



2024:DHC:5433-DB



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 18.07.2024

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W.P.(C) 3675/2023

MUFG BANK LTD

.....Petitioner

Through: Mr. Percy Pardiwala, Sr. Adv.
with Mr. Hiten Thakkar and
Mr. Nikhil Ranjan, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE
2 (2)(1) & ORS.Respondents

Through: Mr. Debesh Panda, SSC along
with Mr. Vikramaditya Singh,
Ms. Zehra Khan, JSCs, Mr.
Vineet Gupta, Mr. Ojaswa
Pathak and Mr. Anuantta
Shankar, Advs.
Mr. Ravi Prakash, CGSC for
UOI.

CORAM:**HON'BLE MR. JUSTICE YASHWANT VARMA****HON'BLE MR. JUSTICE RAVINDER DUDEJA****J U D G M E N T****YASHWANT VARMA, J. (Oral)**

1. The writ petitioner impugns the order framed by the **Assessing Officer**¹ dated 13 May 2022 to the extent that it denies a deduction of INR 9,62,39,916/-.
2. Undisputedly, the said order has come to be framed in order to give effect to the decision rendered by the **Income Tax Appellate**

¹ AO



Tribunal² for Assessment Year³ 1998-1999.

3. As we read the order of the Tribunal and which dealt with Ground No. 6 which pertained to deductions claimed in respect to payment of salary to expatriate employees, it had observed as under:-

“19. Ground No.6:

“6(a) That on the facts and in the circumstances of the case, the CIT(Appeals) erred in confirming the action of the Assessing Officer in rejecting the claim of the appellant for being allowed deduction with respect to salaries paid by the appellant in foreign currency and outside India, to the expatriates of the appellant working in India, and the taxes paid by (be appellant (on lax on tax basis) with respect to such salaries, where the said salaries and taxes aggregated to Rs.9,62,39,916/-, while computing the business profits of the permanent establishment of the appellant chargeable to tax in India, within the meaning of Indo-Japan tax treaty, by allegedly invoking the provisions of section 40(a)(i) of the Act, when the restrictions envisaged in the said section are not applicable in the case of the appellant in view of the express provisions of the Indo-Japan tax treaty.

6(b) That on the facts and in the circumstances of tile case, the salaries paid by the appellant in foreign currency and outside India the expatriates of the appellant working in India, and the taxes paid by the appellant(on tax on tax basis) with respect to such salaries, in all aggregating Rs. 9,62,39,916/- are allowable as deduction while, computing the business profits of the appellant chargeable to lax in India, in view of the express provisions of Article 7(3) of the Indo-Japan tax treaty, notwithstanding the fact that the said sum had not been debited to the profit and loss account prepared by the appellant for its Indian operations.”

20. Learned Counsel for the Assessee submitted that this issue is covered by the Order of the ITAT, Delhi Bench in the case of assessee i.e., Bank of Tokyo Mitsubishi UFJ Ltd., vs. ADIT, Circle-1(1),International Taxation, New Delhi, Dated 19.09.2014 reported in [2014] 49 taxmann.com 441 (Delhi-Tribu.), in which in paras 11 and12, the Tribunal held as under :

“11. The facts are not disputed. The expatriates were working

² Tribunal

³ AY



in India and salary had been subjected to tax for which form-no. 16 was also issued to the expatriates. Therefore, there cannot be any dispute regarding verifiability of these expenses. The expenses had been incurred wholly and exclusively for the Indian branch and, therefore, no part of these expenses could be allocated to any other branch by head office. We find that this issue is now no more res integra as has been demonstrated by Id. Sr. Counsel for the assessee with reference to various decisions. He has rightly pointed out that the decisions in the case of ABM Amro Bank N.V. (supra) is squarely applicable because there was no dispute amongst the members in regard to non-applicability of provisions u/s 44C. The issue before third member was not at all in regard to allow ability of deduction u/s 44C and only following points of difference were before him for adjudication:

“(a) Whether or not, on the facts and in the circumstances in the case, the assessee is entitled to deduction of tax component of salary of expatriate employees, relating to asst. yrs. 1990-91 and 1991-92, in the asst. yr. 1995-96, i.e., the year in which the tax has been paid by the assessee.

(b) Whether or not, on the facts and in the circumstances of the case, the assessee was entitled to deduction of interest levied u/s 201(1A).

(c) Whether or not, on the particular facts and in the particular circumstances of this case, the assessee was entitled to deduction on account of operational loss of Rs. 9,57,58,904/-.”

11.1 Thus, Ld. DRP has not correctly appreciated the facts of the case.

12. Respectfully, following the decisions of Hon'ble Bombay High Court in the case of Emirates Commercial Bank Ltd. (supra), this ground is allowed”.

20.1. Learned Counsel for the Assessee also submitted that the aforesaid Order of the Tribunal Dated 19.09.2014 as reported in 49 taxmann.com 441 (supra) has been confirmed by the Hon'ble Delhi High Court by dismissing the Departmental Appeal in ITA.No.604/2015, Dated 08.04.2016. Learned Counsel for the Assessee also submitted that ITAT, Delhi Bench in A.Y. 2010-2011 in the case of same assessee following the above decisions of the Tribunal and Hon'ble Delhi High Court, allowed the similar claim of assessee in ITA.No.1174/2015 Dated 25.01.2017.

20.2 The Ld. D.R. did not dispute the same.



21. Following the Order of the Tribunal and Hon'ble Delhi High Court in the case of same assessee on identical facts, we set aside the Orders of the authorities below and delete the addition. Ground No.6 (a) and (b) of appeal of Assessee is allowed. ”

4. It was thereafter that the matter came to be placed before the concerned AO for passing an appeal effect order. We note that while examining the aforesaid issue, the AO has observed as under: -

“6. In view of the above settled law, the appeal effect can only be considered to the extent the assessed income of the assessee should not be less than the returned income of the assessee of Rs.27,91,99,320/- vide revised return dated 14.10.1999. Therefore, income of the assessee company computed as Rs.27,91,99,320/-. The assessee claimed advance tax of Rs. 13,75,00,000/- and the same considered in computation of tax in appeal effect order u/s 254/143(3) of the Income Tax Act, 1961 as original challans of Rs. 13,75,00,000/-was found on record.”

5. The record would further reflect that although time had been granted to the respondents to file a reply, no counter affidavit has been filed by them till date. We consequently find no justification to defer disposal of this matter on that score.

6. On an ex-facie examination of the reasons assigned by the AO, we find that the opinion expressed is wholly misconceived and thoroughly untenable. Once the Tribunal had accorded relief and allowed Ground No. 6, a deduction was liable to be necessarily made by the AO.

7. We also bear in mind the view expressed by the Supreme Court in **Goetze (India) Ltd. vs. Commissioner of Income Tax**⁴ and where an exception was carved out in respect of the statutory prohibition of a deduction being claimed outside the Return of Income and of the same not being applicable in case of a direction issued by a Tribunal or

⁴ 2006 SCC OnLine SC 1446



Court. Dealing with that issue, the Supreme Court in *Goetze* had held as follows: -

“2. The question raised in this appeal relates to whether the appellant assessee could make a claim for deduction other than by filing a revised return. The assessment year in question was 1995-96. The return was filed on November 30, 1995, by the appellant for the assessment year in question. On January 12, 1998, the appellant sought to claim a deduction by way of a letter before the Assessing Officer. The deduction was disallowed by the Assessing Officer on the ground that there was no provision under the Income-tax Act to make amendment in the return of income by modifying an application at the assessment stage without revising the return.

3. This appellant’s appeal before the Commissioner of Income-tax (Appeals) was allowed. However, the order of the further appeal of the Department before the Income-tax Appellate Tribunal was allowed. The appellant has approached this court and has submitted that the Tribunal was wrong in upholding the Assessing Officer’s order. He has relied upon the decision of this court in *National Thermal Power Company Ltd. v. CIT* [1998] 229 ITR 383, to contend that it was open to the assessee to raise the points of law even before the Appellate Tribunal.

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

8. We also deem it apposite to notice the judgment of our Court in **Commissioner of Income Tax vs. Jai Parabolic Springs Ltd⁵**. and which has explained the legal position in this regard in the following terms: -

“10. Thus, the principal question that arises for determination in this appeal is “Whether the Tribunal was right in law in allowing

⁵ 2008 SCC OnLine Del 1486



relief of Rs. 15,58,500 in the assessment year under consideration when no such claim was made by the assessee in the return of income ?

11. It is contended by learned counsel for the Revenue that the Tribunal has erred both in law and on facts in granting relief of Rs. 15,58,500 to the assessee on account of expenditure claimed by the assessee as “ deferred revenue expenditure” in the audited balance-sheet. As per the relevant statutory provisions no such claim can be allowed which has not been claimed in the return of income. Further, particulars for the purpose of assessment have to be submitted before the completion of assessment proceedings and if the information is supplied subsequent to the completion of the assessment, it would mean that the assessment order will have to be reopened and the Act does not contemplate such reopening of assessment. Furthermore, in the absence of any direction given by the Tribunal in the first round of proceedings to allow the entire claim, the Tribunal failed to appreciate that out of the entire deferred revenue expenses an amount of Rs. 3,89,625 has already been allowed by the Assessing Officer and the remaining expenditure was treated by the Assessing Officer in consonance with the proper manner laid down under the law.

