduction claimed by the assessee should have been allowed.

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6] The learned CIT(A) erred in not appreciating that each phase of wind mills was to be considered as a separate undertaking eligible for deduction u/s.80IA and hence, the deduction u/s.80IA(4) should have been computed independently for each phases and not on consolidated basis.

7] The learned CIT(A) erred in not appreciating that in view of the provisions of section 80IA(5) of the Income tax Act, 1961 the profit from the eligible business for the purpose of deduction u/s. 80IA of the Act need not be computed after deduction of the notional brought forward losses and depreciation of eligible business which have been set off against other income in earlier years.

7.1] The learned CIT(A) failed to appreciate that the provisions of section 80IA(5) were applicable only from the initial asst. year i.e. the asst. year in which deduction u/s. 80IA was first claimed by the assessee and only for the years starting from the initial asst. year and thereafter, the provisions of section 80IA(5) were applicable and hence, there was no reason to set off the notional brought forward losses/depreciation while computing the deduction u/s. 80IA for the present asst. year.

8] The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal."

4. The Ld. Counsel for the assessee at the outset submitted that the issue stands decided against the assessee by the decision of the Pune Bench of the Tribunal in the case of B.G. Shirke Construction Technology Pvt. Vs. ACIT vide ITA Nos.727 to 730/PN/2012 order dated 31-10-2013 for A.Yrs. 2003-04 and 2006-07 to 2008-09 respectively. It has been held in the said decision that in respect of the assessments which are completed prior to the date of search, no fresh claim of deduction can be made by the assessee. In view of the above submission by the Ld. Counsel for the assessee and in absence of any objection from the Ld. Departmental Representative, the order of the CIT(A) holding that assessee is not entitled to make a fresh claim in the return filed u/s.153A when no such claim was made in the original return of income has to be upheld. The grounds raised by the assessee are accordingly dismissed.

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ITA No.1149/PN/2013 (A.Y. 2005-06) (By Assessee) :

5. Grounds of appeal No.1 to 8 by the assessee relate to denial of deduction claimed u/s.80IA(4) of the Act amounting to Rs.3,33,57,599/-.

6. Facts in brief are that the assessee had made a claim of Rs.3,33,57,599/- u/s.80IA(4) in the return filed in response to notice u/s.153A whereas no such claim was made in the original return of income. The AO disallowed such claim which was upheld by the CIT(A). Aggrieved with such order of CIT(A) the assessee is in appeal before us.

7. After hearing both the sides, we find the grounds raised by the assessee are identical to grounds of appeal in ITA No.1148/PN/2013 for A.Y. 2004-05. We have already decided the issue and the grounds raised by the assessee have been dismissed. Following the same reasonings, the grounds raised by the assessee for A.Y. 2005-06 are also dismissed.

ITA No.1183/PN/2013 (A.Y. 2005-06 (By Revenue) :

8. The grounds raised by the Revenue are as under :

> "1. The Ld.CIT(A) erred in deciding that no addition can be made u/s.153A, if the same is not made in assessment u/s.143(3) of the Act and if it is not based on any incriminating seized materials pertains to such A.Y.
>
> 2. The Ld.CIT(A) erred in deciding that provision of section 40a(ia) of the Act is applicable only in the case of payable and not in the case of actual paid.
>
> 3. The appellant craves leave to add, alter or amend any or all the grounds of appeal."

9. Facts of the case, in brief, are that the AO during the course of assessment proceedings noted that the assessee during the impugned

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assessment year has derived sales tax incentive/benefit to the tune of Rs.2,62,49,999/-in sales tax incentive deferral scheme on account of its investment in windmills. The entire sales tax incentive has been transferred by the assessee to Kopargaon Sahakari Sakhar Karkhana Ltd. and M/s. Vanaz Engineering Ltd. On account of these transfer of benefit the assessee has received an amount of Rs.2,04,16,666/- from Kopargaon Sahakari Sakhar Karkhana Ltd. and Rs.58,33,332/- from M/s. Vanaz Engineering Ltd. with liability to return these amounts to the said parties after 10 years in 5 equal annual instalments. As per the terms agreed between the parties the assessee was to treat the amount received from the purchaser as loan which was to be repaid as per the terms mentioned above without any interest. Further, the agreement shows that in case there was delay in payment within a given time the assessee was entitled to receive interest @14% per annum and 18% per annum respectively from Kopargaon SSK Ltd. and M/s. Vanaz Engg. Ltd. As per clause 1.11.1 the assessee was to treat the amount as loan and accordingly showed the amount in the balance sheet as unsecured loan. Since the assessee has paid interest @12.5% to Kopargaon SSK Ltd. and @9% to M/s. Vanaz Engg. Ltd. as discount amounting to Rs.32,50,743/- and claimed the same as finance charge in the profit and loss account, the AO asked the assessee to explain as to why disallowance u/s.40(a)(ia) shall not be applied for failure to deduct TDS on interest as per the requirement of section 194A. Rejecting the various explanations given by the assessee and applying the provisions of section 40(a)(ia) the AO made addition of Rs.32,50,743/-.

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10. Before CIT(A) it was submitted that original assessment u/s.143(3) was already completed prior to the search. In the assessment order passed u/s.153A the AO has made this addition. Relying on the decision of the Hon'ble Bombay High Court in the cases of CIT Vs. Murali Agro Products Ltd. vide ITA No.36/2009 order dated 29-10-2010 and the decision of the Special Bench of the Tribunal in the case of All Cargo Global Logistics Ltd. Vs. DCIT reported in 18 ITR 106 it was argued that in absence of any incriminating material found during the course of search no addition can be made in the assessment u/s.153A of the I.T. Act.

11. In appeal the Ld.CIT(A) relying on the decision of the Special Bench of the Tribunal in the case of Merilyn Shipping and Transports Ltd. reported in 16 ITR (Trib.) 5 deleted the addition made u/s.40a(ia). Further, he noted that this addition was neither made in the original assessment nor does it arise out of any new facts unearthed during the search. Relying on the decision of the Hon'ble Bombay High Court in the case of Murali Agro Products Ltd. (Supra) and following his decision in the case of Rajesh Malpani for A.Y. 2004-05 vide Appeal No.PN/CIT(A)-I/ACIT/Cen.Cir.1(1)/PN/430/11-12 the Ld.CIT(A) held that the assessment which has already been completed u/s.143(3) prior to search becomes final unless any incriminating evidence was found relating to the addition during the course of search.

12. Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

13. We have considered the rival arguments made by both the sides. Admittedly, the assessment in the instant case was earlier completed

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u/s.143(3) on 29-12-2008 which is prior to the date of search that took place on 06-10-2009. No material has been gathered during the course of proceedings u/s.153A of the I.T. Act that relief granted under the finalized assessment/re-assessment were contrary to the facts unearthed during the course of 153A proceedings. The Ld. Departmental Representative could not controvert the findings given by the CIT(A) that no incriminating material was found during the course of search. The Hon'ble Bombay High Court in the case of CIT Vs. Murali Agro Products Ltd. vide ITA No.36/2009 order dated 29-10-2010 and in the case of CIT Vs. Continental Warehousing Corporation vide ITA No.523/2013 order dated 21-04-2015 has held that the AO while passing the assessment order u/s.153A r.w.s. 143(3) cannot disturb the assessment order which has been finalized earlier in absence of any incriminating material unearthed during the search or during 153A proceedings. Respectfully following the decisions of Hon'ble jurisdictional High Court cited (Supra) and in absence of any contrary material brought to our notice, we do not find any infirmity in the order of the CIT(A). The ground raised by the Revenue is accordingly dismissed.

14. So far as ground of appeal No.2 by the Revenue is concerned, the Pune Benches of the Tribunal are consistently taking the view that provisions of section 40(a)(ia) of the I.T. Act are applicable even when no amount is payable at the end of the year. Therefore, ground of appeal No.2 by the Revenue has to be allowed. However, in view of the Ist ground being dismissed, the 2nd ground become only academic in nature.

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ITA No.1150/PN/2013 (A.Y. 2006-07) (By Assessee) :

15. Grounds of appeal Nos. 1 to 8.1 by the assessee relates to denial of deduction claimed u/s.80IA(4) of the Act amounting to Rs.4,70,07,435/-.

16. After hearing both the sides, we find the assessee in the original return of income filed on 31-12-2006 has not claimed any deduction u/s.80IA(4) and had declared income of Rs.20,08,76,295/-. In the return filed in response to notice u/s.153A on 24-06-2010 the assessee declared income of Rs.15,42,90,549/- after claiming deduction of Rs.4,70,07,435/- u/s.80IA(4). The original assessment u/s.143(3) was passed on 29-12-2008 making addition of Rs.58,64,461/- to the total income of the assessee. In the order passed u/s.153A r.w.s. 143(3) the AO denied the fresh claim made u/s.80IA(4) amounting to Rs.4,70,07,435/- which was upheld by the CIT(A).

17. Aggrieved with such order of the CIT(A) the assessee is in appeal before us.

18. After hearing both the sides, we find the grounds raised by the assessee are identical to grounds of appeal in ITA No.1148/PN/2013 for A.Y. 2004-05. We have already decided the issue and the grounds raised by the assessee have been dismissed. Following the same ratio, the grounds raised by the assessee are dismissed.

19. Grounds of appeal No.9 to 9.2 by the assessee are as under :

> "9] The learned CIT(A) erred in confirming the disallowance of depreciation at higher rate of 80% claimed by the assessee in respect of the cost of electrical yard fencing and the cost of preparation of temporary approach road without appreciating that the asst. *u/s.* 143(3) was

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completed for this year and hence, in the absence of any incriminating material found during the search pertaining to this issue, the disallowance of depreciation was not warranted.

9.1] The learned CIT(A) erred in holding that the expenditure on electrical yard fencing and cost of preparation of temporary approach road was not part of actual cost of the wind mill and hence, the depreciation at a higher rate of 80% was not allowable in respect of such items."

20. Facts of the case, in brief, are that the AO during the course of assessment proceedings noted from the depreciation chart that addition of Rs.46,06,93,328/- was made in the block of windmills. From the breakup of the cost the AO noted that the assessee has included cost of civil works in this cost. He therefore asked the assessee to justify its claim of depreciation at higher rate of 80% on the expenditure on civil works as well as electrical items, transformers, erection and commissioning, if any. It was explained that the entire expenditure being cost of windmill is entitled to depreciation @80%.

