IN THE INCOME TAX APPELLATE TRIBUNAL
SPECIAL BENCH : MUMBAI

BEFORE HON'BLE PRESIDENT SHRI G.E. VEERABHADRAPPA,

SHRI D.K AGARWAL, JUDICIAL MEMBER AND

SHRI K.G. BANSAL, ACCOUNTANT MEMBER

I.T.A Nos. 5018 to 5022 & 5059/M/10,

Asstt. Years 2004-05 to 2009-10

M/s. All Cargo Global Logistics Ltd. 5th Floor, Diamond Square, C.S.T. Road, Kalina, Santacruz (E), Mumbai – 400 098. (Appellant)	Vs.	DCIT, Central Csircle-44, Aayakar Bhavan, M.K. Road, Mumbai – 400 020. (Respondent)

Appellant by: S/Shri S.E. Dastur, Sr. Advocate, B.V. Jhaveri, Advocate

Respondent by: Shri Girish Dave, Standing Counsel

Date of hearing : 08-05-2012

Date of pronouncement : 21-05-2012

INTERIM ORDER

PER BENCH:

These appeals involve common grounds in respect of the claim of the assessee u/s 80IA (4) of the Income Tax Act, 1961 ("the Act" for

short). The issue was discussed before us with reference to the facts of the case for assessment year 2004-05. The grounds taken by the assessee in this appeal are as under :-

1. *"On the facts and in the circumstances of the case and in law, the CIT(A) erred in not appreciating that the order passed by the Assessing Officer is without jurisdiction and bad in law as the jurisdiction u/s 153A is vitiated.*
2. *The Commissioner (Appeals) erred in confirming the disallowance of deduction of ` 1,25,77,637/- u/s 80IA(4) of the Act.*
3. *The CIT(A) erred in relying on the decision of the Appellate Triubnal in the case of Container Corporation of India Ltd. vs. ACIT [30 SOT 284 (Del.)], without appreciating that the facts in the present case are different from that of the aforesaid case.*
4. *The Commissioner (Appeals) failed to appreciate that the appellant is covered by the definition of the term "infrastructure facility" given in Explanation to section 80IA(4)(i) of the Act as "Ports".*
5. *The Commissioner (Appeals) erred in not following circular No. 793 dated 23rd June, 2000 and clarification dated 16th December, 2005 issued by the CBDT which is binding on the Income Tax Authorities.*
6. *The Commissioner (Appeals) failed to appreciate that sub-clause (aa) of section 7 of the Customs Act, 1962 clarifies that the Customs Ports are the places which are identified and demarcated for the unloading of imported cargo and the loading of exported cargo and, therefore, the Container Freight Stations would be Customs Ports with reference to the Customs Law and, therefore, it would be qualified for the benefit of section 80-IA(4)(i) of the Act.*
7. *In the alternative and without prejudice, the Commissioner (Appeals) failed to appreciate that the Container Freight Station is an Inland Port and therefore, it is an infrastructure facility within the meaning of section 80-IA(4) of the Act.*
8. *The order of the Commissioner (Appeals) is bad in law and without jurisdiction."*

1.1. Appeals were heard by the Division Bench. It came to the conclusion that two questions, mentioned in reference u/s 255 (3) dated 19.1.2011,

should be considered by the special bench. The findings in this respect are contained in paragraph nos. 4.1 and 5, which are reproduced below :-

> *4.1 "Having heard both the sides and perused the relevant material on record, it is noticed that the assessment years under consideration are 2004-05 to 2009-10. The Delhi Bench of the Tribunal in Container Corporation of India Ltd. (supra) also considered assessment years 2003-04 to 2005-06. Some of the arguments raised by the Ld. Sr. A.R., in the proceedings before us, were also raised, considered and rejected by the Tribunal. At the same time, it is also true that there is no reference to certain relevant material in the Delhi Bench order, such as Notification S.O.744(E) dated 1.9.1998 (copy placed at page 118 of the paper book), letter of Director, CBDT, to all Chief Commissioners of Income-tax dated 16.12.2005 (copy placed at page 120 of the paper book) etc., which may have some bearing on the issue.*
>
> *5. Under such circumstances, we propose the following two questions :*
>
> *1. "Whether, on the facts and in law, the scope of assessment u/s 153A encompasses additions, not based on any incriminating material found during the course of search"?*
>
> *2. "Whether, on the facts and in the circumstances of the case, the Ld. CIT (Appeals) was justified in upholding the disallowance of deduction u/s 80IA(4) of the Act, on merits"?"*

1.2 Consequently, the Hon'ble President, Income Tax Appellate Tribunal, constituted the special bench to decide following questions :-

> *1. "Whether, on the facts and in law, the scope of assessment u/s 153A encompasses additions, not based on any incriminating material found during the course of search?"*
>
> *2. "Whether, on the facts and in the circumstances of the case, the learned CIT(Appeals) was justified in upholding the disallowance of deduction u/s 80IA (4) of the Act, on merits?"*

2. In the course of hearing before us, Ld. Standing Counsel for the revenue submitted at the outset that ground No. 1 was not taken up by

the assessee either before the AO or the Ld. CIT(A). In this connection, he furnished the grounds taken before us and the grounds taken before the Ld. CIT(A) in a tabular form, which is reproduced below to the extent it is relevant to us :

	Form No. 36		*Form No.35*
	Grounds of Appeal		*Grounds of Appeal*
		1	*Disallowance on Deduction u/s 80IA (4) of ` 1,25,77,537/-*
	On the facts and in the circumstances of the case and in law, the CIT(A) erred in not appreciating that the order passed by the Assessing Officer is without jurisdiction and bad in law as the jurisdiction u/s 153A is vitiated		*The Learned DCIT erred in disallowing the claim of deduction u/s 80IA 4) of ` 1,25,77,637 on the reasoning that Container Freight Station (CFS) are not Inland Ports*
	The Commissioner (Appeals) erred in confirming the disallowance of deduction of ` 1,25,77,637/- u/s 80IA(4) of the Act	*2.*	*The Learned DCIT erred in disallowing the claim of deduction u/s 80IA(4) relying on a Delhi ITAT order in the case of Container Corporation of India case reported in 30 SOT 284 (Delhi)*
	The CIT(A) erred in relying on the decision of the Appellate Tribunal in the case of Container Corporation on India Ltd. vs. ACIT [30 SOT 284 (Delhi), without appreciating that the facts in the present case are different from that of the aforesaid case.	*3.*	*The Learned DCIT erred in disallowing the claim of deduction u/s 80IA(4) already granted in the order passed u/s 143(3) dated 30.12.2006 which is merely change of opinion.*

2.1 It is submitted that the grounds taken before the Ld. CIT(A) did not deal in any manner with the jurisdiction or absence thereof u/s 153A of

the Act. However, ground No. 1 taken before the Tribunal is to the effect that the Ld. CIT(A) erred in not appreciating that the order passed by the AO is without jurisdiction and bad in law as the jurisdiction u/s 153A is vitiated. Since such ground was not taken before Ld. CIT(A), his decision is not available in this matter. Consequently, it is argued that ground No. 1 does not arise out of the order of lower authorities. The questions referred to the special bench cannot be answered in isolation de hors the grounds taken by the assessee in appeal. Therefore, finding will have to be given whether ground No. 1 before the Tribunal is additional ground, which requires to be admitted with the leave of the Tribunal. On the other hand, the submission of the Ld. Counsel for the assessee has been that this ground has been taken in the memorandum of appeal and, therefore, it is not an additional ground. Further, he drew our attention towards ground No. 3 taken before the Ld. CIT(A) that Ld. DCIT erred in disallowing the claim of deduction u/s 80IA(4) already granted in order passed u/s 143(3) dated 30.12.2006 which is merely change of opinion. His argument is that though the language employed in this ground is different from the language employed in ground No. 1 taken before Tribunal, yet in essence they are similar in nature. In the alternative, it is submitted that even if ground No. 1 does not arise out of the order of the Ld. CIT(A), it is purely a legal ground in respect of which all facts are available on assessment record. Therefore, this ground may be admitted, although it is reiterated that ground is not an additional ground as it has been taken up in the memorandum of appeal. The rival parties vehemently argued that this

issue ought to be disposed off by passing an interim order so that respective parties may take legal remedy as available, if found necessary. In view of this insistence of both the parties, we proceed to determine this issue on the basis of detailed arguments made before us.

3. Ld. Counsel submits that an order of assessment for this year was made earlier by the AO u/s 143 (3) prior to the conduct of search u/s 132(1) on or about 26.4.2007. This is evident from the submissions of the assessee made before the Ld. CIT(A) recorded in paragraph No. 3.4 where it is submitted that in the original assessment order passed u/s 143(3), deduction u/s 80IA(4) was allowed by the AO in various years. The facts and circumstances in so far as deduction u/s 80IA(4) is concerned remain the same, therefore, the AO was not justified in changing the stand taken by his predecessor on the basis of the decision of the Tribunal in the case of Container corporation of India Limited vs. ACIT (2009) 30 SOT 284(Del). The division bench considered this matter which is evident from the fact that in the reference made to Hon'ble President, ITAT, it is inter alia mentioned in paragraph 4 that the decision in the case of Container Corporation of India Ltd., according to the assessee, is not applicable to the facts of his case because the Tribunal considered the admissibility of the deduction in the case of Inland Container Depot ("ICD" for short) and not in the case of a Container Freight Station ("CFS" for short). On the other hand, the case of the revenue is that the decision of Hon'ble Bombay High Court in the case of CIT vs. ABG Heavy Industries Ltd.

(2010) 189 Taxman 54, relied upon by the assessee, is not applicable to the facts of this case as the assessee has claimed the income to be derived from operation of cranes and not from infrastructure facilities such as ICD or CFS. The division bench also mentioned in paragraph Nos. 3.1 & 3.2 that there is a cleavage of opinion amongst different benches of the Tribunal in respect of scope of assessment framed u/s 153A, i.e. whether addition can be made on items in respect of which no incriminating material is found in search. The decisions in favour and against of the assessee have also been listed. That is why, two questions have been referred to special bench. The issue has also been considered by Hon'ble President, ITAT, who has constituted the special bench to consider the two questions. Although it is a trite to say that the decision has to be taken on the facts and circumstances of the case, yet it is clear that various issues have been considered by the division bench and the Hon'ble President and, therefore, question No. 1 can not be taken as additional ground. In any case the revenue has taken no objection at the time of hearing before the division bench and now it is too late to take any such objection.

3.1 Further, Ld. Counsel referred to the provision contained in section 253, which inter alia provides that the President, may for the disposal of any particular case, constitute a Special Bench consisting of three or more Members, one of whom shall necessarily be a judicial member and one an accountant member. On the basis of language contained in this provision,

it is argued that the President has constituted a Special Bench consisting of three members to dispose off the questions referred to it. Therefore, these questions are required to be disposed off by this Bench. In this connection, reliance is placed on the decision of 'H' Bench (Special Bench) of Mumbai Tribunal in the case of Mahindra & Mahindra Ltd. vs. DCIT (2009) 30 SOT 374 (Mumbai). The assessee sought to raise an additional ground to the effect that the order passed by the Ld. AO u/s 185 of the Act is void ab initio being barred by limitation. Ld. DR objected to raising the ground and submitted that the assessee had no right to raise the question of limitation by way of additional ground as such ground could have been initially taken before the AO. He relied upon decision in the case of Hindustan Times Ltd. s. Union of India AIR 1998 (SC) 688. On hearing both the parties and considering relevant material on record, the Hon'ble Tribunal observed that during the course of original hearing before the Division Bench, the assessee had raised the question of limitation by way of additional ground. The revenue approached Hon'ble President for the constitution of Special Bench for deciding the controversy as there were conflicting views in the matter. Therefore, the special bench was constituted to decide the question. It has been held that it is too late in the day for the revenue to object to the legality of admission of additional ground at this stage, because the special bench has been constituted for disposing off this very controversy and that too at the instance of the revenue. It has been further held that the question of limitation goes up the very root of the matter. If the proceedings are initiated or completed

beyond the prescribed time, then such proceedings deserve to be quashed. The legal position is that there is no embargo on any party to raise a legal ground before the Tribunal provided that the requisite material already exists on record and no further investigation of fact is required. Further, reliance is placed in the case of National Thermal Power Corporation Ltd. vs. CIT (1998) 229 ITR 383 (SC) ("NTPC" for short). It has been held that the powers of the Tribunal in dealing with the appeals are expressed in the widest possible terms and it has jurisdiction to examine the question of law which arises from the facts available before lower authorities and which has a bearing on the liability of the assessee, even if such question has not been raised before the lower authorities. Thus, it is argued that even if the questions involve an additional ground, it is too late for the revenue to object to it because the matter has been considered by the Division Bench and now these questions have to be decided by the Tribunal as per order made by Hon'ble President. In any case even if an additional ground is involved, the Bench has all the powers to admit it and adjudicate upon it if all the facts necessary for such decision are available on record of lower authorities. It is stated that all facts are there on record and no new fact is required to be brought on record, therefore, the ground may be admitted.

3.2. Ld. Counsel also referred to the decision of Hon'ble Bombay High Court in the case of J.B. Greaves vs. CIT (1963) 49 ITR 107 , in which it has inter alia been mentioned that it is indeed true that the powers of the Tribunal u/s 33(4) (of the old Act) are wide. The Tribunal after giving both

the parties to the appeal, an opportunity of being heard, can pass such orders thereon as it thinks fit. The word “thereon” occurring in section 33(4) has been construed in various decisions as meaning “the subject matter of appeal before the Tribunal”. Now the subject-matter of appeal before the Tribunal would naturally be the grounds raised by the appellant before it. Rule 12 provides that the appellant shall not, except by the leave of the Tribunal, is to be heard in support of any ground not set forth in the memorandum of appeal ; but the Tribunal in deciding the appeal shall not be confined to the grounds set forth in the memorandum of appeal and taken by leave of the Tribunal under this rule. Rule 27 further provides that the respondent, though he may not have filed appeal, may support the order of the Appellate Assistant Commissioner on any of the grounds decided against him. These are the relevant provisions relating to the question that arises for consideration. Having regard to these provisions, it can be mentioned that the subject matter of appeal would be the grounds specifically raised in the memorandum of appeal, grounds which Tribunal allows the appellant to raise, and contentions raised by the Respondent in support of the order made by the appellate Assistant Commissioner challenging the adverse findings against him. The scope and ambit of these rules have been considered by the court in ITR No. 50 of 1959 (Commissioner of Income Tax vs, M/s Hazarimal Nagji & Co. (1962) 46 ITR 1168, decided on 6th October, 1961, wherein it has been observed :-

'Now, reading the provisions of section 33(4) and the relevnt rules to which our attention has been drawn by Mr. Joshi, it seems to us that the powers of the Appellate Tribunal are similar to the powers of the appellate court under the Civil Procedure Code. That also is the view which this court has taken in New India Life Assurance Co. Ltd. v. Commissioner of Income Tax {1957) 31 ITR 844 where it is observed that the position of the Appellate Tribunal' is the same as a court of appeal under the Civil Procedure Code and its powers are 'identical' with the powers enjoyed by an appellate court under the "Code". Now, a respondent in an appeal is undoubtedly entitled to support the decree which is in his favour on any grounds which are available to him, even though the decision of the lower court in his favour may not have been based on those grounds. A respondent, unless he has filed an appeal himself or filed cross-objections in the appeal filed by his opponent, will not be entitled to challenge that part of the lower court's decree which is against him, and the appellate court will have no power or jurisdiction to permit him to do so. But, in so far as he only wants to maintain the decree of the lower court which is against the appellant and in his favoaur, he will be entitled to support it on fresh grounds also if he can do so, and the appellate court also will have jurisdiction to permit him to do so, provided, of course, that the fresh grounds which he wants to urge do not require a further investigation into facts which are not already on record and are not based on facts which were neither alleged nor admitted nor proved and which the other side was never called upon to meet in the lower court."

3.3. It thus follows that the subject matter of appeal would get confined to limits of the grounds specifically raised in the memorandum of appeal, the new grounds raised by the appellant with the previous permission of the Tribunal and the grounds urged by the respondent in support of decree passed in his favour,

3.4 Based upon these decisions, it is argued that the question of requirement of leave of the Tribunal is merely a formality in this case and if it is necessary to grant such a leave, it may be granted.

3.5. He also referred to ground No. 3 taken before the Ld. CIT(A) that the Ld. DCIT erred in disallowing the claim of deduction u/s 80IA(4) granted in the order passed in section 143(3) on 30.12.2006 **which is merely change of opinion** (emphasis stated by the Ld. Counsel). It is urged that the highlighted words are large enough to take into account ground No. 1 taken before the Tribunal regarding lack of jurisdiction u/s 153A, as the grounds are to be read widely and not narrowly.

3.6 Ld. Counsel also dealt with the written submissions dated 3.5.2012 and 7.5.2012 filed by the revenue.

4. In reply, the Ld. Standing Counsel submits that the decision in the case of NTPC has to be read in the context of the facts of that case. The facts are that the assessee had deposited surplus funds with banks as short – term deposits. The interest received in the relevant year on such deposits, amounting to ` 22,84,994/-, was offered for tax and the assessment was completed accordingly. Before the Ld. CIT(A), a number of grounds were taken by the assessee but the inclusion of aforesaid amount in the total income was neither challenged by the assessee nor considered by the Ld. CIT(A). The assessee filed appeal before the Tribunal against the order of the Ld. CIT(A), in which the inclusion of the amount of ` 22,84,994/- was not objected to in the memorandum of appeal. However, in letter dated 16.7.1983, the assessee took three

additional grounds to effect that the aforesaid amount ought to be deducted from the expenditure incurred during construction and it cannot be included in the total income. It was explained that the grounds have been taken on account of two orders passed by Special Bench of the Tribunal in the case Arasan Alluminium Industries Pvt. Ltd. and Nagarjuna Steels Ltd, where upon the assessee learnt that the interest earned in this manner before setting up of the business is not a part of taxable income as it goes to reduce capital cost of the plant. The Hon'ble court took into account the decision in the case of Jute Corporation in India vs. CIT (1991) 187 ITR 688) (SC) and held that the view that the Tribunal is confined only to issues arising out of the appeal before the Ld. CIT(A) takes too narrow a view of the powers of the Appellate Tribunal. Undoubtedly, the Tribunal will have the discretion to allow or not to allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on the record in the assessment proceedings, the court fails to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee. A narrow view to which the Hon'ble court referred to had been taken in the case of CIT vs. Anand Prasad (1981) 128 ITR 388(Delhi), CIT vs. Karamchand Premchand Pvt. Ltd. (1969) 74 ITR 254 (Guj) and CIT Vs. Cellulose Products of India Ltd. (1985) 151 ITR 499 (Guj) (Full Bench). The case of the Ld. Standing Counsel is that the facts are distinguishable ; and in any case the assessee has to furnish reasons as to why the ground was not taken

before lower authorities and why it should now be admitted by the Tribunal.

4.1 In order to support his contention, he relied on the decision of the Mumbai Tribunal in the case of Jay Bharat Co-op. Housing Society Ltd. vs. ITO (2011) 10 ITR (Trib.) 717, in which it has been inter alia held that the judgment in the case of NTPC was rendered on the facts of the case, i.e. during the course of appellate proceedings, the legal position on the issue changed on account of judgments of the Appellate Tribunal. In these circumstances, the assessee was allowed to raise a new ground before the Tribunal and it was held that the Tribunal can admit a new ground if all facts relating to the issue are available before Tribunal and no investigation or verification of the fact is required. It is argued that there is no change in position of law and Ld. Counsel has not referred to the facts and completeness thereof, which do not require any further investigation or verification.

4.2 Further, he relied on the decision of Hon’ble Bombay High Court in the case of Pokhraj Hirachand (1963) 49 ITR 293. Briefly speaking, the facts are that the question raised before the Tribunal was – whether, payment made by the assessee to Milkhi Ram R Goyal was capital or revenue in nature? The Tribunal held that the payment is revenue in nature. Further the Tribunal held that the entire amount has not been paid to Milkhi Ram but only a part thereof has been paid, therefore, the

deduction was allowed only for that part of the payment which had been actually made. The Hon'ble court held that in the statement of the case, the Tribunal had not stated that the departmental representative or the Income Tax Officer had raised any contention in respect of quantum of payment before it. If it is the correct position that the Income Tax Officer or the departmental representative had raised any such contention before the Tribunal, it will be a reasonable to assume that the Commissioner would have seen that this fact is incorporated in the statement of the case. This being the position on record, the Tribunal was in error in dealing with the question about the quantum of payment made to Milkhi Ram. The submission of the Ld. Standing Counsel, on the basis of this judgment, seems to be that there is no mention about consideration of jurisdictional aspect in the order of the Ld. CIT(A) and, therefore, the question does not arise from the order of the lower authorities.

4.2.1 In this context, he referred to the provision contained in section 253 (1), which starts with the words " any assessee **aggrieved** by any of the following orders may appeal to the Appellate Tribunal against such order " (emphasis supplied by the Ld. Standing Counsel). It is argued that the question was never taken up before the lower authorities, therefore, it cannot be said that the assessee is aggrieved by the impugned order, therefore, the assessee could not have taken ground No. 1 as it exists in the memorandum of appeal. Thereafter, he referred to the provision contained in section 254 (1), which states that – "the appellate Tribunal

may pass after giving both the parties to the appeal an opportunity of being heard, such orders **thereon** as it thinks fit (emphasis supplied by the Ld. Standing Counsel). It is argued that the appellate Tribunal has to confine itself to the grounds taken in the memorandum of appeal, additional ground taken by the assessee which are permitted by the Tribunal and any other ground taken by the defendant with a view to support the impugned order. Thus, the Tribunal can deal with ground No. 1 only if it is taken as an additional ground and admitted by the Tribunal by granting leave.

4.2.2 It is submitted that the Tribunal may be pleased not to grant such a leave because no reason has been advanced for not raising the ground before any of the lower authorities.

4.3 Ld. Standing Counsel also submits that if the ground is allowed to be proceeded with as the ground taken in memorandum of appeal or the additional ground and decided in favour of the assessee, it will lead to grave peril to the revenue. In this connection, our attention has been drawn to paragraph No. 5 of the assessment order, in which it is mentioned that in the return filed u/s 153A consequent upon the search, the assessee has declared additional incomes of ` 26,85,850/- and `. 3,50,000/-, being part of general offer u/s 132 (4) of undisclosed income made to cover any error / omission / discrepancy not noticed at the time of conducting the search. The sum of ` 26,85,820/- consists of `

23,05,528/- disallowed by the AO on account of conveyance and other expenses in the original assessment made u/s 143(3) on 30.12.2006, and the balance of ` 3,80,292/- is on account of reduction in the claim made u/s 80IA. The revenue does not have objection to the decision regarding deduction u/s 80IA(4) on merits. However, if the order u/s 153A is held to be beyond jurisdiction, the incomes offered by the assessee suo moto in the return will also get deleted as status quo ante shall prevail. Such a position cannot be allowed to be obtained in view of the decision of Hon'ble Andhra Pradesh High Court in the case of CIT vs. Late Begum Noor Banu Alladin (1993) 204 ITR 166 (AP) (Full Bench). He referred to the head notes where it is mentioned that the jurisdiction of the Tribunal is necessarily restricted to subject – matter of the dispute before the first Appellate Authority and the Tribunal cannot allow the assessee or the department to dispute new items or entertain claims of deduction for the first time. If the assessee is precluded from taking a new ground unrelated to subject – matter before the Appellate Assistant Commissioner, he cannot avail of Rule 11 of the ITAT Rules and obtain the leave of the Tribunal to raise a new ground for the first time. Occasional injustice is no ground to mould the interpretation in favour of the assessee and the arguments based on equity and justice are something like double-edged weapon which cut both ways. Consequently it has been held that it is not competent to allow additional plea of the assessee if it was not subject – matter of the dispute before the Appellate Assistant Commissioner. The Hon'ble court considered a large number of decisions, some approved,

some overruled, some dissented from, some concurred with, and some relied upon. This position has been summarized in the summery of the ruling furnished by the publisher. It will be fruitful to reproduce this summary :-

CIT vs. Krishna Mining Co. (1977) 107 ITR 702 (AP) approved ; CIT vs. Gangappa Cables Ltd. 1978 CTR (AP) 332 : (1979) 116 ITR 778 (AP) overruled; Ahmedabad Electricity Co. Ltd. vs. CIT (1992) 106 CTR (Bom) (FB) 78: (1993) 199 ITR 351(Bom) (FB), State of Tamil Nadu vs. Alumurugan & Co. (1982) 51 STC 381 (Mad) (FB), CIT vs. Indian Express (Madurai) (P) Ltd. (1983) 33 CTR (Mad) 314 : (1983) 140 ITR 705 (Mad.), CED vs. Brahadeeswaran (1986) 57 CTR (Mad.) 162 : (1987) 163 ITR 680 (Mad.) , CIT vs. Kerala State Co-operative Marketing Federation LTd. (1991) 100 CTR (Ker) 230 : (1992) 193 ITR 624 (Ker.) CIT vs. Pratapsingh (1986) 57 CTR (Raj.) 291 : (1987) 164 ITR 431 (Raj.), ITAT vs. B. Hill & Co. (P) Ltd. (1982) 29 CTR (All) 301 : (1983) 142 ITR 185 (All.), Atlas Cycle Industries Ltd. vs. CIT (1981) 21 CTR (P &H) 109 : (1982) 133 ITR 231 (P & H) Taylor Instruemtns Co. (India) Ltd. vs. CIT (1992) 105 CTR (Del) 5 : (1992) 198 ITR 1 (Del) and Hindustan Malleables & Forgings Ltd. vs. CIT (1991) 191 ITR 110 (Pat) dissented from ; CIT vs. Steel Cast Corporation (1977) 107 ITR 683 (Guj.), CIT vs. Karamchand Premchand PVt. Ltd. (1969) 74 ITR 254 (guj.) CIT vs. Cellulose Products of India Ltd. (1985) 44 CTR (Guj) (FB) 278 : (1985) 151 ITR 499 (Guj), (FB), Hukum Chand and Mannalal Co. vs. CIT (1980) 126 ITR 251 (MP) and Ugar Sugar Works Ltd. vs. CIT (1982) 27 CTR (Bom) 174 : (1983) 141 ITR 326 (Bom.) CIT vs. Anand Prasad (1981) 128 ITR 388 (Del) and Panchura Estate Ltd. vs. Govt. of Madras (1973) 87 ITR 698 (Mad.) concurred with ; State of A.P. vs. Sri Venkata Rama Lingeshwara Rice Mill (1977) 39 STC 57 (AP) (FB) relied on; Shaik Ibrahim vs. CIT (1968) 69 ITR 117 (AP) explained

4.4. It has been mentioned that the finding of the Tribunal is that the income in question cannot be assessed to tax in the assessment year in which it was taxed or in any other previous year because the time for reopening or reducing the assessment of that previous year has expired by now. Consequently the admitted income is going out of the net of the taxation, which is not equitable in law unless the assessee is entitled to

relief by virtue of a clear legal provision, which is not so. It has further been mentioned that if such position is accepted, a number of assesses may be put to the peril of being exposed to the appeal by the revenue even though the ITO may not have applied to the AAC to enhance the tax. The arguments based on equity and justice is a double-edged weapon which cuts both ways. The Hon'ble Court referred to the decision in the case of Karmchand Premchand Pvt. Ltd. and Shri Venkata Rama Lingeshwara Rice Mill (supra) to the effect that the Tribunal has no jurisdiction to allow such grounds to be raised for the first time before it and that the Tribunal has misconstrued the reasoning in the case of Mahalaxmi Textile Mills Ltd. It has also been mentioned that so long as the item in dispute and the amount on which relief claimed remain the same, it is open to the assessee to raise an additional or alternative ground. But this power does not extend to decide a totally new item of dispute, thus, the decision in the case of Jute Corporation of India Ltd. (supra) has wrongly been pressed in the service of the assessee as the case dealt with the powers of the AAC and not the Tribunal. The court noted that the Apex Court pointed out in un-mistakable terms that the jurisdiction of the Tribunal must be confined to subject-matter of an appeal. The Tribunal has sufficient powers to remand the case to the ITO but the details do not support the assessee's contention, rather they go against her. In the case of Mahalaxmi Textile Mills Ltd,.(1967) 66 ITR 710 (supra), the ITO disallowed the claim of the assessee for development rebate because according to him Casablanca conversion system did not involve

installation of new machinery. This order was upheld by the AAC. Before the Tribunal, it was claimed for the first time that the claim was allowable either as development rebate or current repairs. The Tribunal accepted the alternative claim. It was observed by the Hon'ble Court that on investigation of true nature of alterations made by the introduction of Casablanca Conversion System, the Tribunal came to the conclusion that it did not amount to installation of new machinery, but it amounted to current repairs. Considering this decision, the Hon'ble Andhra Pradesh High Court mentioned that in this case subject-matter of appeal was the same. The item was the same and the quantum of income was the same. However, the facts of the case of the assessee are different. In the case of CIT vs. S. Nelliappan(1967) 66 ITR 722 (SC), it was contended that the ground permitted to be raised relates not only to a new issue but a new item unrelated to original subject – matter. However, such is not the case. The AO had rejected the books of account and additions had been made to the book profits. Cash credits were also added. It was urged before the High Court that once additions have been made to the book profits on account of suppression of income, the additions for unexplained cash credit were not called for. In this case also the Tribunal had not given any relief travelling beyond the true subject matter of appeal. In the case of Karamchand Premchand Pvt. Ltd. it was held that there must be a decision of the AAC by which the assessee or revenue is aggrieved before an appeal can be preferred. These observations may convey the impression that an assessee who did not raise a particular dispute before

the AAC cannot be said to be aggrieved by this order therefore, he cannot file appeal. This may not be a correct approach to the problem. If the assessee is aggrieved by any part of the order of the AAC, he is aggrieved in that sense and he can maintain an appeal. In the case decided by Gujarat High Court and in this case, the assessee can be said to be aggrieved against the order of the AAC because he did not get relief in respect of matter agitated before him. Therefore, there is no bar for filing an appeal to the Tribunal. Of course, if the appeal is allowed by the AAC, it will not be open to the assessee to file the appeal because he cannot be said to be aggrieved by that order. Once the assessee or the ITO files an appeal, the points which could be raised or allowed to be raised is of course a different matter, whose answer depends upon the scope and subject matter of appeal and the extent of relief that could be granted by the Tribunal. Referring to the case of Hukumchand and Mannalal Co. v. CIT (1980) 126 ITR 251 (MP), it is mentioned that jurisdiction of the Tribunal is restricted to subject – matter of the appeal and this principle has not been digressed from in any later case. The words " pass such order as the Tribunal thinks fit" could only mean the orders in respect of subject-matter which could be dealt with by the Tribunal and these words are not relevant to fire up the scope and subject-matter of appeal before the Tribunal. Therefore it is necessary to find out as to what could the real subject-matter of appeal before the Tribunal. In the view of the court, it could not be anything different from the subject-matter before the AAC and necessarily it should be something which arises out of the order of the

AAC. But there is no taboo against raising a new ground or a new plea touching the same subject matter. This view finds support from the decision in the case of Steel Cast Corporation ; & CIT vs. Cellulose Products of India Ltd. (1985) 151 ITR 499 (Guj.) (FB) .

4.5 In the case of Additional Commissioner of Income Tax vs. Gurjargravures P. Ltd. (1978) 111 ITR 1(SC), the revenue was aggrieved by the order of the Tribunal in which Tribunal entertained the question of relief u/s 84 and directed the AO to allow necessary relief. High Court upheld the order of the Tribunal. It was mentioned that neither any submission was made before the AO nor there was any material on record in support of such claim, therefore, the High Court should have answer the question in the negative i.e. against the assessee and in favour of revenue.

4.6 In the case of Commissioner of Income-tax vs. V.K. Sood Engineers and Contractors (P.) Ltd. [2003] 264 ITR 313 (P&H), it has been held that the Tribunal was not right in observing that the grounds of appeal filed in September, 1998, were not acceptable because the same had not been approved by the Commissioner of Income Tax. Rule 9 (1) contains the requirement of filing of specified documents alongwith memorandum of appeal , but sub – rule (3) thereof gives ample discretion to the Tribunal to accept the memorandum of appeal even if it may not be accompanied by

all or any of the specified documents. These rules are procedural in character. Therefore, the failure of the Department to file grounds of appeal on May 6, 1994, should not have been made a ground for dismissing the appeal in limine, more so because in response to the show cause notice issued by the Tribunal, the grounds of appeal duly signed by the Assistant Commissioner of Income-tax (Investigation Circle-II), Chandigarh, had been filed. Ld. Sr. Standing Counsel submits that the instant case does not involve procedural law but substantive law and for taking any such ground, the assessee has to show that it is aggrieved by the order of the Ld. CIT(A) as understood u/s 253(1). In the case of Aravali Engineers Pvt. Ltd., vs. CIT(2011), 335 ITR 508 (P & H) the assessee was prosecuting appeal before the Tribunal in respect of setting off of some losses against income from house property. According to the AO ,the losses occurred in speculative business and, therefore, such set off could not be granted. The assessee also took up an additional plea that notice u/s 143(2) was not served upon it within the statutorily prescribed time limit. The Tribunal held that the assessee did not raise this plea earlier inspite of opportunities granted to it. Therefore, such a plea could not be raised for the first time before the Tribunal. The court dismissed the appeal of the assessee by mentioning that no doubt an appellate authority can allow a question to be raised for the first time even if such question was not raised at lower forum, but such discretion has to be exercised in the interest of justice and not mechanically. The question of fact may not be allowed to be raised for the first time as it may lead to prejudice to the other side. The decision in the case of NTPC does not lay down that in

every case, the question of fact can be mechanically allowed to be raised for the first time. In view of this decision, it is argued that the question now raised by the assessee cannot be allowed to be raised mechanically without going into the reasons as to why the assessee did not raise this issue before the AO or the Ld. CIT(A). In any case , further referring to the decision in the case of Maruti Udyog Ltd. Vs. ITAT and Ors (2000) 244 ITR 303 (Delhi), it is argued that the Tribunal has to record reasons and it is open to the parties to take such pleas as are available to them for taking up before the Tribunal on the question whether the additional ground should be permitted to be urged or not.

5. In the rejoinder reply, the Ld. Counsel reiterated that the Ld. Standing Counsel is arguing against the mandate of the President. Coming to the merits, it is submitted that the decision in the case of Late Begum Noor Banu Alladin was not considered in the decision in the case of NTPC even though the former decision was rendered on an earlier date. However, that does not make any difference to the situation for the reason that the latter decision has been rendered by the Apex Court. The decision unequivocally lays down that where the Tribunal is only required to consider the question of law arising from the facts which are on record in the assessment proceedings, the court fails to see why such a question should not be allowed to be raised, when it is necessary to consider that question in order to correctly assess the tax liability of the assessee. This decision takes care of the word “aggrieved”, used in section 253 (1).

There could be many reasons to raise additional ground. In this case, the ground is raised for the first time before the Tribunal as the assessee was not property advised when the case was being represented before the AO and the Ld. CIT(A).The assessee did not have services of an advocate at that time.

5.1 Coming to the decisions relied upon by the Ld. Standing Counsel, it is submitted that the decision in the case of Padma Sundara Rao (Dead) and Others vs. State of TN and Others (2002) 3 SC 533 is not relevant in the context of the facts of this case. In paragraph No. 9 it is mentioned that courts should not place reliance on decision without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Therefore, the effect is that the Tribunal has to examine the facts of this case and thereafter decide whether ground No. 1 is an additional ground and if yes whether it should be admitted or not. Further, the facts in the case of Jay Bharat Co-operative Society Ltd. are completely different as the issue required verification of facts as the relevant facts were not available on the record. If the question had been admitted, the matter had to go back to the AO for verification. The decision however fails to take into account the observations of Hon’ble Supreme Court in the case of Goetze (India) Ltd.

vs. CIT (2006) 284 ITR 323 (SC). This decision specifically mentions that it does not in any way relate to the power of the Tribunal as any question of law can be raised for the first time before the Tribunal in view of the decision in the case of NTPC.

5.2 Coming to the facts of the case, it is submitted that a sum of ` 26,85,820/- had already been disallowed by the AO in the proceedings of assessment year 2004-05. No incriminating material had been found in regard to the deduction u/s 80IA(4) in the course of search. The assessee had already taken ground No. 3 before the CIT(A) challenging the action of the AO in disallowing the deduction. The present ground is in furtherance of the same ground which the assessee can validly take in the light of the decision in the case of Shaik Ibrahim vs. CIT, (1968) 69 ITR 117 (Andhra Pradesh) wherein it is mentioned that the mere fact with the assessee, not having appreciated his legal rights failed to raise the contention before the ITO or the AAC, where he was not represented by a lawyer but by his auditor who not being qualified in law, was not competent to appreciate the principles of law or its subtleties, cannot be denied the right to raise that question at the stage of the appeal before the Tribunal, which is also a forum both on question of fact as well as law.

5.3 Coming to the decision in the case of Late Begum Noor Banu Alladin, it is argued that the decision is primarily based on the decision in the case of Karamchand Premchand PVt. Ltd.. This decision and the decision in the case of Anand Prakash and Cellulose Products of India Ltd. have not been approved by the Apex Court in the case of NTPC. In this very connection, he also referred to the commentary by Kanga, Palkhivala & Vyas, volume II, page Nos. 2318 and 2319, dealing with raising new questions . Under the heading "Grounds not taken before lower authorities", it is mentioned that the Tribunal has jurisdiction to allow any new question to be raised for the first time in appeal before it and it should allow such question to be raised if it can be decided on the basis of facts already on the record. In the footnote it is mentioned that the decision in the case of Late Begum Noor Banu Alladin is not good in view of the decision in the case of NTPC. The decision in the case of Gurjargravures P. Ltd. (supra) is distinguished by referring to the facts that there was neither any claim made before the ITO nor there was any material on record to support the claim. Therefore, the facts necessary for deciding the issue were not on record. This decision is also in conflict with the decision of Hon'ble Supreme Court in the case of CIT vs Kanpur Coal Syndicate 53 ITR 225 (SC), in which it has been held that the powers of the ITO and the First Appellate Authority are coterminous. In any case this decision deals with the powers of the AAC analogues to the powers of CIT(A). The powers of the Tribunal have been expressed in widest terms as held in the case of NTPC. The decision in the case of CIT vs. Godavari

Sugar Mills Ltd, vs. CIT, ITR 45 of 1977 (1993) 199 ITR, 351 (Bombay) (Full Bench) makes a reference to the decision in the case of Gurjargravures P. Ltd. and it has been explained that the Hon'ble Supreme Court in that case was not called upon to consider a case where the assessee had failed to make a claim although there was evidence on record to support it ; nor it was called upon to consider a case where a claim was made but there was no evidence or insufficient evidence adduced in support of the claim, This judgment also deals with the decision in the case of Ugar Sugar Works Ltd. vs. CIT (1983) 141 ITR 326, which had followed the decision in the case of Karamchand Premchand Pvt. Ltd. It is mentioned that distinction has to be made between the jurisdiction of AAC and the Tribunal. The decision in this case, it is argued, should not be followed as the same is contrary to the decision of Supreme Court and Bombay High Court referred to earlier.

5.4 In the case of Pokhraj Hirachand, the question before the Tribunal was whether, a particular expenditure was of capital or revenue nature? However, the Tribunal also recorded a finding that actual payment was of lower amount than claimed by the assessee. The Hon'ble High Court noted that the statement of case does not mention anywhere that the departmental representative or ITO has raised any contention in respect of the quantum of the payment, therefore, it will be reasonable to assume that the Commissioner had incorporated all facts in the statement of the case. This being the position , the Tribunal could not have dealt with this

question. The case of the Ld. Counsel is that the question is being raised by him and, therefore, the ratio of this case is not applicable. In the case of JB Greaves (supra). It was contended before the Tribunal that the AAC erred in holding that assessee had earned capital gain as a result of transfer of managing agency, the reason being that the transaction was neither of sale nor transfer. The AAC had found that the transaction resulted in loss. The Tribunal observed that the finding of the AAC in this respect was not correct having regard to various aspects of the case including that the value of share of the Company as on 1.1.1939 could not be more than 60% of what it was at the time of sale. The Hon'ble Court mentioned that the material fact to be seen is the actual contract between the parties. The agreement was one of sale of managing agency. This object was achieved by resignation of the assessee from the appointment of managing agency. Therefore on perusal of documents, it would transpire that the transaction was one of sale of shares as well as managing agency. This agreement had been performed by the assessee as it resigned from the Managing Agency Office. In this situation, the authorities were justified in holding that the provisions of section 12B of 1922 Act were attracted. Consequently, the subject matter of appeal would get confined to limits of the grounds specifically raised in the memorandum of appeal, new grounds raised by the appellant with the previous permission of the Tribunal and the grounds urged by the respondent in support of the decree passed in his favour. The case of the Ld. Counsel is that the ground has been specifically raised by the

assessee in the memorandum of appeal, therefore, it has to be decided as such.

5.5 The alternative submission of the Ld. Counsel is that in case the Tribunal holds that this is an additional ground, it may be admitted in the light of decision in the case of NTPC as no further facts are required to be found.

5.6 Ld. Counsel also relied on some additional cases, which were not cited in the course of his main presentation. In the case of Mohan Dairy vs Union of India (2007) 163 Taxman 274(All), the assessee sought to raise additional ground that the assessment proceedings and consequential assessment order are without jurisdiction and barred by limitation, in view of non-service of notice u/s 143(2) within the period allowed as per provision to section 143(2). It was argued that non-service of notice within the prescribe time may be correct, but this aspect of the matter has to be adjudicated by the Tribunal after entertaining the ground ; The case of the Ld. Counsel was that the application for additional ground may be allowed. In these circumstances, the Tribunal was directed to permit the petitioner to add the additional ground. In the case of V.K. Jain vs. CIT (1975) 99 ITR 349 (P &H), the facts are that the assessee filed his return on 28.3.1969, which was valid return u/s 139 (4). Oblivious of this provision ITO treated return as invalid and no order was passed thereon.

Thereafter a notice u/s 148 was issued in response to which the assessee filed a return. This return showed loss of ` 4128/-,as shown in the first return. The assessment was completed on total income of ` 32431/-. The question before the Hon'ble High Court was – whether, the Tribunal was justified in refusing to consider the validity of notice u/s 148 even though the ground challenging the same had not been pressed before AAC? The court came to conclusion that the ITO did not dispose of the return voluntarily filed by the assessee but proceeded to take action u/s 34 (equivalent to section 147 of 1961 Act). The notice issued in pursuance of section 147 is invalid and, therefore, entire proceedings would become void. In such a situation, the Tribunal was bound to hear the assessee in this matter. In the case of West Bengal State Electricity Board vs. DCIT and another (2005) 278 ITR 218 (Calcutta), two points were raised by the assessee i.e. the interest charged u/s 201 (IA) was discretionary. in nature, and ii) The officer who passed the order had no jurisdiction thereby rendering the order as null & void. The question regarding jurisdiction was taken up for the first time before the Tribunal. The court came to the conclusion that no fact needs to be gone in to for deciding this issue and it is purely a question of law, which goes to the root of the matter. Such a question can be admitted by the Tribunal for the first time in the light of the decision in the case of NTPC. In the case of Orissa Cement Ltd. (2011) 250 ITR 856 (Del), the assessee raised additional grounds before the Tribunal in respect of the claim of deduction u/s. 80E. These were rejected by the Tribunal on the ground that they did not arise out of the order to

the AAC. The Hon'bvle Court held that the Tribunal had discretion to allow or not allow to include the grounds. But where it is required to decide a question of law for which all facts are on record in the assessment proceedings, there is no reason as to why such a ground should not be allowed to be raised. In other words, the decision in the case of NTPC has been followed.

6. Ld. Counsel was permitted to state additional cases in the course of rejoinder reply. Therefore, the Ld. Standing Counsel was permitted to deal with these cases. It is submitted that the question in the case of V.K. Jain was whether assessment had to be completed on a belated return and pending that notice u/s 148 could not be issued, thus, the facts are distinguishable. In the case of Mohan Dairy the facts regarding non service of notice were on record. In the case of Orissa Cement Ltd., all the facts in regard to the deduction u/s 80E were on record. Similarly in the case of West Bengal Electricity Board all facts were on record. However, in the instant case, all facts are not on record. What is available on the record of lower authorities is the fact in respect of deduction u/s 80IA. The facts regarding jurisdiction u/s 153A are not on record. Therefore, it is argued that the ground may not be allowed to be raised.

7. We have considered the facts of the case and submissions made before us. We have also considered various cases cited by both the

parties. We find that four questions have to be answered for deciding the controversy at hand. The first question is – whether, question no. 1 raised before the Tribunal is the same or substantially the same as question No. 3 raised before the Ld. CIT(A) ? The submission of the Ld. Counsel is that the ground in appeal should be widely read and it should not be construed narrowly. The ground taken before the Ld. CIT(A) had been that the Ld. DCIT erred in disallowing the claim of deduction u/s 80IA(4) already granted in order passed u/s 143(3) on 30.12.2006 which is merely change of opinion. Thus the plea of change of opinion had indeed been taken up before the Ld. CIT(A). The ground before the Tribunal is that the Ld. CIT(A) erred in not appreciating that the order passed by the AO is without jurisdiction and bad in law as the jurisdiction u/s 153A is vitiated. It is argued that the substance of ground no. 3 before the Ld. CIT(A) is that in case of a completed assessment u/s 143(3), the assessment can not be altered to the disadvantage to the assessee merely on account of change of opinion, i.e. there should be tangible material on record on the basis of which disadvantage may be caused to the assessee. The search, on the basis of which the assessment is made u/s 153A, has not revealed any incriminating material in so far as claim of the assessee u/s 80IA (4) is concerned. Therefore, the addition made is merely on change of opinion. In other words the AO did not have jurisdiction to make assessment (or it should be read adverse assessment) against the assessee. On the other hand, the case of Ld. Standing Counsel is that question of admissibility of deduction u/s 80IA(4) is completely different from the question of

jurisdiction u/s 153A. as the former question deals with the merits of the case u/s 80IA(4) in the assessment / reassessment proceedings ,while the latter question bars the jurisdiction even to make assessment, i.e. lack of jurisdiction u/s 153A renders the notice under this provision vitiated. We find that the two questions do not deal with the same subject. The question before the Ld. CIT(A) had been that income quantified in order passed u/s 153A by disallowing deduction u/s 80IA(4) is against the law as it is based on change of opinion. On the other hand, the question before us is whether the whole of order passed u/s 153A is bad in law because the AO did not have jurisdiction u/s 153A. On bare perusal of section 153A, we find that the provision starts with non obstante clause in respect of sections 139, 147, 148, 149, 151 and 153 ; and it provides that where search has been initiated u/s 132 or books of account, other documents or any assets or cash etc. have been requisitioned u/s 132A after 31.5.2003, the AO shall proceed in the manner provided in clause (a) and clause (b) of this sub-section. Clause (a) is regarding issue of notice to such a person to require him to furnish the return of income. Since the provision overrides section 147 and section 148, we shall refrain from taking analogy from these provisions for the purpose of assessment or reassessment u/s 153A. However, the provision clearly empowers the AO to issue notice in a case where search is initiated after 31.5.2003. This condition is satisfied in the instant case. Therefore, we are not in a position to pursuade ourselves to agree with the Ld. Counsel that the two questions or more or less the same, even when question No. 3 before the

Ld. CIT(A) is read widely. The question before the Ld. CIT(A) may be in regard to jurisdiction to disallow deduction already granted and in respect of which no material has been found in search. However question No. 1 before us is an upfront question which debars jurisdiction u/s 153A all together. The question is qualitatively different from the question raised before the Ld. CIT(A). Thus we are not able to sustain the submissions of the Ld. Counsel in this behalf.

7.1 Secondly, the ld.Standing Counsel has raised a plea that barring the jurisdiction would lead to a conclusion that proceedings u/s 153A are all together bad in law. This would mean that income voluntarily surrendered by the assessee in the return u/s 153A, on which tax has been paid, will have to be refunded to the assessee. This will amount to great prejudice to the revenue as even admitted tax will have to be refunded on the basis of interpretation sought to be placed by the ld. Counsel on the statutory provision. On the other hand, Ld. Counsel has drawn our attention to the provision contained in clause (b) of section 240 to the effect that if an order of assessment is annulled the refund shall become due only of the amount, if any, of the tax paid in excess of the tax chargeable on the total income returned by the assessee. It is submitted that the assessee had himself disallowed certain amounts including a sum of ` 3,50,000/- in respect of claim u/s 80IA. Tax has been paid by way of self assessment on filing the return u/s 153A. In view of the aforesaid provision, the assessee is not entitled to the refund of the tax paid even if the assessment is

annulled or held to be in excess of power granted to the AO u/s 153A. We have considered this matter also. The provision is clear that on account of appeal if the order of assessment is annulled, the amount paid by the assessee at the time of filing the return is not be refunded to the assessee. In the context of the section, the assessment will include reassessment also. Therefore, the prejudice to the revenue, if the ground is admitted, will only be a legal grievance not leading to loss of revenue in so far as returned income is concerned. Accordingly this plea of the Ld. Standing Counsel is rejected.

7.2 The third question is – whether, the ground taken by the assessee is an additional ground ? The facts in this connection are that the ground was not taken before Ld. CIT(A) or AO. Thus, no order is available from the lower authorities on this issue. The case of the Ld. Counsel is rather simple that the ground has been taken in the memorandum of appeal, therefore, it is not an additional ground for which leave is required from the Tribunal. On the other hand, the case of the Ld. Standing Counsel is that the ground does not arise out of the order of lower authorities as this question was never taken up before any one of them. We have considered this matter also. Section 253(1) uses the words “aggrieved”. A person as appellant can be aggrieved only if the ground had been raised and it is decided against him. It may also include a case where the ground is raised but has not been decided by the Ld. CIT(A). Therefore, section 253(1) bars a ground which was not raised and therefore not decided by the Ld.

CIT(A). There cannot be any grievance in respect of a matter where it is not raised at all. Further, provision u/s 254(1) under which the Appellate Tribunal is authorised to pass order on the appeal after granting opportunity to both the parties of being heard uses the words "pass such orders thereon as it thinks fit". According to us this is a stage subsequent to filing the appeal. By this time, the question regarding right of the assessee to take certain grounds, additional grounds etc. in respect of the appeal come to an end. Many other considerations may come into picture before and at the time of passing the order. Thus, we will defer the discussion on this issue and confine ourselves only to section 253(1) and the interpretation of the word "aggrieved" for the time being. We find that the decision in the case of Pokhraj Hirachand (supra), rendered by the jurisdictional High Court, throws sufficient light for coming to a decision in the matter. The facts are mentioned on page 295 of the report, which are reproduced below :-

> *"We are here concerned with the assessment year 1948-49. The assessee is a partnership firm consisting of six partners dealing in cloth and parachutes. One Milkhiram R. Goyal, who was carrying on business as the sole proprietor under the name and style of Milkhiram Brothers, was able to secure a contract for purchase of approximately 1,28,499 parachutes from Tata Aircraft Ltd. at the price of ` 93 lakhs on or about 1st November, 1946. On or about 13th November, 1946, Milkhiram assigned to the assessee the benefits of the said contract of purchase of the parachutes. The terms of the agreement of the aforesaid transfer between the assessee and Milkhiram are contained in a letter addressed to the assessee by Milkhiram, and it is annexed as annexure "A". Now, Milkhiram assigned to the assessee the benefits of the said contract of purchase of parachutes for a consideration of ` 3 lakhs. The assessee paid Milkhiram passed receipt in favour of the assessee for the said amount of ` 3 lakhs. According to assessee, though he had issued two cheques in favour of Milkhiram towards the payment of*

the said sum of ` 3 lakhs, at the request of Milkhiram, the said amount was not paid by cheques, but was paid in cash, and this fact also is admitted by Milkhiram in his own handwriting in the form of an endorsement on the reverse of the said two cheques. Copies of the cheques along with the endorsements in the handwriting of Milkhiram forming part of the case are annexed as annexure "B"."

The finding to which the Ld. Counsel for the assessee took objection and the objections are mentioned at page No. 297 of the report, which are reproduced below :-

The Tribunal, however, went into the question as to whether the entire amount of ` 3 lakhs has been paid by the assessee to Milkhiram Goayl or not. The Tribunal held that the evidence on record does not justify a finding that the assessee had proved that the sum of ` 3 lakhs was paid to Milkhiram Goyal. It is held that the assessee only paid ` 1,87,000/- and not ` 3 lakhs to Milkhiram Goyal. The Tribunal therefore directed that the sum of ` 1,87,000/- be allowed as allowable deducstion in computing the assessable income of the assessee. It appears that when the appeal was heard on 27th November, 1957, Mr. Palkhivala counsel for the assessee, objected to the Tribunal's going into the question as regards the quantum of payment, as according to Mr. Palkhivala that question was neither the subject matter of the appeal, nor a question raised by the respondent before the Tribunal. The objection raised by Mr. Palkhivala is stated in the following terms by the Tribunal in the statement of the case in paragraph 7 thereof :

> *"At the time of further hearing on 27th November, Mr. Palkhivala, the learned counsel for the assessee, contended that ` 3 lakhs was a revenue expenditure and that the Tribunal had no jurisdiction to examine and determine the question of ' factum' of payment of ` 3 lakhs by the assessee, as the same, according to him, was not disputed by the income-tax authorities."*

The finding of the Hon'ble Court is that from the statement of the case submitted by the Tribunal, it is found that the assessee had raised objection that Tribunal had no jurisdiction to deal with the question about the amount paid by the assessee to Milkhiram. This question was not dealt with either by the AO or the Appellate Assistant Commissioner. The

Tribunal, however, suo motu went into the question whether the whole of the amount of ` 3 lakhs has been paid to Milkhiram. It was found that only a sum of ` 1,87,000/- was paid to him and not ` 3 lakhs. The court held that the contention of the Ld. Counsel for the assessee is well founded as the factum of the payment was not disputed by the lower authorities. As mentioned earlier, the fact is that jurisdictional question as posed before the Tribunal had not been raised before the lower authorities. It has also been held that question No. 3 before the Ld. CIT(A) is qualitatively different from question No. 1 before us. Therefore, the question does not arise out of the orders of the lower authorities. The decision in the case of Pokhraj Hirachand becomes important in the light of the fact that the word used in section 263 (1) is “aggrieved”, and grievance can arise only if the matter has been taken up before any of the lower authorities on which decision has been rendered or not. However, the question which has not been raised before any of the lower authorities and obviously not decided by any one of them, cannot lead to a grievance in respect of which a ground can be validly taken in the memorandum of appeal. Therefore, we tend to agree with the Ld. Standing Counsel that ground No. 1 in the memorandum of appeal cannot be a ground validly taken as a grievance from the order of lower authorities. The question whether it can be admitted as an additional ground is all together a different matter. Thus it is held that the ground as it stands could not have been taken in the memorandum of appeal.

7.3 The final question is - whether, such a ground can be raised for the first time before the Triubunal ?

7.4 In the case of JB Greaves (supra), which is the decision of the jurisdictional High Court, it has been held that the subject – matter of appeal before the Tribunal would be the grounds raised by the appellant before it. Rule 11 provides that the appellant shall not except by the leave of Tribunal, be heard in support of any ground not set forth in the memorandum of appeal. But the Tribunal in deciding the appeal shall not be confined to the grounds set forth in the memorandum of appeal and grounds taken by leave of the Tribunal. Rule 27 provides that even though, the respondent may not have filed appeal, he may support the order of Appellate Assistant Commissioner on any of the grounds decided against him. Thus the subject matter of appeal consist of three elements :- I) grounds taken in memorandum of appeal, 2) grounds for which leave is allowed by the Tribunal, and 3) grounds taken by the respondent for supporting the order of AAC/CIT(A). This position has also been explained in the case of Hazarimal Nagaji & Co. decided by Hon’ble Bombay High Court, in which it has inter alia been mentioned that the position of Appellate Tribunal is same as that of a court of appeal under the Civil Procedure Code and its powers are identical with the powers enjoyed by an appellate court under the Code. Thus a respondent in an appeal is undoubtedly entitled to support the decree which is in his favour on any grounds which are available to him, even though the decision of the lower

court in his favour may not have been based on such grounds. We have already held that a ground can be validly taken in the memorandum of appeal only if the appellant is aggrieved by the order of AAC / CIT(A). It has also been held that the ground No. 1 in the present appeal was never taken before any of the lower authorities and , therefore, this ground can not be validly taken up in memorandum of appeal. This brings us to the question whether this ground can be taken up as additional ground with the leave of the Tribunal. To our mind, the answer to the question is obvious in view of the decision in the case of NTPC, decided on 12.4.1996, after the decision was rendered in the case of Late Begum Noor Banu Alladin on 21.4.1993. The Hon'ble Supreme Court has held with the view that Tribunal is confined only to issues arising out of the appeal before the CIT(A) takes too narrow a view. This view was taken in the case of Anand Prasad , Karamchand Premchand Pvt. Ltd. and Cellulose Products of India Ltd. This means that the ratio of these cases has not found favour with the apex court. The decision in the case of Late Begum Noor Banu Alladin heavily relies on the decision in the case of Karamchand Premchand and Cellulose Products of India Ltd. If these cases have not been approved by the Apex Court , it follows that the decision based on these cases may not be followed by us. Further the Hon'ble Apex Court in very clear terms has held that the Tribunal will have discretion to allow or not to allow a new ground to be raised, but where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings, it fails to see why such a question should not be

allowed to be raised when it is necessary to consider that question in order to correctly assessee the tax liability of an assessee. The position of the assessee in the case at hand is similar to the position of NTPC, as both of them are appellants. Therefore, on the basis of the decision, it abundantly clear that if the pure question of law arises for which facts are on record of the authorities below, such a question should be allowed to be raised, if it is necessary to do so to assess the correct tax liability.

7.4.1 The Ld. Counsel has submitted that this ground could not be raised earlier as the assessee was not properly advised in the proceedings before the lower authorities, and it did not have the services of an advocate at his command. On perusal of record, this submission is found to be correct. The question is one of law and not one of fact. Therefore, it could be that a proper ground could not be raised in absence of services of an advocate although the denial of the deduction had been disputed. This constitutes a reasonable cause in the light of the decision in the case of Shaik Ibrahim (supra). Thus, we find that there are reasons to hold that the assessee could not take up this ground before lower authorities for bona-fide reasons.

7.4.2 In view of the stated position, stated by the Ld. Counsel, that all facts are on record, we admit ground No. 1 in the memorandum of appeal

for decision as an additional ground. It also follows from the decision that no fresh fact will be entertained or examined while deciding the ground.

7.4.3. Before parting, we may add that a large number of cases have been quoted by the rival parties , but we do not think it necessary to deal these cases in detail here because we find that there is support available from the decision of the Apex Court in this matter. It may however be added that these cases have been summarised by us earlier for the sake of completeness.

8. The effect of the discussion is that ground No. 1 is admitted as an additional ground.

Sd/-	Sd/-	Sd/-
[D.K. AGARWAL]	[G.E.VEERABHADRAPPA]	[K.G. BANSAL]
JUDICIAL MEMBER	HON'BLE PRESIDENT	ACCOUNTANT MEMBER

Dated: 21-05-2012

Veena

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY

By Order,

Deputy Registrar, ITAT