IN THE INCOME TAX APPELLATE TRIBUNAL DELHI

(DELHI BENCH 'E' : NEW DELHI)

BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.1002/Del/2018, A.Y. 2014-15

Addl. CIT, Circle-61(1), New Delhi	Vs.	Sh. Mayur Batra 7, Barakhamba Road, Connaught Place, New Delhi-110001
(APPELLANT)		**(RESPONDENT)**

Assessee by	Sh. Ajay Vohra, Sr. Adv. & Ms. Somiya Jain, CA
Revenue by	Ms. Ranku Singh, CIT-DR

Date of hearing:	22.09.2022
Date of Pronouncement:	29.09.2022

ORDER

PER ANUBHAV SHARMA, JM:

The appeal has been filed by the Revenue against order dated 30.11.2017 passed in appeal no. 124/17-18/CIT(A)-42, New Delhi for assessment year 2014-15, by the Commissioner of Income Tax (Appeals)-42, New Delhi (hereinafter referred to as the First Appellate Authority or in short 'Ld. F.A.A.') in regard to the appeal before it arising out of assessment order dated 28.12.2016 u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as

'the Act') passed by assessing officer, ACIT(OSD), O/o. the Pr. CIT-21, New Delhi (hereinafter referred in short 'Ld. LO).

2. The facts in brief are Assessee is a Chartered Accountant by profession and derived income from business and profession and return of income was filed by the assessee declaring income of Rs. 2,25,85,460/-. The assessment order shows that the case of assessee was selected for limited scrutiny under CASS for following reasons :-

a. Sale consideration of property in ITR is less than sale consideration in Form 26QB.
b. Tax credit claimed in ITR is less than tax credit available in 26AS.
c. High income reported in the return and no entry in Schedule assets and Liabilities of return of income.
d. Mismatch in sales turnover reported in Audit Report and ITR.
e. Substantial increase in capital in a year.

2.1 During the assessment proceedings, Ld. AO vide note sheet entry dated 05.12.2016 asked the assessee to reply as to why sale consideration of Rs. 25,75,00,000/- as shown in 26AS was not shown in ITR and why no income was offered as capital gains. Assessee replied to the same submitting that the transaction of sale of property was inadvertently overlooked by the Accountant of the Assessee while filing the Income Tax Return and similarly the details of exemptions were also not disclosed inadvertently. However, since the Assessee has fulfilled all the conditions of exemption and the defect being only procedural in nature, it was submitted that the claim of exemption may kindly be granted. Similarly the Assessee claimed to be allowed credit of TDS of Rs 25,75,000/- as it was missed erroneously although it was deposited to government treasury under PAN of the Assessee and disclosed /reported in his Form 26 AS.

2.2 Thereafter vide note sheet entry dated 23.12.2016 assessee was asked to show cause as to why deduction u/s 54 not be disallowed as not only he

has failed to show the relevant sale of immovable property i.e E-6/2 Vasant Vihar, Delhi in his Return of Income and but also he has not claimed deduction u/s 54 of the IT Act in his regular Return of Income.

2.3 Assessee submitted that the case was picked up for "limited scrutiny" on the basis of the partial details in respect of payment of TDS etc. already available with income tax department and also furnished by the Assessee himself during the course of assessment proceedings itself in compliance to scrutiny notice. On receipt of notice, the Assessee himself has furnished all the details with regard to the cost of acquisition of the property sold by him during the year under consideration, sale transaction, investment in another residential property for entitlement to section 54 benefit, computation of 'nil' capital gain, etc. along with all supporting documents to your good office. The Assessee has voluntarily placed all these documents on records during the course of the assessment proceedings.

2.4 However, the Ld. AO being not satisfied with the response observed in the assessment order that;

> *"assessee's submission regarding granting of deduction u/s 54 has been considered but not found tenable. Assessee has not disclosed the sale of property in its ITR neither he filed revised return to rectify his claim. It is only because of the fact that purchaser of the property deducted TDS on the amount paid, Department came to know about the sale of the property. Assessee in his submission stated that,*
>
> *"TDS under the amended provisions was in fact deducted and reflected in Form 26AS of the assessee for AY 2013-14. It is therefore incorrect to presume that details of the transactions of sale of property were not reported by the Assessee"*

2.5 Ld AO held that submission cannot be accepted because it was not the assessee who disclosed the sale of the property but it was the purchaser who deposited the TDS deducted and therefore, said property transaction came into the notice of the Department. Further assessee's submission that the assessee has voluntarily placed all the documents on record during the course of the assessment proceedings is not true. Assessee furnished the details only when he was specifically asked vide note sheet entry dated 05.12.2016.