21. However, the AO did not accept the same on the ground that in the provisions of I.T. Rules, 1962 for allowing depreciation different types of assets have been found specified thereby giving different rates of depreciation. According to him windmill and any special designed types which run on windmills has been allowed depreciation @80% and the block of assets which constitutes building has been allowed depreciation @10%. From the details furnished by the assessee he noted that cost of electrical yard fencing and cost of preparation of temporary approach road totaling to Rs.29,06,008/- has been included in the cost of windmills. According to him electrical yard fencing and preparation of approach road cannot be considered as part of windmills because they are nothing but building. Their use is not depending on windmill. Relying on the decision of the Pune Bench of

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the Tribunal in the case of Poonawala Finvest Agro Pvt. Ltd. Vs. ACIT reported in 118 TTJ 68 the AO disallowed excess claim of depreciation of Rs.10,17,103/-.

22. In appeal the Ld.CIT(A) upheld the action of the AO by observing as under :

> "9.2. It is thus seen that Ground No. 19 to 19.2 essentially relate to a claim relating to the civil installation cost on the installation of windmills and depreciation thereof, made in the original return of income. The claim by the appellant of depreciation at higher rate on civil construction of windmills is inadmissible in view of the jurisdictional ITAT decision in Poonawalla Finvest and Agro (P) Ltd. Vs ACIT reported in 118 TTJ 68 and Vanaz Engineering Ltd. vs. Addl. CIT in ITA No. 987/PN/2006 dated 31.10.2008. The Delhi High Court in Anil Kumar Bhatia and Special Bench ITAT Mumbai in All Cargo Logistics have clearly held that reassessment of income is possible in the fresh proceedings u/s 153A, consequent to search, on the basis of books of accounts not produced earlier, since the two proceedings get merged. In view of the above, following the jurisdictional ITAT decisions referred to supra and my appellate order in the appellant's case for A.Y. 2010-11 in appeal No. PN/CIT(A)-IIACIT/Cen.Cir.1(1)/PN/487/11-12 dated 18.3.2013, grounds of appeal No. 19 to 19.2 are treated as partly allowed, subject to the computation of depreciation as per directions contained in para 6.3 of that order."

23. Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

24. The Ld. Counsel for the assessee at the outset submitted that since the addition is not based on any incriminating material found during the course of search or post search enquiries and the original assessment was completed on 29-12-2008 which is prior to the date of search on 06-10-2009, therefore, no disallowance is called for. For this proposition, he relied on the decision of the Hon'ble jurisdictional High Court in the case of CIT Vs. Continental Warehousing Corporation vide ITA No.523/2013 order dated 21-04-2015. However, on merits he submitted that the issue stands decided against the assessee by the decision of the Tribunal in the case of Poonawala

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Finvest & Agro Pvt. Ltd. (Supra) wherein it has been held that higher rate of depreciation is not allowable on electrical fencing and temporary approach road.

25. The Ld. Departmental Representative on the other hand while supporting the order of the CIT(A) submitted that the AO has jurisdiction u/s.153A to reassess the income.

26. We have considered the rival arguments made by both the sides, perused the orders of the AO and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. Admittedly, in the instant case the assessment was completed u/s.143(3) on 29-12-2008. No incriminating material was found during the course of search for the impugned assessment year. However, during proceedings u/s.153A it was found that assessee has claimed higher depreciation on electrical fencing and temporary approach road. Therefore, in view of the decision of the Pune Bench of the Tribunal in the case of Poonawala Finvest & Agro Pvt. Ltd. reported in 118 TTJ 68, we are of the considered opinion that the Ld.CIT(A) is justified in sustaining the addition made by the AO. Accordingly, the disallowance of depreciation amounting to Rs.10,17,103/- is upheld. Grounds raised by the assessee are accordingly dismissed.

ITA No.1184/PN/2013 (A.Y. 2006-07) (By Revenue) :

27. Grounds of appeal No.1 & 2 by the Revenue are as under :

> "1. The Ld.CIT(A) erred in deciding that no addition can be made u/s.153A, if the same is not made in assessment u/s.143(3) of the Act and if it is not based on any incriminating seized materials pertains to such A.Y.

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> 2. The Ld.CIT(A) erred in deciding that provision of section 40(a)(ia) of the Act is applicable only in the case of payable and not in the case of actual paid."

28. After hearing both the sides, we find the above grounds filed by the Revenue are identical to the grounds of appeal in ITA No.1183/PN/2013 for A.Y. 2005-06. We have already decided the issue and the grounds raised by the Revenue have been dismissed. Following the same reasonings the above grounds are decided accordingly. Even otherwise also disallowance was made in original assessment u/s.143(3) which was upheld by CIT(A). On further appeal, the Tribunal allowed the appeal of the assessee as stated by CIT(A) and not controverted by the Ld. Departmental Representative. Therefore, in absence of any incriminating material, no addition can be made in the assessment u/s.153A. The grounds by the Revenue are accordingly dismissed.

29. Grounds of appeal No. 3 & 4 by the Revenue are as under :

> "3. The Ld.CIT(A) erred in deciding that power generation from windmill is manufacturing activity.
>
> 4. The Ld.CIT(A) erred in deciding that assessee can claim depreciation on windmill if assessee is engaged in manufacturing activities, although mindmill has not connection with its manufacturing business."

30. Facts in brief are that the AO in the assessment order held that the concept of manufacture and production of article or thing and generation of power and generation and manufacture of power are different concepts under the income-tax Act. The former was allowed in respect of industrial undertaking specified u/s.80IB(2)(iii) while latter was allowed in respect of undertaking specified u/s.80IA(4)(iv). He further noted that no excise duty is leviable on production of

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electricity produced by the windmill. Therefore, logical inference is that there is no manufacture involved in the process. Further, the set up of the windmill had absolutely no connection with the assesse's business of manufacture of Tobacco, Jarda, allied products and Lime. He accordingly held that the assessee is not entitled to claim additional depreciation.

31. In appeal the Ld.CIT(A) held that in the assessment completed u/s.143(3) prior to the search the AO had allowed the additional depreciation claimed by the assessee. No incriminating material was found during the course of search. The disallowance is not based on any incriminating material. Therefore, in view of the decision of the Hon'ble Bombay High Court in the case of Murali Agro Products (Supra) no disallowance is called for.

32. Aggrieved with such order of the CIT(A) the revenue is in appeal before us.

33. After hearing both the sides, we find the claim of the assessee regarding additional depreciation was allowed by the AO in the assessment made u/s.143(3) on 29-12-2008 which is prior to the date of search on 06-10-2009. The disallowance of additional depreciation by the AO is not based on any incriminating material found during the course of search or post search enquiry. Therefore, in view of the decision of Hon'ble Bombay High Court in the case of Continental Warehousing Corporation (Supra) the Ld.CIT(A) was justified in deleting the disallowance made by the AO. We accordingly uphold the order of the CIT(A) and the grounds raised by the revenue are dismissed.

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34. Even on merit also we find the issue stands decided in favour of the assessee by the decision of the Hon'ble Madras High Court in the case of CIT Vs. VTM Ltd. reported in 319 ITR 336 has held that assessee which was manufacturing textile goods and had set up a windmill after 31-03-2002 was entitled to additional depreciation. The relevant observation of Hon'ble High Court reads as under (Short Notes) :

> "In order to claim the benefit of section 32(1)(iia) of the Income Tax Act, 1961, what is required to be satisfied is that the new machinery or plant should have been acquired and installed after March 31, 2002, by an assessee, who was already engaged in the business of manufacture or production of any article or thing. The provision does not state that the setting up of a new machinery or plant, which was acquired and installed after March 31, 2002, should have any operational connectivity to the article or thing that was already being manufactured by the assessee."

35. The Chennai Bench of the Tribunal in the case of ACIT Vs.M. Satish Kumar ITA No.718/Mds/2012 order dated 28-09-2012 has held that generation of electricity is akin to manufacturing of new product. Relying on the decision of Hon'ble Supreme Court in the case of CIT Vs. Madhya Pradesh Electricity Board reported in 1970 AIR 732 (SC) and the decision of the Delhi Bench of Tribunal in the case of NTPC Ltd. reported in 2002 (4) (TM) 694 (SC) it was held that generation of electricity is a manufacturing activity and the assessee is eligible for additional depreciation u/s.32(1)(iia). In view of the above, the order of the CIT(A) is upheld and the grounds raised by the revenue are dismissed.

36. Ground of appeal No.5 by the Revenue reads as under :

> "The Ld.CIT(A) erred in deciding that assessee is eligible to claim depreciation @80% on electrical fittings used for mindmill, although depreciation on electrical fittings is @10% only as per I.T Rules, 1962.

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37. After hearing both the sides, we find the AO disallowed depreciation of Rs.10,17,103/- on account of depreciation claimed on civil works which were included in the cost of windmills. The AO noted from the various details furnished by the assessee that electrical yard fencing and cost of temporary approach road totaling to Rs.29,06,008/- have been included in the cost of windmills. Since assets have been put to use for less than 180 days the AO allowed depreciation @5% on the above amount and disallowed the balance depreciation of Rs.10,17,103/-.

38. In appeal the Ld.CIT(A) following the decision of the Tribunal in the cases of Poonawala Finvest Agro Pvt. Ltd. Vs. ACIT reported in 118 TTJ 68 and Vanaz Engineering Ltd. Vs. Addl.CIT vide ITA No.987/PN/2006 order dated 31-10-2008 held that on power evacuation, infrastructure, transformer, erection and commissioning of the structures, line work, electrical items will qualify for depreciation @80% whereas MEDA charges, site development expenses, cost of construction of controlled beam, civil work, internal road, development application charges, professional fees and bank charges will not qualify for higher rate of depreciation. She accordingly directed the AO to verify these expenses and allow depreciation on above items accordingly.

39. Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

40. After hearing both the sides, we find no infirmity in the order of the CIT(A) who has directed the AO to allow the depreciation in the light of the decision of the Tribunal in the case of Poonawala Finvest

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Agro Pvt. Ltd. (Supra) and Vanaz Engineering Ltd. (Supra). Nothing contrary was brought to our notice by the Ld. Departmental Representative against the above 2 decisions of the Tribunal. We accordingly uphold the order of the CIT(A) on this issue and the grounds raised by the revenue is dismissed.

ITA No.1151/PN/2013 (A.Y. 2007-08) (By Assessee) :

41. Grounds raised by the revenue are as under :

"The following grounds are taken without prejudice to each other -

On facts and in law,

1] The learned CIT(A) erred in denying the deduction claimed u/s 80IA(4) of Rs.5,36,44,728/-.

2] The learned CIT(A) erred in holding that in view of the provisions of section 80AC, the assessee can claim the deduction u/s 80IA(4) only if the same has been claimed in the return filed within the due date stipulated u/s.139(1) and since the said claim was not made in the original return filed u/s 139(1), the same could not be allowed in the asst. u/s 153A.

3] The learned CIT(A) erred in holding that the assessee was not entitled to make a fresh claim in the return filed u/s 153A on the ground that in the asst. u/s 153A, only income which had escaped asst. could be taxed and the assessee could not be placed in a better position vis-a-vis the income declared in the original return.

4] The learned CIT(A) erred in holding that in the asst. u/s 153A, the issues which have already attained finality in the original asst. cannot be disturbed unless any incriminating evidence is found in respect of the same and since no such material was found in respect of the deduction u/s 80IA(4) claimed in respect of windmills, the said claim of the assessee made in the asst. u/s153A was not allowable.

5] The learned CIT(A) failed to appreciate that in the asst. u/s. 153A, the assessee could make a fresh claim which was not made in the original return and there was no such bar that no new claim could be made by the assessee in the return filed u/s. 153A.

6] The learned CIT(A) ought to have appreciated that the asst. u/s 143(3) had not taken place for this year and hence, in the asst. u/s 153A, the A.O. was bound to assess the total income of the assessee and therefore, even the issues in respect of which no incriminating evidence was found during search should have been considered in the asst. u/s 153A and thus, the deduction claimed by the assessee should have been allowed.

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> 7] The learned CIT(A) erred in not appreciating that each phase of wind mills was to be considered as a separate undertaking eligible for deduction u/s 80IA and hence, the deduction u/s 80IA(4) should have been computed independently for each phases and not on consolidated basis.
>
> 8] The learned CIT(A) erred in not appreciating that in view of the provisions of section 80IA(5) of the Income tax Act, 1961 the profit from the eligible business for the purpose of deduction u/s 80IA of the Act need not be computed after deduction of the notional brought forward losses and depreciation of eligible business which have been set off against other income in earlier years.
>
> 8.1] The learned CIT(A) failed to appreciate that the provisions of section 80IA(5) were applicable only from the initial asst. year i.e. the asst. year in which deduction u/s. 80IA was first claimed by the assessee and only for the years starting from the initial asst. year and thereafter, the provisions of section 80IA(5) were applicable and hence, there was no reason to set off the notional brought forward losses /depreciation while computing the deduction u/s. 80IA for the present asst. year.
>
> 9] The learned CIT(A) erred in holding that the expenditure on electrical yard fencing and cost of preparation of temporary approach road was not part of, actual cost of the wind mill and hence, the depreciation at a higher rate of 80% was not allowable in respect of such items.
>
> 9.1] The learned CIT(A) failed to appreciate that the above items were part and parcel of the wind mill purchased by the assessee and therefore, depreciation @ 80% was rightly claimed by the assessee.
>
> 10] The appellant craves leave to add, alter, amend or delete any of the above grounds of appeal.

42. The Ld. Counsel for the assessee at the outset submitted that grounds of appeal no.9 and 9.1 are against the assessee for which the Ld. Departmental Representative has no objection. Accordingly, the Grounds of Appeal No.9 and 9.1 are dismissed.

43. Grounds of appeal No.1 to 6 relate to denial of deduction u/s.80IA(4) amounting to Rs.5,36,44,728/-.

44. Facts of the case, in brief, are that the assessee filed original return of income on 30-10-2007 declaring total income at Rs.18,17,42,421/-. In response to notice u/s.153A the assessee filed

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the return of income on 24-06-2010 disclosing total income of Rs.12,80,97,695/- after claiming deduction of Rs.5,36,44,728/-. Since the assessee had not claimed the deduction u/s.80IA(4) the AO was of the opinion that the assessee cannot make the fresh claim in the return filed in response to notice u/s.153A which was not claimed in the original return. According to the AO the person who is searched cannot be placed in a better position after search by declaring lesser income in the return filed in response to notice u/s.153A than the income disclosed in the original return of income. He was of the opinion that proceedings u/s.153A are akin to the proceedings u/s.147 since both assessments emanate out of "reasons to believe" that income chargeable to tax has escaped assessment or a person is in possession of undisclosed income. He relied upon the decision of Hon'ble supreme court in the case of CIT vs. Sun engineering works Pvt. Ltd. Reported in 198 ITR 297 wherein it has been held that reassessment proceedings are not for the benefit of assessee and the income for the purposes of assessment cannot be reduced beyond the income originally assessed. He also relied on the decision of Hon'ble Apex Court in the case of Chettinad Corporation Pvt. Ltd. Vs. CIT reported in 200 ITR 300 wherein it has been held that the assessee could not claim deduction which was neither claimed nor allowed in the original assessment during reassessment proceedings. He further held that the claim was not allowable in view of a specific prohibition u/s.80AC wherein for A.Y. 2006-07 and subsequent years no such deduction shall be allowed u/s.80IA unless the assessee furnishes a return of his income on or before the due dates specified u/s.139(1). The AO further referred to the specific provisions of section 80IA(5) according to which in order to determine the quantum of deduction

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u/s.80IA(4) the income of the assessee has to be computed as if such eligible business was only source of income of the assessee during the previous year relevant to initial assessment year and to every subsequent assessment year upto and including the assessment year for which such deduction is claimed. The AO computed the income of the year by considering both the scenarios, i.e. in a consolidated manner, by considering all windmill undertakings as a single unit of an eligible business and also by considering each windmill undertaking as a single unit of eligible business. From such calculations he came to the conclusion that there are losses both on consolidated basis as well as on individual basis and therefore the question of allowing deduction u/s.80IA(4) of the Act does not arise. He also placed reliance on the decision of the Special Bench of the Tribunal in the case of Goldmine Shares and Finance Pvt. Ltd. reported in 113 ITR 209 according to which for considering "initial assessment year", the year of installation has to be necessarily adopted rather than the "first year of claim" in order to reject the claim of the assessee. The AO accordingly disallowed the claim of deduction of Rs.5,36,44,728/- u/s.80IA(4).

45. Before CIT(A) the assessee apart from relying on the submissions made in the preceding assessment years submitted that no assessment u/s.143(3) was completed prior to the date of search. Although the assessee in the original return of income had not claimed any deduction u/s.80IA, however, since no assessment has taken place in this year, all the issues are open for adjudication and hence the assessee can claim deduction which was not claimed in the original return. It was argued that where no assessment has been

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made prior to the date of search, assessee can make additional claim in the return filed u/s.153A. For the above proposition, the assessee relied on the decision of the Special Bench of the Tribunal in the case of All Cargo Global Logistics Ltd. Vs. DCIT reported in 18 ITR 106 wherein it has been held that for a year for which no assessment has been made prior to search all the issues are open for adjudication. It was accordingly argued that assessee is entitled to claim higher deduction u/s.80IA in the return filed u/s.153A.

46. However, the Ld.CIT(A) was not satisfied with the explanation given by the assessee. She noted that the assessee has not claimed deduction u/s.80IA in the original return filed prior to search and the same has been claimed in the return filed in response to notice u/s.153A. Therefore, the assessee cannot make a fresh claim in the return filed in response to notice u/s.153A. Further, the claim of the assessee is also otherwise inadmissible in view of the clear provisions of section 80AC that no deduction u/s.80IA can be allowed to an assessee for the very year, i.e. A.Y. 2006-07 unless the assessee furnishes return of income for such assessment year on or before the due date specified u/s.139(1).

47. Aggrieved with such order of the CIT(A) the assessee is in appeal before us.

48. The Ld. Counsel for the assessee submitted that the assessee filed his return of income u/s.139(1) on 30-10-2007. The search took place on 06-10-2009. The assessment for this year was pending as on the date of search and therefore the same gets abated in view of second proviso to section 153A. Relying on the decision of the Pune

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Bench of the Tribunal in the case of B.G. Shirke Construction Technology Pvt. Ltd. (Supra) he submitted that the Tribunal in the said decision has held that the assessee can make a new claim for the assessment years which have abated since the AO retains the original jurisdiction. Accordingly, the assessee is entitled to make a fresh claim.

49. So far as the second objection of the CIT(A) that in view of the provisions of section 80AC the assessee can claim the deduction u/s.80IA(4) only if the same has been claimed in the return filed within the due dates stipulated u/s.139(1), the Ld. Counsel for the assessee submitted that the only condition of section 80AC is that the assessee must have filed its return u/s.139(1). Since the assessee has filed the return of income on 31-12-2007 (page 49 of the paper book) within the due date stipulated u/s.139(1) this condition is fulfilled.

50. As regards the contention of the Revenue that the assessee should have also made the claim in the return filed u/s.139(1) is concerned he submitted that the same is not correct. Referring to provisions of section 80IA(5) he submitted that the above provision states that if the assessee has not made any claim in the return no deduction is allowable. The said section only states that if the assessee has not made a claim in the return no deduction is allowable. It does not state that the assessee should make the claim in the return filed u/s.139(1). Therefore, even as per this section, there is no merit in the contention of the department. In any case, in view of the decision of the Tribunal in the case of B.G. Shirke Construction Technology Pvt. Ltd. (Supra), the assessee is entitled to make the claim. Since the assessee has made the claim in the return of income

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filed u/s.153A and the assessment for this year was pending on the date of search.

51. The Ld. Departmental Representative on the other hand heavily relied on the order of the Ld.CIT(A). He submitted that since the assessee has not made the claim u/s.80IA(4) in the original return of income filed u/s.139(1), therefore, the assessee is precluded from claiming of the same in the return filed u/s.153A. He submitted that the assessee cannot be allowed any benefit for its lapses in the return filed u/s.153A of the I.T. Act. He accordingly submitted that the order of the CIT(A) be upheld on this issue and the grounds raised by the assessee be dismissed.

