

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, BENGALURU**

**BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

ITA No.1604/Bang/2016
(Assessment year: 2009-10)

Asst. Commissioner of Income-tax,
Circle 4(1)(1),
Bengaluru. ... Appellant

Vs.

Karnataka State Financial Corporation Ltd.
'KSFC Bhavan', No.1/1, Thimmaiah Road,
Near Cantonment Railway Station,
Bengaluru. ... Respondent
PAN:AAACK 9480 H

Appellant by : Shri A.C.Raju, CA.
Respondent by : Shri B.R.Ramesh, JCIT(DR)

Date of hearing : 18/01/2018
Date of pronouncement : 13/04/2018

O R D E R

Per INTURI RAMA RAO, AM :

This is an appeal filed by the revenue directed against the order of the learned Commissioner of Income-tax (Appeals)-12, Bengaluru, [CIT(A)], dated 28/06/2016 for the assessment year 2009-10.

2. Briefly facts of the case are as under: The respondent-assessee is an undertaking of Government of Karnataka set up for the purpose of providing finance to industries in the State of Karnataka. The return of income for the assessment year 2009-10 was filed on 30/09/2009. Against the said return of income, the assessment was completed by order dated 28/11/2011 passed u/s 143(3) of the Income-tax Act, 1961 [hereinafter referred to as 'the Act' for short] at loss of Rs.3,58,95,3461/. While doing so, the AO disallowed a sum of Rs.34,17,548/- invoking the provisions of section 14A of the Act, legal and professional charges in

connection with issue of bonds of Rs.41,79,935/-, also not allowed the claim for deduction of Rs.548.64 lakhs being the liability arising on account rejection by Government of Karnataka on the ground that the claim was not made in the original return of income.

3. Being aggrieved, an appeal was preferred before the Id. CIT(A) who, vide impugned order, held that in respect of disallowance u/s 14A, disallowance should be restricted to only in respect of investments actually made i.e. share capital but not the share application money which should not form part of the investments for the purpose of calculating the disallowance under rule 8D of the IT Rules. In respect of claim made during the course of assessment proceedings in respect of liability arising on account of rejection of claim by the Government of Karnataka of Rs.548.64 lakhs, the Id.CIT(A), placing reliance on the decisions of the Hon'ble Apex Court in the case of *Jute Corporation of India Ltd. vs. CIT* (187 ITR 688)(SC), *CIT vs. Kanpur Coal Syndicate* (53 ITR 225)(SC) and *CIT vs. Mahalaxmi Sugar Mills Co. Ltd.* (160 ITR 920)(SC) held that the claim should be allowed.

4. Being aggrieved, the revenue is in appeal before us raising the following grounds of appeal:

1. The Order of the Ld. CIT (A), in so far as it is prejudicial to the interest of the revenue, is opposed to law and the fact and circumstances of the case.
2. Whether the Ld.CIT (A) is right in giving the decision against the provisions enumerated in section 14 A of the Act, wherein it was clearly stated that section 14A does not use word 'income of the year' but 'income under' the Act.
3. Whether the decision of the Ld.CIT (A) is right in allowing appeal against the Board's Circular no 14 of 2001 and 5 of 2014 regarding 14A disallowance.
4. Whether the Ld.CIT (A) is right in holding the decision that the amount was utilized for repayment of the capital elements and hence the said expenditure should be allowed, notwithstanding that the said amount was utilized for repayment of capital, which means an expenditure utilized to clear off the loans, is definitely forms the character of capital in nature, which amount is not allowable for deduction.

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5. Whether the Ld. CIT(A) is right in allowing the appeal of the assessee without affording reasonable opportunity to the Assessing Officer with regard to the additional evidences produced by the assessee before the CIT(A), on additional grounds of appeal regarding trading loss of Rs. 548.65 lakhs.

6. For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT (A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.

The appellant craves leave to add, alter, amend and / or delete any of the grounds that may be urged.

5. Ground Nos.1 and 6 are general in nature and do not require adjudication.

6. Ground Nos.2 and 3 challenges the direction of the Id.CIT(A) holding that share application money does not form part of investment for the purpose of computing disallowance under rule 8D. The decision of the Id.CIT(A) is based on the decision of the co-ordinate bench of Tribunal in the case of *ITO vs. LGW Ltd.* (174 TTJ 553). This decision was followed by this Tribunal in assessee's own case for the assessment year 2010-11 in ITA No.2068/Bang/2016 dated 28/06/2017. Therefore, we dismiss the grounds of appeal filed by the revenue.

7. As regards ground No.4 with regard to disallowance of legal and professional charges incurred in connection with issue of bonds, it is settled proposition of law that the expenditure incurred in raising loan is revenue expenditure. There is no dispute that the bonds issued par takes character of loan. Therefore, we do not find any reason to interfere with the order of the Id.CIT(A). Thus we dismiss the ground No.4 raised by the revenue.

8. As regards ground No.5, it is contended that the assessee had incurred loss of Rs.548.64 lakhs on account of rejection of claim on account of subsidies. This claim was not made in the return of income. Hence, the AO, drawing support from the decision of the Hon'ble Supreme Court in the case of *Goetz India Ltd. vs. CIT* (284 ITR 323)(SC) disallowed the claim on the ground that no claim was made in the return of income. However, the Id.CIT(A), placing reliance on the decision of the Hon'ble Apex Court in the case of *Jute Corporation of India Ltd.* (supra) allowed the claim.

9. We heard rival submissions and perused the material on record. The claim made by the assessee had been rejected by the AO solely on the ground that no new claim can be made without filing revised return of income. In our considered opinion, the approach of the AO is not tenable in the light of judicial precedents on this issue. Recently, the co-ordinate bench of Delhi in the case of *The Kangra Co-operative Bank Ltd. vs. JCIT* in ITA No.840/Del/2013 & 1432/Del/2012 dated 16/10/2015 (authored by the Hon'ble Accountant Member), had held as follows:

“5.4 We heard the rival submissions and perused the material on record. The Assessing Officer disallowed this claim for deduction of bonus paid of Rs.19,49,792/- which was disallowed for the assessment year 2009-10 on payment basis during the year under appeal on the ground that the claims were not made by filing the revised return of income. The reasoning of the Assessing Officer cannot stand the test of the law laid down by several High Courts. The Hon'ble Gujarat High Court in the case of *CIT Vs. Mitesh Impex*, 225 Taxman 168 (Gujarat) after review of entire law on the income, held as follows:

"30. In what manner and to what extent, a ground, a legal contention or a fresh claim can be made at an appellate stage are vexed questions and have occupied the minds of the Courts in numerous occasions.

31. In the case of Jute Corpn. of India Ltd. v. CIT [1991] 187 ITR 688 the Supreme Court noted with approval observation of the Court in the case of CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225 to the effect that "The Appellate Assistant Commissioner, therefore, has plenary powers in disposing of appeal. The scope of his power is co-terminus with that of the Income-tax Officer. He can do what the Income-tax Officer can do and also direct him to do what he has failed to do." It was observed that there was no reason why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income-tax Officer. The Act does not place any restriction or limitation on the exercise of appellate power. It was observed that:--

"The above observations are squarely applicable to the interpretation of section 251(1)(a) of the Act. The declaration of law is clear that the power of the Appellate Assistant Commissioner is co-terminus with that of the Income-tax Officer, if that be so, there appears to be no reason as to why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income-tax Officer. No exception could be taken to this view as the Act does not place any restriction or limitation on the exercise of appellate power. Even otherwise an Appellate Authority while hearing appeal against the order of a subordinate 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 appears to be no good reason and none was placed before us 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."

32. In case of National Thermal Power Co. Ltd. v. CIT [1998] 229 ITR 383 (SC) when the question of law was raised for the first time before the Tribunal though facts were already on record, the Supreme Court observed that there is no reason why the assessee should be prevented from raising such a question before the Tribunal for the first time so long as the relevant facts are on record in respect of the item concerned. There is no reason to restrict the power of the Tribunal in such appeal only to decide the grounds which arise from the order of Commissioner (Appeals). The Tribunal should not be prevented from considering the questions of law arising in assessment proceedings although not raised earlier.

33. In case of Goetze (India) Ltd. (supra) the Supreme Court distinguished the judgment in the case of National Thermal Power Co. Ltd. (supra) on the ground that the same pertained to the power of the Tribunal under section 254 of the Act to entertain a point of law for the

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first time and commented that such decision does not relate to the power of the assessing officer to entertain a claim for deduction otherwise than by filing a revised return. In the process the Supreme Court recognized that a new claim could not be entertained by the assessing officer without the assessee revising the return. While doing so it was clarified that:--

"4. . . 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 ITA Nos. 840/Del/2013 & 1432/Del/2012 of the Income-tax Appellate Tribunal under section 254 of the Income-tax Act, 1961. There shall be no order as to costs."

34. In the case of CIT v. Jai Parabolic Springs Ltd. [2008] 306 ITR 42/172 Taxman 258 (Delhi), the Delhi High Court held that there is no prohibition on the powers of the Tribunal to entertain an additional ground which according to the Tribunal arose in the matter and for just decision of the case.

35. In case of CIT v. Pruthvi Brokers & Shareholders (P.) Ltd. [2012] 349 ITR 336/208 Taxman 498/23 taxmann.com 23 (Bom.) the Bombay High Court considered the issue at considerable length and held that Commissioner (Appeals) as well as the Tribunal have the jurisdiction to consider the additional claim and not merely additional legal submissions. The appellate authorities have discretion to permit such additional claims. Such claims need not be those which became available on account of change of circumstances of law but which were even available when the return was filed.

36. The Delhi High Court once again in recent judgment in the case of CIT v. Sam Global Securities Ltd. [2014] 360 ITR 682/[2013] 38 taxmann.com 129 observed that the Courts have taken a pragmatic view and not a technical one as to what is required to be determined in taxable income. In that sense assessment proceedings are not adversarial in nature. With these observations Court confirmed the view of the Tribunal reversing the decision of the assessing officer rejecting the claim of the assessee on the ground that no revised return was filed.

37. In case of CIT v. Cellulose Products of India Ltd. [1985] 151 ITR 499 (Guj.), Full Bench of this Court held that merely because a ground has not been raised though it could have been raised in support of the relief sought in the appeal, it cannot be said that such ground cannot be raised before the Tribunal. Such ground can be raised provided it falls within the contours of the subject matter of the appeal.

38. It thus becomes clear that the decision of the Supreme Court in the case of Goetze (India) Ltd. (supra) is confined to the powers of the assessing officer and accepting a claim without revised return. This is what Supreme Court observed in the said judgment while distinguishing the judgment in the case of National Thermal Power Co. Ltd.(supra) and that is how various High Courts have viewed the dictum of the decision

in the case of Goetze (India) Ltd.(supra). When it comes to the power of Appellate Commissioner or the Tribunal, the Courts have recognized their jurisdiction to entertain a new ground or a legal contention. A ground would have a reference to an argument touching a question of fact or a ITA Nos. 840/Del/2013 & 1432/Del/2012 question of law or mixed question of law or facts. A legal contention would ordinarily be a pure question of law without raising any dispute about the facts. Not only such additional ground or contention, the Courts have also, as noted above, recognized the powers of the Appellate Commissioner and the Tribunal to entertain a new claim for the first time though not made before the assessing officer. Income-tax proceedings are not strictly speaking adversarial in nature and the intention of the Revenue would be to tax real income.

39. This is primarily on the premise that if a claim though available in law is not made either inadvertently or on account of erroneous belief of complex legal position, such claim cannot be shut out for all times to come, merely because it is raised for the first time before the appellate authority without resorting to revising the return before the assessing officer."

5.5 Thus, in the above cases, it has been held that new claims can always be made at any stage of appellate proceedings. The law laid down by Hon'ble Apex Court in the case of Goetz India Ltd (supra) is not applicable to the claim made either before Commissioner of Income Tax (Appeals) or Income Tax Appellate Tribunal. In the light of above pronouncement, the Hon'ble Gujarat High Court after reviewing the entire case law on this issue had clearly laid down "there is no bar to entertain new claim either by Commissioner of Income Tax (Appeals) or Income Tax Appellate Tribunal". Accordingly, respectfully following the above Rulings, we direct the Assessing Officer to allow this claim after due verification, whether the bonus has been paid during the previous year under consideration, and whether the interest claim of Rs. 2,55,233/- is tax free or not.

Accordingly, this ground of appeal is set aside to the file of the Assessing Officer to allow the claim, in the aforesaid terms."

It is clear from perusal of the assessment order that the AO had no occasion to examine the genuineness of the claim. The Id.CIT(A), without looking into genuineness of the claim or allowability or otherwise of the claim, had allowed the ground of appeal. Therefore, in the interests of justice, we remand the issue back to the file of the AO for the

limited purpose of examining the allowability of the claim on merits. We make it clear that the claim was not made in the return of income of income cannot be bar to entertain a new claim.

10. In the result, the appeal filed by the revenue is partly allowed.

Order pronounced in the open court on 13th April, 2018

Sd/-

(SUNIL KUMAR YADAV)
JUDICIAL MEMBER

Place : Bengaluru.

D a t e d : 13/04/2018

srinivasulu, sps

sd/-

(INTURI RAMA RAO)
ACCOUNTANT MEMBER

Copy to :

- 1 Appellant
- 2 Respondent
- 3 CIT(A)
- 4 CIT
- 5 DR, ITAT, Bangalore.
- 6 Guard file

By order

Senior Private Secretary
Income-tax Appellate Tribunal
Bangalore