Ld AO observed;

> *"In the present case, ratio of judgment of Hon'ble Supreme court in the case of Goetze (India) Ltd. vs CIT, order dated 24th March, 2006 is applicable where Hon'ble Supreme Court while referring to its own earlier decision in National Thermal Power Company Limited Vs CIT 229 ITR 383, held that before the AO the assessee could not make a claim for deduction otherwise than by filing a revised return.*
>
> *Considering the above facts and discussion, Assessee's claim of deduction u/s 54 is hereby rejected. Hence, Long Term Capital Gain on sale of the property, as calculated below."*

3. The Ld. CIT(A) dealt with the controversy by following observations :

> *"5.7 The appellant averred that the learned AO has incorrectly applied the principle laid down by the Apex Court in the case of* ***Goetze (India) Ltd. vs. CIT*** *reported in 284 ITR 323. I find that the issue of allowability of deduction even without its claim in the return has now settled based on various judicial pronouncements. Hon'ble Madras High Court summed up this issue in the case of M/s. Abhinitha Foundation Pvt Ltd. 249 Taxman p 37 at para 18 which read as under:*
>
> *"In sum, what emerges from a perusal of the ratio of the judgments*

cited above, in particular, the judgments rendered by the Supreme Court in GOETZE's case and National Thermal Power Co. Ltd.'s case, and those, rendered by the Division Bench of this Court in Ramco Cements Ltd. and CIT vs Malind Laboratories P. Ltd., as also the judgments of the Delhi High Court in Sam Global Securities Ltd. 's case and Jai Parabolic Springs Ltd.'s case, that, even if, the claim made by the assessee company does not form part of the original return or even the revised return, it could still be considered, if, the relevant material was available on record, either by the appellate authorities, (which includes both the CIT (A) and the Tribunal) by themselves, or on remand, by the Assessing Officer."

5.8 *It flows from the above decision that the claim of deduction can be entertained at the level of CIT (A) and higher appellate authorities. Accordingly, the claim of benefit under section 54 of the act cannot be disallowed only on the ground that the same was not claimed in I.T. return."*

4. The revenue is in appeal raising following grounds :-

1. *On the fact and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of exemption of Rs. 15,58,11,962/- u/s. 54 of the Act by ignoring the judgement of Hon'ble Supreme Court in the case of Goetze (India) Ltd. vs. CIT dated 25th March, 2006 & in the case of National Thermal Power Company Ltd. vs. CIT 229 ITR 383, where it is held that before the AO the assessee could not make a claim for deduction otherwise than by filing a revised return.*

2. *On the fact and in the circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring that the fact that, the*

intention of section 54 has always been to provide exemption if the assessee constructs one residential house in India in the event of capital gains arising from transfer of residential house. The amendment brought in Finance Act, 2014 is only a clarifying amendment and did not change the position of law.

3. *The appellant craves leave to add, to alter or amend any ground of appeal raised above at the time of hearing."*

5. Heard and perused the record.

6. The Ld. DR submitted that Ld. CIT(A) has fallen in error in reversing the findings of ld. AO who had relied the judgment of Hon'ble Supreme Court of India in the case of **Goetze (India) Ltd. vs. CIT [2006] 284 ITR 323 (SC)** while holding that assessee cannot make a fresh claim of deduction during assessment proceedings otherwise then by filing revised return. It was submitted that the relevant material was not before Ld. AO and in any case if Ld. CIT(A) was taking into consideration fresh evidence then opportunity should have been given to the Ld. AO to rebut the same. It was submitted that the cases relied by Ld. CIT(A) in **M/s. Abhinitha Foundation Pvt. Ltd. 2014 taxman** is mis-construed as the facts were different. It was submitted that in the cases relied on behalf of the assessee, Ld. AO was made aware of the essential facts. It was submitted that in the case in hand facts like date of completion of house required examination and the also documentary evidences was not available with Ld. AO and he could not examine the same.

6.1 On the other hand, Ld. Sr. counsel representing the assessee took the bench through various portions of the assessment order to submit that Ld. AO was apprised of all the relevant facts. He submitted that Ld. AO summarily dismissed the claim of assessee by relying the judgment of Hon'ble Supreme Court of India in **Goetze (India) Ltd. vs. CIT case (supra).** Ld. Sr. Counsel relied judgment of Hon'ble Supreme Court of India in **Wipro Finance Ltd. Vs.**

CIT [2022] 443 ITR 250 (SC) and the judgment of Hon'ble Delhi High Court in **CIT vs. Jai Parabolic Springs Ltd. [2008] 306 ITR 42 (Del.) and** the third Member judgment of co-ordinate Bench of Delhi in **JCIT vs. Hero Honda Finlease Ltd. [2008] 115 TTJ 752 (Del. Trib.)** to contend that fresh claim made before the Assessing officer during assessment is admissible. He also submitted that Ld. CIT(A) has considered the disallowance claim on all relevant parameters while allowing the benefit of Section 54 of the Act. In this regard, he relied judgment of Hon'ble Gujarat High Court **Leena Jugal kishore Shah vs. ACIT [2016] 392 ITR 18 (Guj.) and CIT vs. Saroja Naidu [2021] 281 Taxman 305 (Mad.)** to support the contention that capital gains invested in residential house outside India is allowable for claiming benefit of Section 54. He relied judgment **CIT vs. Ravinder Kumar Arora [2011] 342 ITR 38 (Del.), CIT vs. Kamal Wahal [2013] 351 ITR 4 (Del.) and ACIT vs. Suresh Verma [2012] 135 ITD 102 (Del Trib.)** to support the contention that investment in residential house in Joint name with wife is allowable u/s 54 of the Act.

7. Now after giving thoughtful consideration to the matter on record and the submissions it can be observed from the assessment order that the case of assessee was picked up for limited scrutiny and one of the issues involved was sale consideration of property in ITR is less than sale consideration in Form 26QV. Para 3 of the assessment order specifically mentions that on 05.12.2016. Assessee was directed to show cause why sale consideration of Rs. 25,75,00,000/- as shown in 26AS was not shown in ITR and why no income was offered as capital gain.

8. Now, once the assessing officer had taken into consideration Form 26QV and the report under 26AS, which have to considered to be part of the returns of an assessee and the assessee has replied in detail to the query putting forth all the information about the transaction along with documents as to how no capital

gain had arisen then it can not be a case that assessee had made claim beyond his return. Assessment is not only of the income but also involves considering claim of the exemption or deduction which flow with the assessee's income. Reliance in this regard can be placed on Hon'ble Karnataka High Court judgment in **Charles D'Souza vs Commissioner Of Income-Tax,** decided on 27 January, 1984 (1984) 40 CTR Kar 353, where Hon'ble High court has explained the scope of assessment as follows.

> *"14. Assessment as defined in s. 2(8) of the Act includes reassessment. The word "assessment" has a comprehensive meaning in the Act and includes all steps and proceedings taken for determination of the tax payable and for imposing liability on the taxpayer.*
>
> *15. Assessment under the Act is done under s. 143/144 and the total income is assessed and the tax payable is determined. Assessment may be made on the basis of the return subject to adjustment provided under the Act. The assessment is completed after due enquiry under sub-s.(3)."*

8.1 Similarly Hon'ble Bombay High Court in **The Commissioner Of Income-Tax vs Khemchand Ramdas** (1938) 40 BOMLR 854 has held;

> *"20. In order to answer them, it is essential to bear in mind the method prescribed by the Act for making an assessment to tax, using the word assessment in its comprehensive sense as including the whole procedure for imposing liability upon the tax-payer. The method consists of the following steps. In the first place the taxable income of the tax-payer has to be computed. In the next place the sum payable by him on the basis of such computation has to be determined. Finally, a notice of demand in the prescribed form specifying the sum so payable has to be served upon the taxpayer."*