52. We have considered the rival arguments made by both the sides, perused the orders of the AO and the CIT(A) and the paper book filed on behalf of the assessee. We find the assessee in the instant case filed his return of income u/s.139(1) on 31-10-2007. The search took place on 06-10-2009. At the time of search the assessment for the impugned assessment year was not completed. The assessee filed the return of income in response to notice u/s.153A on 24-06-2010 disclosing total income of Rs.12,80,97,695/- after claiming deduction of Rs.5,36,44,728/- u/s.80IA(4) of the I.T. Act. The AO disallowed the claim of deduction u/s.80IA(4) on the ground that the same was not claimed in the original return filed u/s.139(1) of the I.T. Act. Relying on the provisions of section 80AC and 80IA (5) the AO disallowed the claim made by the assessee in the return filed in response to notice u/s.153A. We find the Ld.CIT(A) upheld the above action of the AO. We find the Pune Bench of the Tribunal in the case of B.G. Shirke Construction Technology Pvt. Ltd. (Supra) had an occasion to decide

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such an issue. The relevant observation of the Tribunal from para 9 onwards read as under :

> “9. We have carefully considered the rival submissions. In this case, search u/s 132(1) of the Act was carried out on 18.12.2008. On the basis of the second proviso to section 153A(1) of the Act, which reads as under :-
>
> "Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this [sub-section] pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate."
>
> In the present case, the assessments which are pending on the date of initiation of search are for assessment years 2007-08 and 2008-09, and thus such assessments abate. Before us, the Ld. Counsel for the assessee conceded that assessments for assessment years 2003-04 and 2006-07 were not pending on the date of initiation of search and thus the same do not abate as per the aforesaid proviso to section 153A(1) of the Act. The aforesaid position is not disputed by the Revenue also.
>
> 10. In the above undisputed fact situation, now we may examine the scope of assessments to be made u/s 153A(1)(b) of the Act for the assessment years 2007-08 and 2008-09, which have abated and for the assessment years 2003-04 and 2006-07, which do not abate. Following the reasoning laid down in the case of All Cargo Global Logistics Ltd. (supra) , it has to be held that in so far as the assessment years 2003-04 and 2006-07 are concerned, assessments u/s 153A(1)(b) of the Act would be made on the basis of incriminating material, which has been explained to mean (i) books of account, other documents, found in the course of search but not produced in the course of original assessment; and, (ii) undisclosed income or property discovered in the course of search. Of course, the income so determined shall be in addition to the income already assessed in regular assessment proceedings for the said two assessment years. Now, the moot point is as to whether the impugned claim of the assessee for excluding income on account of retention money can fall in the scope and an ambit of an assessment made u/s 153A(1)(b) of theI.T Act for the assessment years 2003-04 and 2006-07. Ostensibly, as observed earlier on the basis of the decision of Special Bench of Tribunal in the case of All Cargo Global Logistics Ltd. (supra), an assessment u/s 153A(1)(b) for the assessment years 2003-04 and 2006-07 would be based on incriminating material, books of accounts, other documents found in the course of search but not produced in the course of original assessment or any undisclosed income or property discovered in the course of search. At the time of hearing, the Ld. Counsel for assessee fairly conceded the position that impugned claim relating to exclusion of income on account of retention money does not fall in the aforesaid category and thus, it is beyond the scope and ambit of an assessment envisaged u/s 153A(1)(b) of the Act for assessment years 2003-04 and 2006-07. Therefore, on this point itself, we uphold the stand of the Revenue for assessment years 2003-04 and 2006-07 in denying assessee's claim for excluding income on account of retention money.

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11. Accordingly, the appeals of the assessee for assessment years 2003-04 and 2006-07 are dismissed.

12. Now, in so far as the assessments for assessment years 2007-08 and 2008-09 are concerned, the original assessments were pending on the date of initiation of search, and the same stand abated in terms of the second proviso to section 153A(1) of the Act. Following the reasoning laid down in the case of All Cargo Global Logistics Ltd. (supra), in so far as assessment years 2007-08 and 2008-09 are concerned, the Assessing officer retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A of the Act. In this context, the preliminary issue is as to whether the scope of assessments u/s 153A(1)(b) of the Act for assessment years 2007-08 and 2008-09 can include consideration of assessee's plea to exclude income on account of retention money, considering the fact the returns of income filed by the assessee for assessment years 2007-08 and 2008-09 u/s 139(1) of the Act did not contain any such claim. In the assessments u/s 153A(1)(b) of the Act, assessee claimed that income on account of retention money be excluded in the years when the customers had withheld the retention money and instead tax it in the year of its actual receipt. No doubt, the said claim does not pertain to any incriminating material found in the course of search, so however, on account of the fact that the Assessing Officer retains his original jurisdiction as well in the assessments for the years 2007-08 and 2008-09 to be made u/s 153A(1)(b) of the Act, in our considered opinion, as the following discussion would so, such a claim though made for the first time in the impugned assessment proceeding, would fall within the ambit and scope of impugned assessment carried out u/s 153A(1)(b) of the Act. Pertinently, the original jurisdiction vested with the Assessing Officer for the assessment years 2007-08 and 2008-09 empowers him to consider the impugned claim; and, to put it in other words, assessee was competent to raise such a fresh claim in the context of the original jurisdiction vested with the Assessing Officer, though it was not raised in the returns of income originally filed.

13. We may also consider this from another angle. As on the date of initiation of search i.e. 18-12-2008, the returns of income filed by assessee u/s 139(1) of the Act for assessment years 2007-08 and 2008-09 were pending for assessment and the impugned claimed was not made in the returns of income originally filed. So, however, u/s 139(5) of the Act, assessee was competent to furnish a revised return and make such a claim, and thus the Assessing Officer was required to entertain such a claim in the course of exercising his original jurisdiction to make an assessment u/s 143(3) of the Act. Now, consequent to search action, for assessment years 2007-08 and 2008-09, Assessing Officer not only acquires jurisdiction to make additions based on the incriminating material but also retains the original jurisdiction, as explained by the Special Bench of Tribunal in the case All Cargo Global Logistics Ltd. (supra). Thus, the ensuing assessments u/s 153A(1)(b)of the Act for assessment years 2007-08 and 2008-09 would enable the Assessing Officer to consider the impugned claim which has been justifiably made by the assessee. Considering the entirety of circumstances and in law, we, therefore, hold that in so far as the assessments for the assessment years A.Y. 2003-04, 2006-07, 2007-08 & 2008-09 2007-08 and 2008-09 are concerned, the income-tax authorities erred in not entertaining the impugned claim of the assessee merely because it was made in the course

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of an assessment u/s 153A(1)(b) of the Act and was not made in the returns of income originally filed u/s 139(1) of the Act.

14. For the assessment years 2007-08 and 2008-09, another objection raised by the Revenue is to the effect that the claim was not made in the return of income filed in response to notice issued u/s 153A(1)(a) of the Act, but was submitted by way of a letter during the assessment proceedings and therefore following the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. vs. CIT, (2006) 284 ITR 323 (SC), the Assessing Officer was justified in not entertaining such a claim.

15. On this aspect, the learned counsel for the assessee pointed out that in the return of income submitted in response to notice u/s 153A(1)(a) of the Act, assessee had enclosed a Note dated 14.09.2009, a copy of which has been placed in the Paper Book at page 1 to 2, putting-forth its claim for excluding income on account of retention money, but in the computation of income no specific claim was made because the quantification of the claim could not be made in the limited time period allowed to file a return in response to notice u/s 153A(1)(a) of the Act. In the course of the subsequent assessment proceedings, assessee quantified the claim for the respective assessment years and also filed copies of the agreements with the customers which contained the relevant clauses permitting retention of a portion of the contract value. It is pointed out that strictly speaking the judgement of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) is not applicable in the present case as no fresh claim was made in the assessment proceedings, but it is a case where a claim put-forth in the return of income was only quantified during assessment proceedings and thus the Assessing Officer ought to have entertained the impugned claim. Alternatively, it is contended that the CIT(A) enjoys plenary powers of the Assessing Officer, and following the judgment of the Hon'ble Supreme Court in the case of Jute Corporation of India Ltd. vs. CIT, (1991) 187 ITR 688, the claim should have been entertained by him as the complete facts were on record. In this context, the learned counsel referred to the decision of the Pune Bench of the Tribunal in the case of Jain Irrigation Systems Ltd. vide ITA No.1319/PN/2009 dated 30.01.2012 wherein the import of the judgment of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) has been explained on the basis of the judgment of the Hon'ble Delhi High Court in the case of CIT vs. Jai Parabolic Springs Ltd., (2008) 306 ITR 42 (Del), in the following words :-

"5. We have carefully considered rival submissions. In our view, the plea of the assessee is well-reasoned, inasmuch as the judgment of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) does not impinge on the powers of the appellate authorities to entertain a fresh claim which was hitherto not preferred by the assessee in the return of income. In fact, the Hon'ble Delhi High Court in the case of CIT v. Jai Parabolic Springs Ltd. 306 ITR 42 (Del) supports the proposition that the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) was limited to the power of the Assessing Officer to entertain claim for deduction otherwise than by a revised return and does not put fetters on such powers of the appellate authorities."

16. On the basis of aforesaid, it is sought to be made out that the claim of the assessee ought to have been entertained by the lower authorities and decided on its merits.

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17. On the other hand, the learned Departmental Representative appearing for the Revenue has contended that the lower authorities were justified in not entertaining the impugned claim as it was a fresh claim made only during the assessment proceedings and not in the return of income.

18. We have carefully considered the rival submissions. The Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) opined that a fresh claim of the assessee can be entertained at the time of assessment only if it is made by way of a revised return of income; and, the aforesaid proposition has been invoked by the income-tax authorities in the present case to deny assessee's claim for exclusion of income on account of retention money, a claim which was made during the assessment proceedings.

19. Factually speaking, we find that in terms of a communication dated 14.09.2009 filed along with the return of income filed in response to notice issued u/s 153A(1)(a) of the Act, assessee inter-alia, stated as under :-

"The business of our company is to execute construction contracts. In respect of some of the contracts executed by the company there is a clause in the contract which entitles the customer to retain between 5% to 10% of contract value till the completion of defect liability period contained in the contract which is generally between 12 to 24 months after the completion of the construction. Inadvertently in the original return filed this amount was not excluded while computing the total income. In the short span of time allowed to us to file the return u/s. 153A, the exact quantification of the retention money could not be worked out. Hence we will submit the details thereof later. But for the time being, we submit that the retention money in the various contracts is not taxable in view of the various decisions including the decisions cited below wherein it is held that the taxability of this amount is to be considered in the year in which this amount is due to the assessee from the contractee.

(a) CIT v Associated Cables P. Ltd.
(2006) 286 ITR 596 (Bom.)
(b) DCIT v Spirax Marshall Ltd.
(2007) 109 TTJ (Pune) 593
(c) National Heavy Engg. Co. Op. Ltd. v DCIT
(2007) 105 ITD 485 (Pune)

Inadvertently, in the Original Return of Income this amount was not claimed as deduction. We request Your Honour to kindly grant us appropriate deduction while completing assessment. We shall submit the necessary details and quantification of claim during the course of assessment."

20. The aforesaid Note clearly depicts the claim of the assessee to the effect that the retention money in various contracts retained/deducted by the customers is not taxable; and, various case laws have also been cited, including that of the Hon'ble Jurisdictional High Court of Bombay in Associated Cables (P) Ltd. (supra) in support of the said proposition. Of course, the claim was not reflected in the actual computation of income in the absence of its quantification. During the course of assessment

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proceedings, assessee not only quantified its claim year-wise but also explained the factual matrix of the claim based on the relevant clauses of the contracts with various contractees/customers, as is evident from copy of assessee's communication to the Assessing Officer placed in the Paper Book at pages 3-6. In this factual background, can it be said that the assessee made a fresh claim during the assessment proceedings so as to fall within the purview of the ratio laid down by the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra)? In our view, the fact situation in the present case is qualitatively different than that considered by the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra). Ostensibly, the assessee company made a claim for excluding income on account of retention money in the return of income itself, though the quantification was absent, and the actual quantification of such claim was made during the assessment proceedings; thus, substantively speaking it cannot be said that assessee made a new claim during assessment proceedings which was not made in the return of income. Considering the above fact situation, in our view, the CIT(A) erred in upholding the action of the Assessing Officer in refusing to entertain the impugned claim based on the judgement of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra).

21. In any case, the judgement of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. (supra) does not impinge on the powers of appellate authorities to entertain a fresh claim which was hitherto not preferred by the assessee in the return of income, as explained by the Hon'ble Delhi High Court in the case of Jai Parabolic Springs Ltd. (supra). Accordingly, there was no impediment for the CIT(A) to have entertained the impugned claim especially when the required facts to adjudicate the controversy were already on record.

22. Thus, considered in the aforesaid light, we find no justification for the Revenue to reject assessee's impugned claim for assessment years 2007-08 and 2008-09 on the ground that the claim was made by way of a letter during the course of assessments and not in the return of income.

23. The third objection which has been raised by the Revenue is in terms of a discussion made by the CIT(A) in para 3.6 of the impugned order. According to the CIT(A), if the claim for excluding retention money was entertained and allowed, it would result in the determination of total income at a figure below the income originally returned/assessed and thus the same was not permissible. This objection of the Revenue, in our view is no bar to entertain the aforesaid claim, keeping in mind the ratio of the judgement of the Hon'ble Supreme Court in the case of CIT vs. Shelly Products & Anr., (2003) 261 ITR 367 (SC) and also the judgement of the Hon'ble Gujarat High Court in the case of Gujarat Gas Co. Ltd. vs. CIT, 245 ITR 54 (Guj).

24. On the basis of the aforesaid discussion, in conclusion we hold that in so far as the assessment years 2007-08 and 2008-09 are concerned, the claim of the assessee for exclusion of income on account retention money withheld by contractees/customers has been wrongly rejected by the lower authorities.”

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53. Since the assessment for the impugned assessment year was pending on the data of search, therefore, respectfully following the decision of the coordinate bench of the tribunal cited (supra) we hold that the CIT(A) was not justified in rejecting the claim made u/s.80IA(4) of the I.T Act merely because the assessee had not made the claim in the original return. We accordingly set aside the order of the CIT(A) on this issue and the grounds raised by the assesse are allowed.

54. Ground of appeal No.7 relates to methodology of computation of deduction u/s.80IA(4) as adopted by the AO by considering difference phases of windmills as separate undertaking. The Ld.CIT(A) following his order for A.Y. 2005-06 held that in a fresh claim made by the assessee unless it is supported by some incriminating material found during the course of search the claim cannot be entertained during proceedings u/s.153A. He accordingly dismissed the above ground raised by the assessee.

55. The Ld. Counsel for the assessee referring to the decision of the Pune Bench of the Tribunal in the case of J-Sons Foundry Pvt. Ltd. Vs. DCIT and vice versa vide consolidated order dated 30-01-2013 for A.Y. 2007-08 and 2008-09 he submitted that the Tribunal in the said decision held that each windmill is to be considerate as a separate undertaking.

56. The Ld. Departmental Representative on the other hand heavily relied on the order of the CIT(A).

57. After hearing both the sides, we find the Coordinate Bench of the Tribunal in the case of J-Sons Foundry Pvt. Ltd. (Supra) while

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dismissing the grounds raised by the Revenue on this issue has observed as under :

> "15. Against the decision of the Ld. CIT(A), the Revenue is in appeal before us. We have heard the rival submissions of the parties and perused the record. Admittedly, the assessee is power general through the wind mills at 3 different locations i.e. in Tamilnadu, Panchgani and Satara. The wind mills are commissioned and erected in different assessment years as noted by the authorities below. Assessee is maintaining separate books of accounts in respect of 3 wind mills and working out the profit or losses. Though the first wind mill was erected and commissioned in the A.Y. 2002-03, there were consistent losses up to the A.Y. 2007-08 and assessee did not opt for claiming the deduction u/s 80IA(2) of the Act. So far as A.Y. 2008-09 is concerned, assessee opted for claiming the deduction u/s 80IA(2) treating the said assessment year (A.Y.) as an initial assessment year as there was the profit in Satara wind **mill** but losses in the Tamil Nadu wind **mill** and Panchgani wind mill. If we look at the scheme of the section 80IA(2), it speaks about the "undertaking" or "enterprise" and not the business of the assessee. Admittedly, three wind mills at the 3 locations are independently operated and the financial results are separately worked out. As per sub-sec.(5) of section 80IA, for computing the deduction u/s 80IA(2), the eligible business is to be treated as the only source of income. Sub-sec.(5) of section 80IA has been explained by the Hon'ble High Court and Kerala in the case of CIT Vs. Accel Transmatic Systems Ltd. 230 CTR 206 (Ker) which has been followed by the Ld. CIT(A). The term "business" used In sub-sec.(5) section 80IA in our humble opinion is confined to the independent undertaking and cannot get merged with the other businesses. In Sec. 80IA(2), for claiming deduction "undertaking" or "Enterprise" as such is to be considered. Sec.80IA(2) is charging sections for determining basic eligibility and there is no mention of word "business". Sub-sec.(5) of Sec.801A speaks of business but same is to be construed as business of "undertaking" or "Enterprise" as referred to in Sub-sec.(2) of Sec.80IA. It is well settled principle of interpretation of statutory provision that they are to be interpreted harmoniously to make workable to give intended results. Hence, as rightly held by Ld. CIT(A) term "business" used in sec.80IA(5) is to be construed and understood to mean "business" or "undertaking or enterprise". In our opinion, the Ld.CIT(A) in his well reasoned order has rightly held that every unit constitute a separate undertaking engaged in the eligible business and losses from one unit cannot be set off against the profits. Another unit engaged in the same business for the purpose of computing the deduction u/s.80IA. We find no reason to interfere with the findings of the Ld.CIT(A) on this issue. Accordingly, the same are confirmed and grounds taken by the Revenue are dismissed."

58. Respectfully following the decision of the Coordinate Bench of the Tribunal cited (Supra) and in absence of any contrary material brought to our notice we hold that each phase of windmill has to be considered as separate undertaking eligible for deduction u/s.80IA

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and therefore deduction u/s.80IA(4) should have been computed independently for each phase and not on consolidated basis. The grounds raised by the assessee on this issue is accordingly allowed.

59. Grounds of appeal No.8 to 8.1 relates to whether initial assessment year u/s.80IA(5) means year of installation of windmill or year in which the claim of deduction u/s.80IA is first made.

60. After hearing both the sides, we find the AO at para 4.8.1 of the order held that as per the provisions of section 80IA(5) for determining the quantum of eligible deduction under sub-section 80IA(4) of the I.T. Act, the income of such assessee is to be computed as if such eligible business was the only source of income of the assessee during the previous year relating to initial assessment year and to every subsequent assessment year upto and including the assessment year for which the determination is to be made. Considering all windmill undertakings as one single unit of eligible business of the assessee the AO prepared a chart for different assessment years and came to the conclusion that the cumulative loss if Rs.73,49,07,073/- on a consolidated basis. Such cumulative income is also negative on separate undertaking basis for each undertaking, i.e. Satara-I, Satara-II, Satara-III and Rajasthan for which the assessee has claimed deduction. He further noted that the major bone of contention between the assessee and the revenue is the issue of initial assessment year as envisaged in section 80IA(5) of the I.T. Act. Assessee treats the first year of its claim as initial assessment year and thereby computes its quantum deduction u/s.80IA(4) of the Act. However, the provisions make it clear that assessee is eligible for deduction u/s.80IA(4) only when profits and gains from windmills

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exceed the accumulated depreciation on such windmills. He, therefore, was of the opinion that the year of installation has to be necessarily treated as initial assessment year in order to arrive at quantum of eligible deduction u/s.80IA(4) in accordance with section 80IA(5) of the I.T. Act.

61. Following the decision of the Special Bench of the Tribunal in the case of Goldmine Shares and Finance Pvt. Ltd. reported in 113 ITD 209 the AO held that for considering the initial assessment year, the year of installation has to be necessarily adopted rather than the first year of claim. He accordingly rejected the claim of the assessee amounting to Rs.5,36,44,728/-. In appeal the Ld.CIT(A) upheld the action of the AO.

62. The Ld. Counsel for the assessee at the outset submitted that the Pune Bench of the Tribunal in the case of Poonawala Estate Stud & Agro Farm Pvt. Ltd. reported in 136 TTJ (Pune) 236 following the decision of Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills Pvt. Ltd. reported in 340 ITR 477 has decided the issue in favour of the assessee. Therefore, this being a covered matter the grounds raised by the assessee should be allowed.

63. The Ld. Departmental Representative on the other hand heavily relied on the order of the CIT(A).

64. After hearing both the sides, we find the issue as to whether initial assessment year u/s.80IA(5) means year of installation of windmill or year in which the claim of deduction u/s.80IA is first made has been decided in favour of the assessee by the decision of the Pune Bench of the Tribunal in the case of Poonawalla Estate Stud & Agro

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Farm Pvt. Ltd. following the decision of Hon'ble Madras High Court in the case of Velayudhaswamy Spinning Mills Pvt. Ltd. has observed as under :

> "13. We have heard both the parties and perused the factual matrix of the case and orders of the Revenue and the paper book. We have also examined the legal position on the matter. Before adjudicating the issue in question, it is necessary to examine the scope of the provisions relating to the initial assessment year :
>
> "80-IA. Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.—(1) Where the gross total income of an assessee includes any profits and gains derived from any business of an industrial undertaking or an enterprise referred to in sub-s. (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to hundred per cent of profits and gains derived from such business for the first five assessment years commencing at any time during the periods as specified in sub-s. (2) and thereafter, twenty-five per cent of the profits and gains for further five assessment years :
>
> Provided that where the assessee is a company, the provisions of this sub-section shall have effect as if for the words 'twenty-five per cent'; the words 'thirty per cent' had been substituted.
>
> (2) The deduction specified in sub-s. (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park or generates power or commences transmission or distribution of power :
>
> Provided that where the assessee begins operating and maintaining any infrastructure facility referred to in cl. (b) of Explanation to cl. (i) of sub-s. (4), the provisions of this sub-section shall have effect as if for the words 'fifteen years', the words 'twenty years' had been substituted..............."
>
> 14. From the above provisions of sub-s. (2) of s. 80-IA of the Act, it is evident that the assessee is granted the option to select 'initial assessment year' i.e., first assessment year of the 'any ten consecutive assessment years out of fifteen years'. Starting assessment year for counting the duration of fifteen years is also provided in the said sub-section. As per these provisions, the assessee is not allowed to jump the assessment year once an initial assessment year is opted. Therefore, we find no fault with the assessee in selecting the asst. yr. 2004-05 as the 'initial assessment year'. In this regard i.e., on the issue of assessee's option to select the 'initial assessment year', we have perused the citations relied upon by the assessee's counsel. The conclusion by the Tribunal Mumbai Bench decision in ITA No. 4620/Mum/2007 (asst. yr. 2004-05) in the case of Dy. CIT vs. Ushdev International Ltd., is straight on this issue of initial

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assessment year and the option to the assessee and the held portion of the decision reads as under :

"In view of the above learned CIT(A)'s order to the extent of holding that initial assessment year and subsequent succeeding assessment years can only be considered for the purpose of computing deduction under s. 80-IA. Coming to the facts of the case, however, as seen from the schedule of details available in the learned CIT(A)'s order the assessee has incurred losses in the asst. yrs. 1997-98 and 1998-99 only. Subsequently in all the years there were profits till asst. yr. 2004-05. It is not clear whether the assessee has claimed any deduction in earlier years under s. 80-IA. This being the 8th year of starting the project, assessee would be left with only another 7 years of claim out of the 10 years available to the assessee. Considering this we are of the opinion that the initial assessment year is to be determined on the basis of the year the assessee choose to claim the deduction for the first time........"

15. When the statute have granted the option to choose the initial assessment year and when the assessee has so chosen the current assessment year as the initial assessment year and when the assessee accordingly paid the taxes on the profits of the windmill activity in the earlier years as per the statute, the AO's decision to thrust the initial assessment year on the assessee is not in tune with the provisions of s. 80-IA(2) of the Act. Accordingly, we are of the opinion, the learned CIT(A) erred in holding that the initial assessment year for the purposes of s. 80-IA(2) r/w s. 80-IA(5) was the year in which the assessee started generating the electricity. Therefore, the order of the CIT(A) has to be reversed on this issue. It is clear that the 'initial assessment year' for the above purposes was the first year in which the assessee claimed the deduction under s. 80-IA(1) after exercising his option as per the provisions of s. 80-IA(2) of the Act. Consequently, the assessee is entitled to claim the deduction of Rs. 25,44,326 under s. 80-IA in respect of the profits from the windmill activity. Accordingly, the clarificatory ground raised is allowed. In the result, adjudication of the grounds 3 and 4 raised in the appeal is mere academic and hence they are dismissed as infructuous.

16. In the result, the appeal of the assessee is allowed."

65. Respectfully following the decision of the Coordinate Bench of the Tribunal cited (Supra) and in absence of any contrary material brought to our notice we hold that the provisions of section 80IA(5) are applicable only from the initial assessment year, i.e. the assessment year in which deduction u/s.80IA was first claimed by the assessee after exercising his option as per the provisions of section 80IA(2) of the Act. The grounds raised by the assessee are accordingly allowed.

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66. In grounds of appeal No. 9 to 9.1 the grievance of the assessee is regarding denial of claim of higher rate of depreciation in respect of cost of electrical fencing and temporary approach road.

67. The Ld. Counsel for the assessee at the outset submitted that the issue stands decided against the assessee by the decision of the Pune Bench of the Tribunal in the case of Poonawala Finvest and Agro Pvt. (Supra). In view of the above, grounds of appeal No. 9 to 9.1 by the assessee are dismissed.

68. Ground of Appeal No.10 being general in nature is dismissed.

ITA No.1185/PN/2013 (2007-08) (By Revenue) :

69. Grounds raised by the Revenue are as under :

> "1. The Ld.CIT(A) erred in deciding that no addition can be made u/s.153A, if the same is not in assessment u/s.143(3) of the Act and if it is not based on any incriminating seized materials pertains to such A.Y.
>
> 2. The Ld.CIT(A) erred in deciding that power generation from windmill is manufacturing activity.
>
> 3. The Ld.CIT(A) erred in deciding that assessee can claim additional depreciation on windmill if assessee is engaged in manufacturing activities, although windmill has no connection with its manufacturing business.
>
> 4. The Ld.CIT(A) erred in deciding that assessee is eligible to claim depreciation @80% on electrical fittings used for windmill, although depreciation on electrical fittings is @10% only as per I.T. Rules, 1962.
>
> 5. The appellant craves to add, alter or amend any or all the grounds of appeal."

70. So far as ground of appeal No.1 is concerned we find no assessment order was passed u/s.143(3) of the I.T. Act. The Ld.CIT(A) has also not deleted any addition made for this year on the ground that no addition can be made without any incriminating evidence. In view of the above, we are of the considered opinion that this ground

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raised by the Revenue is devoid of any merit. Accordingly, the above ground is dismissed.

71. Grounds of appeal No.2 and 3 by the Revenue relates to additional depreciation on the cost of windmills installed.

72. Facts of the case, in brief, are that the AO during the course of assessment proceedings held that additional depreciation is available only to an assessee engaged in manufacture of production of article or thing. Since the assessee was generating power and not producing the power from wind energy, the claim of additional depreciation made by the assessee is not allowable. According to the AO, the set up of a windmill had absolutely no connection with the assessee's main business of tobacco. The assessee was already enjoying the benefit of depreciation at a higher rate and by claiming further additional depreciation the assessee would derive double benefit which is not permissible under the Act. In view of the above, the AO rejected the claim of additional depreciation at Rs.91,23,658/-.

73. In appeal the Ld.CIT(A) allowed the claim of the assessee by observing as under :

> "7.1 The appellant has stated that since the issue is similar to Grounds No.20 to 20.5 to A.Y. 2006-07, it places reliance on submissions made for that year. However, the facts for A.Y. 2006-07 are distinguishable in as much as the claim for additional depreciation was made in the original return filed and allowed by the Assessing Officer in the original proceedings u/s.143(3). For the impugned year, the appellant did make a claim in the original return but the same has not been examined by the Assessing Officer u/s.143(3). Following the Bombay Special Bench decision in All Cargo Global Logistics Ltd., 137 ITD 287 it is held that reassessment___ the Assessing Officer on this issue is possible. At the same time, the issue is decided in favour of the appellant in view of the jurisdictional ITAT decision on ITA No.823/PN/2011 dated 27-08-2012 in the case of Shri Aninash Nivrutti Bhosale. It is to also seen that the Madras High Court decision in the case of V.T.M. Ltd reported in ITR 336 is squarely on the related ground that has been taken by the Assessing Officer for denial of additional depreciation that even if the windmill has

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> no connection with the business of manufacture carried out by the assessee (In this ___ manufacture of jarda), it is entitled to claim additional depreciation on the cost of the windmill. Grounds No. 13 to 13.6 are therefore, treated as allowed."

74. Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

75. After hearing both the sides, we do not find any infirmity in the order of the CIT(A) who allowed the claim of the assessee by following the decision of the Tribunal in the case of Avinash Nivrutti Bhosale (Supra) as well as the decision of Hon'ble Mumbai High Court in the case of V.T.M. Ltd. (Supra) . Further, we have already decided this issue in favour of the assessee in ITA No.1184/PN/2013 for A.Y. 2006-07 and the ground raised by the Revenue on this issue has been dismissed. Accordingly, the grounds raised by the Revenue are dismissed.

76. In ground of appeal No.4 the Revenue has challenged the order of the CIT(A) in allowing depreciation @80% on electrical fittings used for windmills.

77. After hearing both the sides, we find the AO allowed depreciation @10% as per I.T. Rules on electrical fittings used for windmills. In appeal the Ld.CIT(A) held that the assessee is eligible to claim depreciation @80% on electrical fittings used for windmills. While doing so, he relied on the decision of the Pune Bench of the Tribunal in the case of Poonawalla Finvest & Agro Pvt. Ltd. (Supra).

78. Aggrieved with such order of the CIT(A) the Revenue is in appeal before us.

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79. After hearing both the sides, we find no infirmity in the order of the CIT(A). We find the Ld.CIT(A) at para 6.3 in the order for A.Y. 10-11 which has been followed in this year has observed as under :

> "6.3 On careful consideration, I find that the above issue has been dealt elaborately by the jurisdictional Tribunal in the case of poonawalla Finvest & Agro Pvt. Ltd. Vs. ACIT reported in 118 TTJ (Pune) 68 : 2008 12 DTR 211 and Vanaz Engineering Ltd. Vs. Addl.CIT, Range-7 in ITA No.987/PN/2006 A.Y. 03-04 dated 31-10-2008. In view of the above, I do not find any requirement to consider other judgments relied upon by the appellant as the Hon'ble Tribunal, Pune 'A' Bench has already considered these aspects while giving the judgment on the above issue in the above referred cases. In the case of Poonawalla Finvest & Agro Pvt. Ltd., the Hon'ble Tribunal has held that the civil work of control room, site development and internal roads adjunct to a windmill generating electricity is not entitled to 100%b depreciation as a windmill but transformer upto DP structure being gadget for transmission of power generated by windmill is entitled to 100% depreciation. Similarly, in the case of Vanaz Engineering Ltd. also wherein the principle laid in Poonawalla Finvest & Agro Pvt. Ltd. was followed, it was held that claim of depreciation in respect of plant and machinery and electrical fittings is allowed and the claim of depreciation in respect of building is rejected. Following the same, I am of the opinion that the depreciation on power evacuation infrastructure, transformer, erection and commissioning of these structures, like work, electrical items will qualify for depreciation @80% whereas MEDA charges, site development expenses, cost of construction of control room, civil work, internal road development, application charges, professional fees, and bank charges will not qualify for higher rate of depreciation. The Assessing Officer is directed to verify these expenses and allow as per above items accordingly. Since the disallowance for earlier A.Yrs. 2006-07 to 2009-10 have been partly confirmed subject to the quantification as per the above remarks, the appellant gets consequential relief. Grounds No. 11 to 11.2 therefore, is partly allowed, subject to the above remarks."

80. Since the Ld.CIT(A) while along higher rate of depreciation on electrical fittings used for windmill has followed the decision of the Coordinate Bench of the Tribunal, therefore, in absence of any contrary material, we find no infirmity on this issue. Accordingly, ground raised by the Revenue is dismissed.

ITA No.1152/PN/2013 (A.Y. 2008-09) (By Assessee) :

81. Grounds of appeal No. 1to 6 by the assessee read as under :

> "The following grounds are taken without prejudice to each other -

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On facts and in law,

1] The learned CIT(A) erred in denying the deduction claimed u/s 80IA(4) of Rs.5,49,98,855/-.

2] The learned CIT(A) erred in holding that in view of the provisions of section 80AC, the assessee can claim the deduction u/s 80IA(4) only if the same has been claimed in the return filed within the due date stipulated u/s.139(1) and since the said claim was not made in the original return filed u/s 139(1), the same could not be allowed in the asst. u/s 153A.

3] The learned CIT(A) erred in holding that the assessee was not entitled to make a fresh claim in the return filed u/s 153A on the ground that in the asst. u/s 153A, only income which had escaped asst. could be taxed and the assessee could not be placed in a better position vis-a-vis the income declared in the original return.

4] The learned CIT(A) erred in holding that in the asst. u/s 153A, the issues which have already attained finality in the original asst. cannot be disturbed unless any incriminating evidence is found in respect of the same and since no such material was found in respect of the deduction u/s 80IA(4) claimed in respect of windmills, the said claim of the assessee made in the asst. u/s153A was not allowable.

5] The learned CIT(A) failed to appreciate that in the asst. u/s. 153A, the assessee could make a fresh claim which was not made in the original return and there was no such bar that no new claim could be made by the assessee in the return filed u/s. 153A.

6] The learned CIT(A) ought to have appreciated that the asst. u/s 143(3) had not taken place for this year and hence, in the asst. u/s 153A, the A.O. was bound to assess the total income of the assessee and therefore, even the issues in respect of which no incriminating evidence was found during search should have been considered in the asst. u/s 153A and thus, the deduction claimed by the assessee should have been allowed."

82. Grounds of appeal No. 1 to 6 relate to disallowance u/s.80IA(4) where the assessee has not claimed the same in the return filed u/s.139(1) and claimed the same for the first time in the return filed in response to notice u/s.153A.

83. After hearing both the sides, we find the above grounds are identical to grounds of appeal No.1 to 6 in ITA No.1151/PN/2013. We have already decided the issue and the grounds raised by the assessee

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have been allowed. Following similar reasonings, the above grounds raised by the assessee are allowed.

84. Ground of appeal No.7 by the assessee read as under :

> "7] The learned CIT(A) erred in not appreciating that each phase of wind mills was to be considered as a separate undertaking eligible for deduction u/s 80IA and hence, the deduction u/s 80IA(4) should have been computed independently for each phases and not on consolidated basis."

85. After hearing both the sides, we find the above ground is identical to ground of appeal No.7 in ITA No.1151/PN/2013 for A.Y. 2007-08. We have already decided the issue and the ground raised by the assessee has been allowed. Following similar reasonings, the above ground by the assessee is allowed.

86. Grounds of appeal No.8 to 8.1 by the assessee read as under :

> "8] The learned CIT(A) erred in not appreciating that in view of the provisions of section 80IA(5) of the Income tax Act, 1961 the profit from the eligible business for the purpose of deduction u/s 80IA of the Act need not be computed after deduction of the notional brought forward losses and depreciation of eligible business which have been set off against other income in earlier years.
>
> 8.1] The learned CIT(A) failed to appreciate that the provisions of section 80IA(5) were applicable only from the initial asst. year i.e. the asst. year in which deduction u/s. 80IA was first claimed by the assessee and only for the years starting from the initial asst. year and thereafter, the provisions of section 80IA(5) were applicable and hence, there was no reason to set off the notional brought forward losses /depreciation while computing the deduction u/s. 80IA for the present asst. year."

87. After hearing both the sides, we find the above grounds by the assessee are identical to grounds of appeal No.8 to 8.1 in ITA No.1151/PN/2013. We have already decided the issue and the grounds raised by the assessee have been allowed. Following similar reasonings, the above grounds raised by the assessee are allowed.

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88. Ground of appeal No.9 by the assessee reads as under :

> "9] Without prejudice to the above grounds, assuming without admitting that the assessee is not eligible to make fresh claims in the asst. u/s.153A, the assessee submits that the assessee had already claimed deduction u/s.80IA(4) to the tune of Rs.3,22,50,551/- in the original return filed u/s.139(1) and hence, the deduction should have been allowed to that extent."

89. After hearing both the sides, we find it is the alternate contention of the assessee that deduction u/s.80IA(4) made to the extent of its claim in the original return. Since we have already allowed the claim made in the return u/s.153A, therefore, this ground becomes infructuous. Accordingly, the same is dismissed.

90. Grounds of appeal No.10 to 10.1 by the assessee reads as under:

> "10] The learned CIT(A) erred in holding that the expenditure on electrical yard fencing and cost of preparation of temporary approach road was not part of the windmill and hence, the depreciation at a higher rate of 80% was not allowable in respect of such items.
>
> 10.1] The learned CIT(A) failed to appreciate that the above items were part and parcel of the wind mill purchased by the assessee and therefore, depreciation @ 80% was rightly claimed by the assessee.

91. The Ld. Counsel for the assessee at the outset submitted that the above issue is decided against the assessee by the decision of the Pune Bench of the Tribunal in the case of Poonawala Finvest & Agro Pvt. Ltd. reported in 118 TTJ 68. In view of the above, the above grounds by the assessee are dismissed.

92. Ground of appeal No.11 by the assessee being general in nature is dismissed.

ITA No.1186/PN/2013 (A.Y. 2008-09) (By Revenue) :

93. Grounds of appeal No. 1 and 2 by the Revenue read as under :

> "1. The Ld.CIT(A) erred in deciding that power generation from windmill is manufacturing activity

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> 2. The Ld.CIT(A) erred in deciding that assessee can claim additional depreciation on windmill if assessee is engaged in manufacturing activities, although windmill has no connection with its manufacturing business."

94. After hearing both the sides, we find the above grounds are identical to grounds of appeal No.1 and 2 in ITA No.1185/PN/2013. We have already decided the issue and the grounds raised by the Revenue have been dismissed. Following the same reasonings the above grounds by the Revenue are dismissed.

95. Ground of appeal No.3 by the Revenue reads as under :

> "3. The Ld.CIT(A) erred in deciding that assessee is eligible to claim depreciation @80% on electrical fittings used for windmill, although depreciation on electrical fittings is @10% only as per I.T. Rules, 1962."

96. After hearing both the sides, we find the above ground is identical to ground of appeal No.4 in ITA No.1185/PN/2013. We have already decided the issue and the ground raised by the Revenue has been dismissed. Following the same reasonings this ground by the Revenue is dismissed.

ITA No.1153/PN/2013 (By Assessee) (A.Y. 2009-10) :

97. Grounds of appeal No. 1to 6 by the assessee read as under :

> "The following grounds are taken without prejudice to each other -
>
> On facts and in law,
>
> 1] The learned CIT(A) erred in denying the deduction claimed u/s 80IA(4) of Rs.7,75,08,855/-.
>
> 2] The learned CIT(A) erred in holding that in view of the provisions of section 80AC, the assessee can claim the deduction u/s 80IA(4) only if the same has been claimed in the return filed within the due date stipulated u/s.139(1) and since the said claim was not made in the original return filed u/s 139(1), the same could not be allowed in the asst. u/s 153A.

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> 3] The learned CIT(A) erred in holding that the assessee was not entitled to make a fresh claim in the return filed u/s 153A on the ground that in the asst. u/s 153A, only income which had escaped asst. could be taxed and the assessee could not be placed in a better position vis-a-vis the income declared in the original return.
>
> 4] The learned CIT(A) erred in holding that in the asst. u/s 153A, the issues which have already attained finality in the original asst. cannot be disturbed unless any incriminating evidence is found in respect of the same and since no such material was found in respect of the deduction u/s 80IA(4) claimed in respect of windmills, the said claim of the assessee made in the asst. u/s153A was not allowable.
>
> 5] The learned CIT(A) failed to appreciate that in the asst. u/s. 153A, the assessee could make a fresh claim which was not made in the original return and there was no such bar that no new claim could be made by the assessee in the return filed u/s. 153A.
>
> 6] The learned CIT(A) ought to have appreciated that the asst. u/s 143(3) had not taken place for this year and hence, in the asst. u/s 153A, the A.O. was bound to assess the total income of the assessee and therefore, even the issues in respect of which no incriminating evidence was found during search should have been considered in the asst. u/s 153A and thus, the deduction claimed by the assessee should have been allowed."

98. Grounds of appeal No. 1 to 6 relate to disallowance u/s.80IA(4) where the assessee has not claimed the same in the return filed u/s.139(1) and claimed the same for the first time in the return filed in response to notice u/s.153A.

99. After hearing both the sides, we find the above grounds are identical to grounds of appeal No.1 to 6 in ITA No.1151/PN/2013. We have already decided the issue and the grounds raised by the assessee have been allowed. Following similar reasonings, the above grounds raised by the assessee are allowed.

100. Ground of appeal No.7 by the assessee read as under :

> "7] The learned CIT(A) erred in not appreciating that each phase of wind mills was to be considered as a separate undertaking eligible for deduction u/s 80IA and hence, the deduction u/s 80IA(4) should have been computed independently for each phases and not on consolidated basis."

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101. After hearing both the sides, we find the above ground is identical to ground of appeal No.7 in ITA No.1151/PN/2013 for A.Y. 2007-08. We have already decided the issue and the ground raised by the assessee has been allowed. Following similar reasonings, the above ground by the assessee is allowed.

102. Grounds of appeal No.8 to 8.1 by the assessee read as under :

> "8] The learned CIT(A) erred in not appreciating that in view of the provisions of section 80IA(5) of the Income tax Act, 1961 the profit from the eligible business for the purpose of deduction u/s 80IA of the Act need not be computed after deduction of the notional brought forward losses and depreciation of eligible business which have been set off against other income in earlier years.
>
> 8.1] The learned CIT(A) failed to appreciate that the provisions of section 80IA(5) were applicable only from the initial asst. year i.e. the asst. year in which deduction u/s. 80IA was first claimed by the assessee and only for the years starting from the initial asst. year and thereafter, the provisions of section 80IA(5) were applicable and hence, there was no reason to set off the notional brought forward losses /depreciation while computing the deduction u/s. 80IA for the present asst. year."

103. After hearing both the sides, we find the above grounds by the assessee are identical to grounds of appeal No.8 to 8.1 in ITA No.1151/PN/2013. We have already decided the issue and the grounds raised by the assessee have been allowed. Following similar reasonings, the above grounds raised by the assessee are allowed.

104. Ground of appeal No.9 by the assessee reads as under :

> "9] Without prejudice to the above grounds, assuming without admitting that the assessee is not eligible to make fresh claims in the asst. u/s.153A, the assessee submits that the assessee had already claimed deduction u/s.80IA(4) to the tune of Rs.2,31,54,624/- in the original return filed u/s.139(1) and hence, the deduction should have been allowed to that extent."

105. After hearing both the sides, we find it is the alternate contention of the assessee that deduction u/s.80IA(4) made to the

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extent of its claim in the original return. Since we have already allowed the claim made in the return u/s.153A, therefore, this ground becomes infructuous. Accordingly, the same is dismissed.

106. Grounds of appeal No.10 to 10.1 by the assessee reads as under:

> "10] The learned CIT(A) erred in holding that the expenditure on electrical yard fencing and cost of preparation of temporary approach road was not part of the windmill and hence, the depreciation at a higher rate of 80% was not allowable in respect of such items.
>
> 10.1] The learned CIT(A) failed to appreciate that the above items were part and parcel of the wind mill purchased by the assessee and therefore, depreciation @ 80% was rightly claimed by the assessee.

107. The Ld. Counsel for the assessee at the outset submitted that the above issue is decided against the assessee by the decision of the Pune Bench of the Tribunal in the case of Poonawala Finvest & Agro Pvt. Ltd. reported in 118 TTJ 68. In view of the above, the above grounds by the assessee are dismissed.

108. Ground of appeal No.11 by the assessee being general in nature is dismissed.

ITA No.1187/PN/2013 (By Revenue) (A.Y. 2009-10) :

109. Grounds of appeal No. 1 and 2 by the Revenue read as under :

> "1. The Ld.CIT(A) erred in deciding that power generation from windmill is manufacturing activity
>
> 2. The Ld.CIT(A) erred in deciding that assessee can claim additional depreciation on windmill if assessee is engaged in manufacturing activities, although windmill has no connection with its manufacturing business."

110. After hearing both the sides, we find the above grounds are identical to grounds of appeal No.1 and 2 in ITA No.1186/PN/2013. We have already decided the issue and the grounds raised by the

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Revenue have been dismissed. Following the same reasonings the above grounds by the Revenue are dismissed.

111. Ground of appeal No.3 by the Revenue reads as under :

> "3. The Ld.CIT(A) erred in deciding that assessee is eligible to claim depreciation @80% on electrical fittings used for windmill, although depreciation on electrical fittings is @10% only as per I.T. Rules, 1962."

112. After hearing both the sides, we find the above ground is identical to ground of appeal No.4 in ITA No.1186/PN/2013. We have already decided the issue and the ground raised by the Revenue has been dismissed. Following the same reasonings this ground by the Revenue is dismissed

ITA No.1154/PN/2013 (By Assessee) (A.Y. 2010-11)

113. Grounds of appeal No. 1 to 3 by the assessee read as under :

> "1. The Ld.CIT(A) erred in holding that for the purposes of section 80IA(4), all the windmills purchased by the assessee were to be considered as one consolidated eligible undertaking and the deduction u/s.80IA(4) was to be computed on consolidated basis only.
>
> 2. The learned CIT(A) erred in not appreciating that each phase of wind mills was to be considered as a separate undertaking eligible for deduction u/s 80IA and hence, the deduction u/s 80IA(4) should have been computed independently for each phases and not on consolidated basis.
>
> 3. The Ld.CIT(A) ought to have appreciated that the assessee could have separate undertaking carrying on the eligible business and there was no reason to combine all the eligible undertakings for computing the deduction u/s.80IA(4)."

114. After hearing both the sides, we find the above grounds are identical to ground of appeal No.7 in ITA No.1151/PN/2013 for A.Y. 2007-08. We have already decided the issue and the grounds raised by the assessee have been allowed. Following the same reasonings, the above grounds raised by the assessee are allowed.

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115. Grounds of appeal No. 4 and 5 by the assessee read as under :

> "4. The Ld.CIT(A) erred in holding that the expenditure on electrical yard fencing and cost of preparation of temporary approach road was not part of actual cost of the windmill and hence, the depreciation at a higher rate of 80% was not allowable in respect of such items.
>
> 5. The Ld.CIT(A) failed to appreciate that the above items were part and parcel of the windmill purchased by the assessee and therefore, depreciation @80% was rightly claimed by the assessee."

116. The Ld. Counsel for the assessee at the outset submitted that the above grounds have been decided against the assessee by the decision of the Pune Bench of the Tribunal in the case of Poonawala Finvest & Agro Pvt. Ltd. (Supra). In view of the above, the above grounds by the assessee are dismissed.

117. Ground of appeal No.6 by the assessee being general in nature is dismissed.

ITA No.1188/PN/2013 (A.Y. 2010-11) (By Revenue) :

118. Grounds of appeal No. 1 and 2 by the Revenue read as under :

> "1. The Ld.CIT(A) erred in deciding that power generation from windmill is manufacturing activity
>
> 2. The Ld.CIT(A) erred in deciding that assessee can claim additional depreciation on windmill if assessee is engaged in manufacturing activities, although windmill has no connection with its manufacturing business."

119. After hearing both the sides, we find the above grounds are identical to grounds of appeal No.1 and 2 in ITA No.1186/PN/2013 for A.Y.2008-09. We have already decided the issue and the grounds raised by the Revenue have been dismissed. Following the same reasonings the above grounds by the Revenue are dismissed.

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120. Ground of appeal No.3 by the Revenue reads as under :

> "3. The Ld.CIT(A) erred in deciding that assessee is eligible to claim depreciation @80% on electrical fittings used for windmill, although depreciation on electrical fittings is @10% only as per I.T. Rules, 1962."

121. After hearing both the sides, we find the above ground is identical to ground of appeal No.3 in ITA No.1186/PN/2013 for A.Y. 2008-09. We have already decided the issue and the ground raised by the Revenue has been dismissed. Following the same reasonings this ground by the Revenue is dismissed.

122. Grounds of appeal No.4 and 5 by the Revenue read as under :

> "4. The Ld.CIT(A) erred in deciding that selection of initial assessment year for computing exemption u/s.80IA is at the option of the assessee and not the year in which year business activity of eligible undertaking/unit starts?
>
> 5. The Ld.CIT(A) erred in deciding that if brought forward loss of eligible unit u/s.80IA, is already set off with non-eligible business undertaking then there is no need of notionally brought forward such loss and set off with income of eligible unit/undertaking before arriving quantum of exempt income of such eligible unit u/s.80IA, as mandated u/s.80IA(5) of the Act."

123. So far as the above 2 grounds are concerned we have already decided the issue in favour of the assessee in grounds of appeal No. 8 to 8.1 in ITA No.1151/PN/2013. Following the same reasonings and considering the fact that the order of the CIT(A) is in consonance with our observations in the said paragraphs, we do not find any infirmity in the same. Accordingly, the grounds raised by the Revenue are dismissed.

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124. In the result, all the appeals filed by the Assessee are partly allowed and all the appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 30-10-2015.

Sd/-	Sd/-
(**VIKAS AWASTHY**)	(**R.K. PANDA**)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

पुणे Pune; दिनांक Dated : 30th October, 2015.
सतीश

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)-I, Pune
4. आयकर आयुक्त / The CIT-I, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "**बी**" पुणे / DR, ITAT, "B" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune

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