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14. Reference may be made to National Thermal Power Co. Ltd. v. CIT [1998] 229 ITR 383, where the Supreme Court observed that (page 386):

“The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. We do not see any reason to restrict the power of the Tribunal under section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.”

15. Reference may also be made to Gedore Tools P. Ltd. v. CIT [1999] 238 ITR 268 (Delhi), wherein the apex court decision in National Thermal Power Co. Ltd. [1998] 229 ITR 383 has been followed.



16. In the case of Jute Corporation of India Ltd. v. CIT [1991] 187 ITR 688, while dealing with the powers of the Appellate Assistant Commissioner, the Supreme Court observed that (page 386 of 229 ITR):

“An appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

17. In Goetze (India) Ltd. v. CIT [2006] 284 ITR 323 (SC) wherein deduction claimed by way of a letter before the Assessing Officer, was disallowed on the ground that there was no provision under the Act to make amendment in the return without filing a revised return. Appeal to the Supreme Court, as the decision was upheld by the Tribunal and the High Court, was dismissed making clear that the decision was limited to the power of the assessing authority to entertain claim for deduction otherwise than by a revised return, and did not impinge on the power of the Tribunal.”

9. A similar issue arose for consideration of our Court in **Rites Limited v. Commissioner of Income Tax**⁶, wherein the Court observed as follows:-

“16. The impugned order of the CIT appears to have ignored the history of the litigation leading to the filing of the revision petition.

⁶ 2017 SCC OnLine Del 8940



The Petitioner has already exhausted the remedies that were available to it. In light of the order of this Court disposing of the Petitioner's appeal in the first round, the CIT ought to have considered the claim of the Petitioner on merits. The Petitioner's revision petition under Section 264 of the Act ought not to have been dismissed on a mere technicality.

17. In *C. Parikh & Co. v. CIT* (supra), the Gujarat High Court observed as under:

“It is clear that under Section 264, the Commissioner is empowered to exercise revisional powers in favour of the Assessee. In exercise of this power, the Commissioner may, either of his own motion or on an application by the Assessee, call for the record of any proceeding under the Act and pass such order thereon not being an order prejudicial to the Assessee, as he thinks fit. Sub-sections (2) and (3) of s. 264 provide for limitation of one year for the exercise of this revisional power, whether *suo motu*, or at the instance of the Assessee. Power is also conferred on the Commissioner to condone delay in case he is satisfied that the Assessee was prevented by sufficient cause from making the application within the prescribed period. Sub-section (4) provides that the Commissioner has no power to revise any order under s. 264(1): (i) while an appeal against the order is pending before the AAC, and (ii) when the order has been subject to an appeal to the Income-tax Appellate Tribunal. Subject to the above limitation, the revisional powers conferred on the Commissioner under s. 264 are very wide. He has the discretion to grant or refuse relief and the power to pass such order in revision as he may think fit. The discretion which the Commissioner has to exercise is undoubtedly to be exercised judicially and not arbitrarily according to his fancy. Therefore, subject to the limitation prescribed in s. 264, the Commissioner in exercise of his revisional power under the said section may pass such order as he thinks fit which is not prejudicial to the Assessee.

There is nothing in s. 264 which places any restriction on the Commissioner's revisional power to give relief to the Assessee in a case where the Assessee detracts mistakes on account of which he was over-assessed after the assessment was completed. We do not read any such embargo in the Commissioner's power as read by the Commissioner in the present case. It is open to the Commissioner to entertain even a new ground not urged



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before the lower authorities while exercising revisional powers. Therefore, though the petitioner had not raised the grounds regarding under-totalling of purchases before the ITO, it was within the power of the Commissioner of admit such a ground in revision.”

18. Likewise, the Kerala High Court in *Parekh Brothers v. CIT* (supra) observed:

“We hold, that even though a mistake was committed by the Assessee and it was detected by him after the order of assessment, and the order of assessment is not erroneous, none the less it is open to the Assessee to file a revision before the Commissioner under Section 264 of the Act and claim appropriate relief. But it should not be forgotten that the power to be exercised under Section 264 is a revisionary one. The limitations implicit in the exercise of such power are well known. The jurisdiction is discretionary; Whether in a particular case, on the basis of facts disclosed, the Commissioner will exercise his jurisdiction and interfere in the matter, is a matter of discretion. It is certainly a judicial discretion vested in the Commissioner, to be exercised in accordance with law. We are not called upon to pronounce on the scope and amplitude of the revisional power. The only question mooted for our consideration in this case is whether the Commissioner has got revisional jurisdiction at all, where the Assessee having included the income for assessment, can claim the relief of weighted deduction under Section 35B of the Act, for the first time, in a petition filed under Section 264 of the Act. On that aspect of the question, we have no doubt in our mind that the Commissioner has jurisdiction to entertain a revision petition under Section 264 of the Act.”

19. In *Sneh Lata Jain v. CIT* (supra), the High Court of Jammu & Kashmir followed the above decisions and observed that in its revisionary jurisdiction the CIT has the power to call for the record of any proceedings under this Act and is also entitled to make any enquiry himself or cause any inquiry to be made and to pass such order as he thinks fit.

20. In the present case, therefore, the mere fact the Petitioner did not make any claim in the original return and also in its revised return before the passing of the assessment order by the AO would not stand in the way of the CIT exercising revisionary jurisdiction to grant relief. The Supreme Court in its decision in *Goetze India*



Limited v. Commissioner of Income Tax (supra) held that while the AO could not permit a claim to be made after the filing of the return without the Assessee revising it prior to the assessment order, it did not impinge on the scope of the revisionary jurisdiction of the CIT.

21. The decision in *Orissa Rural Housing Development Corporation* (supra) is distinguishable on facts. In the instant case, the order of the CIT(A) in the first round for AY 1997-98 itself recognized that the Petitioner could claim the deduction for provision for the arrears of revised wages in the subsequent AY 1998-99. The observations in *Goetze India Limited* (supra) were explained by this Court in *Sam Global Securities Limited* (supra) where in para 8 it held that “wherein deduction claimed by way of a letter before the Assessing Officer, was disallowed on the ground that there was no provision under the Act to make amendment in the return without filing a revised return. Appeal to the Supreme Court, as the decision was upheld by the Tribunal and the High Court, was dismissed making clear that the decision was limited to the power of the assessing authority to entertain claim for deduction otherwise than by a revised return, and did not impinge on the power of the Tribunal.”

10. The Supreme Court recently in **Wipro Finance Ltd. v. Commissioner of Income Tax**⁷ has enunciated the legal position in the following terms:

“10. The learned Additional Solicitor General appearing for the Department had faintly argued that since the appellant in its return had taken a conscious explicit plea with regard to the part of the claim being ascribable to capital expenditure and partly to revenue expenditure, it was not open for the appellant to plead for the first time before the Income-tax Appellate Tribunal that the entire claim must be treated as revenue expenditure. Further, it was not open to the Income-tax Appellate Tribunal to entertain such fresh claim for the first time. This submission needs to be stated to be rejected. In the first place, the Income-tax Appellate Tribunal was conscious about the fact that this claim was set up by the appellant for the first time before it, and was clearly inconsistent and contrary to the stand taken in the return filed by the appellant for the concerned assessment year including the notings made by the officials of the appellant. Yet, the Income-tax Appellate Tribunal entertained the claim as permissible, even though for the first time before the Income-tax Appellate Tribunal, in appeal under section 254 of the

⁷ 2022 SCC OnLine SC 675



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1961 Act, by relying on the dictum of this court in National Thermal Power Co. Ltd.*. Further, the Income-tax Appellate Tribunal has also expressly recorded the no objection given by the representative of the Department, allowing the appellant to set up the fresh claim to treat the amount declared as capital expenditure in the returns (as originally filed), as revenue expenditure. As a result, the objection now taken by the Department cannot be countenanced.

11. Learned Additional Solicitor General had placed reliance on the decision of this court in Goetze (India) Ltd. v. CIT** in support of the objection pressed before us that it is not open to entertain fresh claim before the Income-tax Appellate Tribunal. According to him, the decision in National Thermal Power Co. Ltd. merely permits raising of a new ground concerning the claim already mentioned in the returns and not an inconsistent or contrary plea or a new claim. We are not impressed by this argument. For, the observations in the decision in Goetze (India) Ltd. itself make it amply clear that such limitation would apply to the "assessing authority", but not impinge upon the plenary powers of the Income-tax Appellate Tribunal bestowed under section 254 of the Act. In other words, this decision is of no avail to the Department."

11. We, consequently, find ourselves unable to sustain Para 6 of the impugned order.

12. The writ petition is accordingly allowed. We quash the order dated 13 May 2022 insofar as it denied relief to the petitioner in respect of the deductions which were liable to be made pursuant to the order of the Tribunal dated 03 June 2019. The AO shall frame and grant consequential relief within a period of six weeks from today.

13. The writ petition stands disposed of on the above terms.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JULY 18, 2024/RW