8.2 A coordinate Bench at Amritsar in **Jagan Nath Gurbachan Singh vs Ito decided on 28 June, 1999 Equivalent citations: (2002) 73 TTJ Asr 878** has also held;

> *"9. The important word in section 143(3), which was judicially analysed by various courts including the Hon'ble Supreme Court in "assessment" of income. The Hon'ble Supreme Court has broaden the definition of 'assessment' in the case of CIT v. Balkrishna Malhotra (1991) 81 ITR 759 (SC) and has given wider meaning which includes the computation of income, determining the amount of tax and also the entire process involved in computation of such income and such tax payable or such amount refundable to the assessee. As we have clearly mentioned that in no circumstance, the assessment gets meaning of accepting the return of income. Harmoniously reading of section 143(3) will lead to the conclusion that the assessing officer has to process and analyse the material gathered by him and material supplied by the assessee and the process of analysis will determine the ssessment of income of the assessee."*

9. Thus, when the taxable income of the tax-payer has to be computed on the basis of partial information in Return and remaining on queries put by the Ld AO during assessment, then in the next place the sum payable by assessee, on the basis of such computation has to be determined and which certainly includes taking into consideration, if the income so assessed is exempt or subject to any deductions and only then a notice of demand in the prescribed form specifying the sum so payable can be served upon the taxpayer. In the case in hand, when Ld. AO has taking into consideration the information like cost of construction and other costs, provided by assessee to index the income and calculate the capital gains, then the Ld. AO could not have left the assessment half way by not inquiring into the deduction if any claimed as applicable. It was

in fact duty of Ld AO to take the assessment to its logical end. As some of the information available with the return of income was considered to call for further information and same was relied to make assessment of income then not extending benefit of deduction of exempt income to assessee in regard to that income, would be against principles of natural justice and assessment cannot be said to be completed in accordance with law.

10. Accordingly the facts before the Ld. AO were different from those in **Goetze (India) Ltd. vs. CIT [(supra)** as in that case the return of income was filed on 30.11.1995 by the assessee for the assessment year 1995-96 and on 12.01.1998 a claim of deduction was made by way of letter which was disallowed by Ld. AO observing that there was no provision under the Act to make amendment in the return of income by modifying an application at the assessment stage without revising the return also. There was no case of a scrutiny assessment of the issue for which the assessee had furnished partial information and was seeking a deduction. Similarly in **National Thermal Power Company Ltd. vs. CIT 229 ITR 383** infact the claim was made for the first time in appeal.

11. Even otherwise there is no error in the findings of ld. CIT(A) as he did not as such distinguish the case of assessee or the law laid down in **Goetze India Ltd.(supra)** but he only went ahead with further in accordance with law that even if the claim is not part of original return or the revised return, the same can be considered by appellate authorities while exercising appellate powers. In this regard even if by judgment of Hon'ble Supreme Court in **Goetze India Ltd.(supra)** is considered the same also recognizes the powers of appellate authority and the restriction if any was limited to the power of assessing authority. Reliance for this can be placed on para no. 4 of the judgment and same is reproduced below for conveniences :-

"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 action 254 of the Income-tax Act, 1961. There shall be no order as to costs."

12. Hon'ble Delhi High Court in the case of **Jai Parabolic Springs Ltd. [2008] 172 Taxman 258 (Delhi)**, having considered judgment in **National Thermal Power Company Ltd. and Goetze (India) Ltd. (supra)** has held that there is no restrictions in the powers of Appellate Authorities to entertain an additional ground. Hon'ble Delhi High Court has referred to judgment of Hon'ble Supreme Court in **Jute Corporation of India Ltd. vs. CIT (1991) 187 ITR 688** wherein Hon'ble Supreme Court while dealing with the powers of Appellate Assistant Commissioner had observed :

"...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." (p. 386)"

12.1 Then explanation attached to Section 251 describing powers of Commissioner (Appeals) specifically provided that :

"Explanation – In disposing of an appeal, the [***] [Commissioner (Appeals)] may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the [***] [Commissioner(appeals)] by the appellant."

12.2 Reliance can also be placed on the order of Bombay Bench in **Income Tax Officer – 21(3)(2) Versus Shri Sanjay Gurudasmal Chawla vide ITA NO.2931/MUM/2017 (A.Y: 2012-13)** decided on 30/11/18 where it was considering the question whether assessee can amend a return filed by him for making additional claim for deduction other than filing a revised return and held that the question has been answered in favour of the assessee by the Hon'ble Jurisdictional High Court in the case of **CIT v. M/s. Pruthvi Brokers & Shareholders (P.) Ltd. in IT Appeal. No. 3908 of 2010 dated 21.06.2012**. While answering the question the Hon'ble High Court observed as under :

"22. It was then submitted by Mr. Gupta that the Supreme Court had taken a different view in Goetze (India) Limited v. Commissioner of Income-tax, (2006) 157 Taxman 1. We are unable to agree. The decision was rendered by a Bench of two learned Judges and expressly refers to the judgment of the Bench of three learned Judges in National Thermal Power Company

Limited vs. Commissioner of Income tax (supra). The question before the Court was whether the appellant-assessee could make a claim for deduction, other than by filing a revised return. After the return was filed, the appellant sought to claim a deduction by way of a letter before the Assessing Officer. The claim, therefore, was not before the appellate authorities. The deduction was disallowed by the Assessing Officer on the ground that there was no provision under the Act to make an amendment in the return of income by modifying an application at the assessment stage without revising the return. The Commissioner of Income-tax (Appeals) allowed the assessee's appeal. The Tribunal, however, allowed the department's appeal. In the Supreme Court, the assessee relied upon the judgment in National Thermal Power Company Limited contending that it was open to the assessee to raise the points of law even before the Tribunal. The Supreme Court held :-

"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." [emphasis supplied]

23. It is clear to us that the Supreme Court did not hold anything contrary to what was held in the previous judgments to the effect that even if a claim is not made before the assessing officer, it can be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim has not been negated by the Supreme Court in this judgment. In fact, the Supreme Court made it clear that the issue in the case was limited to the power of the assessing authority and that the judgment does not impinge on the power of the Tribunal under section 254.

24. A Division Bench of the Delhi High Court dealt with a similar submission in Commissioner of Income-tax v. Jai Parabolic Springs Limited, (2008) 306 ITR 42. The Division Bench, in paragraph 17 of the judgment held that the Supreme Court dismissed the appeal making it clear that the decision was limited to the power of the assessing authority to entertain a claim for deduction otherwise than by a revised return and did not impinge on the powers of the Tribunal. In paragraph

19, the Division Bench held that there was no prohibition on the powers of the Tribunal to entertain an additional ground which, according to the Tribunal, arises in the matter and for the just decision of the case.

25. In the circumstances, it is not necessary to decide the other questions raised by Mr. Mistri."

13. Thus, Ld. CIT(A) was very much in powers to consider the claim of the assessee which was left half way by the Ld. AO. Then, upon going through para 5.9 to 5.15 of the order of ld. CIT(A) it can be observed that Ld. CIT(A) has

meticulously examined the claim of deduction u/s 54 of the Act in terms of eligibility and quantum. He specifically dealt with question if the sale proceeds can be used for purchasing property in Dubai and has rightly relied the judgment quoted by Ld. Sr. Counsel before this Bench wherein it was held that prior to amendment brought by Finance Act "No. 2, 2014 the benefit of exemption is available even if the house is purchased / constructed outside India.

13.1 He has examined the evidence on record which established that assessee purchased the residential plot in the name of himself and his wife and constructed residential house within the prescribed period. As with regard to the contention of Ld. DR that this aspect was required to be examined by ld. AO and he had no material before him then going by the grounds raised there is no ground of the appeal of the revenue that assessee had failed to prove construction of the house on the plot within prescribed period. Rather, Ld. CIT(A) has relied completion certificate bearing consultants signature dated 15.12.2017.

14. Thus, there is no substance in the arguments raised on behalf of the Revenue and the Ld. CIT(A) had not fallen in error in extending benefit of deduction u/s 54 of the Act to the assessee. There is no substance in the grounds raised. T**he appeal of Revenue is dismissed.**

Order pronounced in the open court on 29th September, 2022.

Sd/-	**Sd/-**
(N.K.BILLAIYA)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date:-29 .09.2022
Binita, SR.P.S

Copy forwarded to:
1. Appellant

2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI