IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'A', NEW DELHI

BEFORE SH. O.P. KANT, ACCOUNTANT MEMBER
AND
SH. K.N. CHARY, JUDICIAL MEMBER

ITA No. 4568/Del/2015
Assessment Year: 2011-12

ACIT, Circle 31(1), New Delhi	**Vs.**	Sh. Rahul Juneja, Plot No. 29, DLF Indl. Area, Phase-I, Faridabad
PAN : AAFPJ2485F		
(Appellant)		**(Respondent)**

Appellant by	Sh. Ravi Kant Gupta, Sr.DR
Respondent by	Sh. Rajesh Malhotra, CA

Date of hearing	21.12.2017
Date of pronouncement	29.12.2017

ORDER

PER O.P. KANT, A.M.:

This appeal has been preferred by the Revenue against the order dated 21/04/2015 passed by the learned Commissioner of Income-tax (Appeals)-11, New Delhi [in short the Ld. CIT-(A)] for assessment year 2011-12, raising following grounds:

1. *Whether the Ld. CIT(A), was justified in deleting the disallowance of Rs.36,71,075/- made by the Assessing Officer u/s 40(a)(ia) of the Income Tax Act of commission paid to nonresidents on which tax had not been deducted at source when the Circular No.7 of 2009 issued by CBDT withdrew previous circulars viz. No. 23 of 1969 and No. 786 of 2000 which had given such benefit to the taxpayers and hence CIT(A) had not appreciated that circulars in force in the relevant assessment year have to be taken into consideration and should not be ignored as held by the Hon'ble High Court of Delhi in Angelique International Ltd. (ITA No. 280/2013 & 454/2013)?*

2. *Whether the Ld. CIT(A) was justified in accepting the assessee's claim of revised computation of capital gains without filing a revised*

return as required u/s 139(5) of the Income Tax Act, particularly in the light of the judgment of the Hon'ble Supreme Court in Goetze (India) Ltd Vs. CIT 284 ITR 323 ?

3. The appellant craVzs leave to add, alter or amend any of the grounds of appeal before or during the course of appellate proceedings before Hon'ble ITAT."

2. Briefly stated facts of the case are that the assessee is a proprietor of M/s Sukara i.e. a propriety concern and was engaged in the business of manufacturing and export of ready-made garments. The assessee filed return of income on 03.09.2011 electronically declaring total income of Rs.1,51,05,140/-. The case was selected for scrutiny and notice under section 143(2) of the Income-tax Act, 1961 (in short 'the Act') was issued and complied with. In the assessment completed under section 143(3) of the Act on 27/01/2014, the Assessing Officer made certain additions/disallowances and assessed the total income at Rs.1,88,21,220/-. Aggrieved, the assessee filed appeal before the Ld. CIT-(A), who partly allowed the appeal of the assessee. Aggrieved, the Revenue is in appeal before the Tribunal raising the grounds as reproduced above.

3. The Ground No. 1 of the appeal relates to disallowance of Rs.36,71,075/- under section 40(a)(ia) of the Act for non-deduction of tax at source (TDS) on commission payments to non-resident located outside India.

3.1 The facts qua the disallowance are that out of the total commission of Rs.36,71,075/- made to foreign agents, an amount of Rs.30,55,801/- was received by the foreign agents abroad out of the sale proceeds and the remaining commission of Rs.6,15,274/-was remitted from India to the foreign agents. The contention of the Ld. Assessing Officer is that no tax was deducted under section 195 of the Act by the assessee on said commission remitted and hence the said commission amount was

disallowable in terms of section 40(a)(ia) of the Act. According to the assessee, services were rendered outside India and the commission was also received by them outside India and therefore income does not arise under the provision of section 5(2)(b) read with section 9(1) of the Act and, therefore, there was no liability to deduct TDS while paying commission to the foreign agents. However, the Assessing Officer did not accept the contention of the assessee relying on the provisions of section 5(2)(b) of the Act, which according to him, deals with the scope of total income of a non-resident including all income from whatever sources derived. The Ld. AO in this regard placed reliance on the decision of the Authority for Advance Ruling in the case of SKF Boilers and Driers (P) Ltd (AAR No. 983-984 of 2010). According to the Assessing Officer, the contention of the assessee that agents had rendered services outside India for procuring orders and commission remitted to them abroad was not relevant for the purpose of determining their income and the assessee was required to deduct TDS as per the provisions of section 195 of the Act. Further, the Assessing Officer observed that Circulars No. 23 and 786 were withdrawn by the Central Board of Direct Taxes (CBDT) vide Circular No. 7 of the 2009 dated 22/10/2009. The Ld. CIT-(A) after considering the detailed submission of the assessee on the issue in dispute deleted the disallowance with following observations:

> *"4.1.1 I have considered the detailed submission made by the assessee, judicial pronouncements relied upon by Ld. AR and observations of the Assessing Officer in the Assessment Order. Upon examination of the facts as brought out in the order and the submissions of the AR, it is seen that Assessing Officer was not justified in disallowing the Commission expenses. Further, the Ld assessing officer was not right in holding that the commission payments are subject to rigors of 9(l)(vii) of the Income tax Act. The withdrawal of Circular No.23 of 1969, will not change the position of payment of commission liable to tax*

under the provisions of IT Act particularly when the services were rendered outside India, used outside India and payments were made outside India in the absence of a permanent establishment in India. Irrespective of Circular issued by CBDT, the question of taxability of such commission to income-tax has to be decided as per the provisions of section 9(1) of the Act. Such income (commission) in the hands of non-resident commission agents did not accrue or arise directly or indirectly, through or from any business connection in India or through the transfer of capital asset situated in India. The provisions of sec.9(l) were hence not applicable to such payment of commission by appellant to non-resident agents and the and therefore were not taxable in India. Accordingly, provisions of Section 195 can also not be invoked in respect of such payments made, therefore, the appellant was not required to make any reference to the Assessing officer for determination of TDS rate u/s 195 of the Income tax Act."

3.2 Before us, the Ld. Sr. DR relied on the order of the Assessing Officer and submitted that order of the Assessing Officer might be upheld.

3.3 On the contrary, learned counsel of the assessee relied on the finding of the Ld. CIT(A). In support of his contention that such commission paid to foreign agent was not income accrued/arised in India and, therefore, it was not liable for TDS in India, he relied on following decisions:

1. *Commissioner of Income Tax Vs. EON Technology Private Limited, (2011) 15 taxmann.com 391 (Delhi).*
2. *Commissioner of Income Tax-I, and Angelique International Ltd. (2013) 38 taxmann.com 425 (Delhi)*
3. *GE India Technology Centre Private Limited Vs. Commissioner of Income Tax, (2010) 193 taxmann 234 (SC).*

3.4 We have heard the rival submission and perused the relevant material on record. We find that the Revenue has challenged the finding of the Ld. CIT-(A) mainly on the ground that Ld. CIT-(A) has not followed

the circular in force during the relevant assessment year. According to the Ld. CIT(DR), the circular was binding on the Departmental (Revenue) Authorities. But we find that the Ld. CIT-(A) has relied mainly on the decision of the Jurisdictional High Court as well as other High Courts cited by the assessee. Being a first appellate authority, the Ld. CIT-(A) was required to follow decision of the Jurisdictional Tribunal as well as decision of the Jurisdictional High Court. In our opinion, the Ld. CIT-(A) has not committed any error in following the judicial precedents available on the issue in dispute. Ld. CIT-(A) has held that these commission agents were not having any business connection in India particularly when the non-residents commission agents are not having any permanent establishment in India. The Ld. CIT-(A) also rejected the contention that commission payments were subject to rigors of section 9(1)(vii) of the Act i.e, fee for technical services. In our opinion, the finding of the Ld. CIT-(A) on the issue in dispute is well reasoned and no further interference is required in the said finding of the Ld. CIT-(A), accordingly, we uphold the same. The ground of the Revenue is dismissed.

3.5 The ground No. 2 of the appeal relates to accepting claim of capital gains on the basis of revised computation by the Ld. CIT-(A), without filing the revised return under section 139(5) of the Act by the assessee. The Ld. CIT-(A) in para-4.2 of the impugned order has reproduced the submission of the assessee and relevant judicial pronouncement relied upon by the assessee. The Ld. CIT-(A) keeping in view the facts of the case and ratio of various judicial pronouncement, allowed the ground of the assessee. The relevant finding of the Ld. CIT-(A) is reproduced as a under:

"4.2 In the next point of appeal (Ground No. 5 to 7), Ld. AR has impugned the addition of Rs.21,567/- made by the AO as short term capital gain without giving the benefit of set off from short term

capital loss. In this connection, the submission of the Ld. AR are reproduced below:

"Facts of the case are that in the return of income filed for the A.Y. 2011-12 the assessee could not file the complete detail of income/loss under the head Capital gain due to the reason that the appellant did not procure relevant data required for ascertainment of total income/loss under the head Capital gain. Therefore during the course of assessment proceedings the appellant vide his submission dated 06/12/2013 filed the revised Statement to the extent of Capital Gain/Loss (Which was not filed at the time of filing return for want of data) to be considered for correct assessment of his income,

i.	*Short Term Capital Gain*	*Rs 3,59,782/-*
ii.	*Short Term Capital Loss*	*Rs 10,07,850/-*
iii.	*Long term Capital Gain*	*Rs 9,53,510/-*
iv.	*Long term Capital Loss*	*Rs 3,294,754/-*

Further in response to AIR, the assessee vide his reply dated 27.12 2013 shown Short Term Capital Gain of Rs.21,567/- with respect to transaction relating to M/s Atlas Copco India Limited as mentioned in the assessment order. The A. O did not did not give the benefit of Setting off of short term of Capital Gain from the Short Term Capital Loss and further denied benefit of carried Forward of Short Term Capital Loss and erred in adding the Undisclosed Capital Gain of Rs 21,567/- without taking into account the effect of Capital Gain/Loss filed by way of Statement in the course of assessment Proceedings and denied the same solely for the reason that the return was not revised in the light of decision of the Hon 'ble Supreme court vide the decision of Goetze (India) limited v/s CIT (284ITR 323).

It is submitted that the A.O has wrongly denied a legitimate claim by wrongly applying the decision of Hon 'ble Supreme Court vide the case of Goetze (India) Limited. It is contended that Hon 'ble Supreme Court decision of Goetze (India) Limited would have been applicable had the case of the assessee would not have been under scrutiny u/s 143(3) of the Act. Thus the Ld.A.O by misconstruing the decision of Goetz Case erred in denying the legitimate claim of the assessee. It is submitted that once the case is under scrutiny, the entire issue is open before the A.O because the very purpose of assessment is to assessee the correct income. The correct income cannot be assessed without talking into account legal provision enshrined under the Act.

In the instant case, the assessee in the Original Return had already shown the Partial Income under the head Capital Gain/loss as per available data on the date of return and therefore the assessee during the course of assessment proceedings furnished only additional Claim by way of statement to the extent of Capital Gain/loss only with a view to Correct assessment of his Income. Thus, the ratio of Goetze (India) Limited case is not applicable in the instant case because of the distinguishing facts.

Further it is submitted that had the case of the assessee not under scrutiny u/s 143(3),then the A.O would have been right is applying the Goetz case and not to give any benefit on the basis of data furnished on the basis of statement furnished without revising the return. But under the facts of case the A.O erred in not appreciating that very purpose of assessment is to assess the correct Income. A claim which is legally allowable cannot be disallowed for the reason that the same was pointed out in the course of assessment proceedings by way of statement without revising the return. Due to the rejection of a legitimate claim, the correct income has not been ascertained in the instant case and the purpose of assessment has been defeated. Thus it is submitted that Goetz's (India)Ltd's case has been misunderstood by the assessing officer in declining to entertain any fresh claim during a pending assessment under scrutiny. Even in appeal, a fresh claim could be admitted by the first appellate authority even as decided in Jute Corporation of India Limited v/s CIT 187 ITR 688(SC) and National Thermal Power Corporation Limited v/s CIT 229 ITR 383(SC).

The Hon'ble Pune Bench in the case of DCIT v/s Lab India Instrument Pvt. Ltd 277 ITR (AT) 39(Pune) has held that had the legislature intended to disentitle the assessee to make any claim of deduction after the expiry of the period specified under Section 139(5), it could do so by making a specific provision in this regard. Therefore in the absence of such provision, the assessee was entitled to make any claim of deduction /exemption in the course of assessment proceedings and consequently the assessing officer was duty bound to adjudicate upon such claim, even though it was filed after the prescribed period under section 139(5). The commissioner (appeals) was justified in entertaining such claim of the assessee.

The Hon'ble Delhi High Court in the case of Commissioner of Income-tax v. Bharat Aluminium Co. Ltd.303 ITR 256 wherein the assessee filed a return for the assessment year 1999-2000 and during the assessment proceedings filed a revised computation of income reducing the income by claiming further expenses on account of additional power cost and other expenses in connection with failure of a transmission tower. The assessee later filed another revised computation of income claiming further deduction on account of the expenses being the cost of afforestation of mines and maintenance of roads. The Assessing Officer allowed the expenses claimed in the first revised computation of income but disallowed the expenses claimed in the second revised computation of income holding them to be of a capital nature. The Commissioner set aside the order passed by the Assessing Officer. The Tribunal allowed the appeal filed by the assessee and set aside the order of the Commissioner. On appeal by the Revenue contending that the order passed by the Assessing Officer was erroneous and prejudicial to the interests of the Revenue as the Assess' Officer had accepted the revised computation of income without any revised return filed by the assessee as required under section 139(5) of the Income-tax Act, 1961:

In this context the Hon'ble Delh High Court by dismissing the appeal held that the assessee had claimed one-fifth of the total expenditure in the original return of income by considering the balance as deferred revenue expenditure. Since there was no concept of deferred revenue expenditure in the Act, the assessee claimed deduction for the whole amount of such expenditure within the year itself through its letter. Further, the assessee did not revise the return for which the time as prescribed under section 139(5) of the Act had expired but made this claim during the course of assessment proceedings and the Assessing Officer allowed the claim after considering all the relevant facts and evidence and being in accordance with law. The assessee did not say before the Assessing Officer that by making such a claim it had revised its return and the original return must be taken to have been withdrawn. The assessee also did not say that the original return should not be taken as a basis of assessment. What the assessee had maintained before the Assessing Officer was that the original return was a valid return and it had merely made a further claim of expenditure which was duly disclosed in the return filed originally but only a part of it was claimed as deductible in the year under consideration and through its revised claim only the quantum was enhanced and as such the assessee did not make a new claim. The Commissioner nowhere in his order said that the claim was wrong or not allowable legally. The phrase "prejudicial to the interests of the Revenue " has to be read in conjunction with an erroneous order and not in isolation. Thus, the Commissioner did not say as to how by allowing the legitimate deduction to the assessee a prejudice had been caused to the Revenue. When the order was not found erroneous the Commissioner did not acquire jurisdiction to revise the order of the assessment made by the Assessing Officer. The Tribunal further held that the provision of section 140(c) of the Act only requires that the return should be signed by a competent person and no legal burden was cast upon the assessee to correct the original return only through a specified person. The assessee had corrected the claim allowable to it by virtue of the provision of section 37(1) of the Act on account of the expenditure which was incurred wholly and exclusively for purpose of business. The order passed by the Assessing Officer in accepting the revised computation of income was not erroneous and prejudicial to the Revenue and the revised computation of the income had been accepted within the prescribed period.

The A.O failed to appreciate the distinction between revised return and a correction of the return. If the assessee files an application for correcting a return already filed or making amends therein, it would not mean that he has filed a revised return. It will still retain the character of an original return, but once the revised return is filed ,the original return must be taken to have been withdrawn and to have been substituted by a fresh return for the purpose of assessment. The Hon'ble Mumbai Tribunal in the case of Franco-Indian Pharmaceuticals Pvt. Ltd v/s ITO 3 ITR (Trib) 754(Mum) wherein the assessee filed its return of income claiming deduction of Rs.37,90,949/- as bad debts. During the course of assessment proceedings, the assessee by way of a letter made an additional claim of deduction of Rs.50,73,993/- as bad debts on the ground that there was a

short claim in the original return of income. The Assessing Officer denied the additional claim of the assessee. The Commissioner (Appeals), relying on the Supreme Court's decision in Goetze (India) Ltd. 's case [2006] 248 ITR 323, confirmed the denial of additional claim on the ground that the assessee had to file a separate revised return to make an additional claim. In an appeal along with an application for admission of additional evidence, the assessee contended that the Supreme Court's decision did not affect the powers of the Tribunal to admit an additional ground, when all the facts of the case were on record:

The Hon'ble Tribunal allowing the appeal held that it was clear from the decision of the Supreme Court in Goetze (India) Ltd. [2006] 284 ITR 323 that the powers of the Tribunal laid down in the case of National Thermal Power Corporation v CIT [1998] 229 ITR 383 (SC) were not affected by its decision. Therefore, the Tribunal has the power to admit an additional ground or claim made by the assessee when all the facts are on record. Since the facts had been brought on record before the Assessing Officer in a letter, the claim of the assessee was admitted. Since neither the Assessing Officer nor the Commissioner (Appeals) had considered the issue on merits, the matter was remanded to the Assessing Officer for considering the additional claim of deduction.

The Hon'ble Mumbai Tribunl also in the case of Naptha Jhakri Joint Venture v/s ACIT 5ITR (Trib)75(Mum) wherein for the A.Y 2001-02, deduction of expenditure incurred on temporary structures on site was allowed. However, for the assessment year 2002-03, the Assessing Officer disallowed deduction for 5 per cent, of total expenses owing to incompletion of the project. The Commissioner (Appeals) directed the Assessing Officer to allow deduction in the subsequent years on completion of the project. In the course of assessment proceedings, the assessee claimed that the amount disallowed in the proceedings, the assessee claimed that the amount disallowed in the preceding year be allowed in the year because the project had been fully completed. The Assessing Officer, relying on the judgment of the Supreme Court in Goetze (India) Ltd.'s case [2006] 284 ITR 323, disallowed deduction on the ground that the assessee failed to file any revised return.

On appeal was held that the Supreme Court had clarified the position that the mandate of the judgment in Goetze's case was limited to the power of the assessing authorities and did not impinge on the power of the Tribunal under section 254 of the Act.If the revised return was not filed or the time-limit for filing the revised return had expired but the assessment was still pending, the assessee could not be prohibited from making a claim. The order of the Commissioner (Appeals) for the assessment year 2002-03 disallowing deduction of 5 per cent, of the project expenses on the ground that it was incomplete and directing the Assessing Officer to allow deduction in subsequent years on completion of the project had attained finality. There was no reason to interfere with the order of the Commissioner (Appeals) because the Assessing officer had been directed

to allow proportionate deduction of expenses to the extent of the completion of the project.

In view of the aforesaid, the A.O. was erred in not making the proper assessment by disallowing the benefit of setting- Off and carried forward of Short term Capital loss as stated in the assessment order by rejecting the revised Statement of Capital Gain/loss furnished in the course of assessment Proceedings."

4.2.1 I have considered the submissions of the Ld. AR and reliance placed on various judicial pronouncements and considered the order passed by the AO. Keeping in view the facts of the case and ratio of various judicial rulings, as referred above, this ground of the appellant is allowed."

3.6 Before us, the Ld. Sr. DR relied on the order of the Assessing Officer and submitted that assessee has not revised its return of income and therefore claim of the assessee based on revised computation, should not be accepted.

3.7 On the other hand, Ld. counsel of the assessee relied on the various decisions cited before the Ld. CIT-(A) and submitted that finding of the ld. CIT-(A) on the issue in dispute should be upheld.

3.8 We have heard the rival submission and perused the relevant material on record. The issue in dispute involved is whether in absence of any revised return of income filed, the revised computation filed during assessment proceedings in respect of the claim already made should be allowed to the assessee. Before the Ld. CIT-(A), the assessee cited decision of the Tribunal, Pune bench in the case of DCIT Vs. Lab India Instrument Private Limited, 277 ITR (AT) 39 (Pune) in support of its claim that the Assessing Officer was duty bound to adjudicate upon any claim made even though it was filed after the prescribed period under section 139(5) of the Act. The assessee also cited decision of the Hon'ble Delhi High Court in the case of Commissioner of Income Tax Vs. Bharat Aluminium Company Limited, 303 ITR 256. The Hon'ble High Court

observed in the case that the assessee did not revise return for which time as prescribed under section 139(5) of the Act had expired but made claim during the assessment proceeding and the Assessing Officer allowed the claim after considering all the relevant facts and evidence and being in accordance with law. The Hon'ble High Court held that order passed by the Assessing Officer in accepting revised computation of income was not erroneous and prejudicial to the interest of the Revenue. The assessee cited few more judicial pronouncements on the issue in dispute.

3.9 In our opinion, the Ld. CIT-(A) has adjudicated the issue in dispute keeping in view of the above judicial pronouncement. Before us, Ld. Sr. DR has not brought on record any decision contrary to the above decisions. In view of above, we are of the opinion that order of the Ld. CIT-(A) on the issue in dispute is well reasoned and we do not find any error in the same. Accordingly, we uphold the same. The ground of the appeal of the Revenue is accordingly dismissed.

4. Ground No. 3 of the appeal being general in nature, we are not required to adjudicate upon specifically and thus, it is dismissed as infructuous.

5. In the result, appeal of the Revenue is dismissed.

The decision is pronounced in the open court on 29th Dec., 2017.

Sd/-	Sd/-
(K.N. CHARY)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 29th December, 2017.
RK/-(D.T.D)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi