IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G' NEW DELHI

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER
AND
SHRI N.S. SAINI, ACCOUNTANT MEMBER

ITA No. 1188/Del/1995
Assessment Year: 1987-88

ITA No. 1189/Del/1995
Assessment Year: 1989-90

ITA No. 5782/Del/1994
Assessment Year: 1990-91

ITA No. 3241/Del/1996
Assessment Year: 1991-92

Sikkim Jansewa Pratisthan (Pvt.) Ltd., C/o Shri G.C. Choadhry, Flat No. F-II, W-113, Greater Kailash Part II, New Delhi-48	**Vs**	DCIT(A), Special Range 26, New Delhi.
Appellant		Respondent

Assessee by: Shri M.A Gohel, CA
Department by: Shri S.S. Rana, CIT DR

Date of hearing : 20.12.2018
Date of Pronouncement : 21.12.2018

O R D E R

PER BENCH

All these four appeals filed by the assessee pertaining to assessment years 1987-88, 1989-90, 1990-91 and 1991-92 have come up for hearing by virtue of the order dated 2.8.2018 in ITA 89/2004 where in the appeal filed by the assessee u/s 260A, the Hon'ble Court was pleased to set aside the consolidated order dated 25.04.2003. The relevant extract from the decision is reproduced hereunder for ready reference:-

"This Court had by orders dated 08.02.2005 and 15.02.2018 framed questions of law.

The questions framed - in the course of the proceedings before the lower court, broadly indicate that the parties proceeded on the premise that the assessee/company was a foreign company. At the outset, learned senior counsel appearing on behalf of the assessee submitted that the jurisdiction in question which is also a pure question of law arises i.e. with respect of the interpretation of Section 115A of the Income Tax Act, 1961 (hereafter referred to as 'the Act'). According to the learned senior counsel, the assessee, a Sikkim based company incorporated under the relevant statute of Sikkim (the Registration of Companies (Sikkim) Income Tax Act, 1961 (hereinafter referred to as "the Act"), 1961) was continued in force by virtue of Article 371 F(k) of the the Constitution of India. Thus, it fell well within the description of an Indian company as per section 22(26)(i) of the Act which states that a company incorporated by any law relating to companies "applicable" in "any part" of India clearly applied. Thus, it was submitted that being an Indian Company under Section 115A, under the Act, the assessee could not be treated as a foreign company with respect to the dividend income that it declared - at least for the concerned years (AYs 1987-88 and 1989-90). It was also argued that the Indian Income Tax Act was brought into force or extended to the territory of Sikkim w.e.f. 01.04.1990 and thus for the previous two assessment years, since the assessee was incorporated under the laws of Sikkim which continued in force in India (from 26.04.1975), it could not have been treated as a foreign company and its dividend income thus had to receive appropriate treatment.

Counsel for the Revenue points out that the question now sought to be urged was never argued before the Tribunal or even raised before this Court. It was urged that for the concerned years (AYs 1987-88 and 1988-89), the assessee in fact accepted that it was a foreign company and accordingly proceeded to contest the assessments having regard to such position. It was urged that therefore this Court should not examine the appeal from that point of view but rather proceed to adjudicate on the questions framed.

This Court has carefully considered the submissions. Although, the Court's jurisdiction under Section 260A of the Act is circumscribed, no doubt by what are expressly framed questions of law. Nevertheless, it is also equally well established that the Court can re-formulate the questions framed originally and is in no way constrained if additional questions do arise for its consideration. In the Court's opinion, the question as to the applicability of Section 2(26) and its interplay with Section 115 A are very substantial and go into the root of the matter. They strike at the very applicability of the Income Tax Act to the assessee and the treatment accorded to it, in the proceedings drawn by the Revenue. Given these facts, the most appropriate course in this Court's opinion, would be to relegate for fresh consideration the question as to the applicability of the Income Tax Act in the context of whether the assessee, as was at the relevant time, an Indian Company, within the meaning under Section 2(26) having regard to the express provisions of Article 371F(k) of the Constitution of India and the other relevant provisions such as Section 115A. We clarify that no opinion has been expressed on the other questions of law which have not been addressed and would arise for consideration at a later date, depending on who is aggrieved.

In the light of the foregoing discussion, the appeal is disposed of with a direction to the ITAT to hear the parties on the issue as to whether the assessee was, at the relevant time, an Indian company and therefore, entitled to be treated as such having regard to the other provisions of law and the Income Tax Act and further if

the assessee was in fact declaring its global income, as such. All rights and contentions of the parties are reserved. The parties are directed to be rpesent before the ITAT on 20.8.2018. The ITAT shall endezavour to complete its rpocedigns and render its final order for all the relevant four assessment years (1987-88 to 1991-92), within four months.

The appeal is disposed of in the above terms"

2. In the light of the said decision, the ld. AR Shri Gohel, CA invited our attention to the orders of the ITAT passed in subsequent assessment years wherein the said issue raised by the assessee being Indian company and not a foreign company was raised for the very first time by way of additional ground in ITA 451-454/Del/1999 in assessment years 1992-93 to 1995-96. It was submitted that the ITAT vide its consolidated order dated 30.9.2005, considering the issue and noting the departmental objection restored it to the file of the Commissioner of Income Tax(A). For ready reference:-

"6. On the other hand, Id DR relied upon the order of the authorities below and submitted that additional ground is taken for the first time which was not taken before the authorities below. Therefore, this issue was not adjudicated by the CIT(A) and was also not examined by the Assessing Officer. Therefore, the additional ground requires examination of the facts. Accordingly, he opposed the admission of additional ground. Ld DR, however, admitted Sikkim is a part of India and Income Tax Act is applicable to the state of Sikkim.

7. We have considered rival submissions of Ld. representatives of both the parties for the purpose of disposal of applications for admission of additional ground mentioned above and merits thereof. Before dealing with this issue, we would like to mention that CIT(A) mentioned in the impugned order that in assessment years 1992-93 and 1995-96 assessment orders under section 143(3) are under challenge. CIT(A) also mentioned that in assessment years 1993-94 and 1994-95 the intimation under section 143(1)(a) was in dispute before him. However, considering the above submission and material on record, we are of the view that the position is not so as in assessment year 1993-94 the orders under section 143(3) was challenged before CIT(A). Only for the assessment year 1994-95 the intimation under section 143(1)(a) was in challenge. Similarly, we find that CIT(A) has mentioned in para 3 of the impugned order that in the return of income the status of the assessee has been shown as domestic company. However, Ld counsel for the assessee has very fairly admitted before us that in fact assessee had shown the status in the return of income to be a foreign company but according to him this fact is not correct as Sikkim is part of India and Income Tax Income Tax Act is applicable and, therefore, assessee is domestic company as provided under Income Tax Act. Therefore, we first take up the matter for tire assessment year 1992-93, 1993-94 and 1995-96 for the purpose of admission of the additional ground as mentioned above. The Hon Supreme Court in the matter of National Thermal Company Ltd (Supra) held:

> *"Undoubtedly, the Tribunal has the discretion to allow or not to allow a new ground to be raised. But where tire Tribunal is only required to consider the question of law arising from facts which are on record in tire assessment proceedings, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that questioning order to correctly assess the tax liability of an assessee."*

8. On considering of the above facts it is clear that authorities below should have determined the status of the assessee in each year for the purpose of determining the tax liability of the assessee. Merely because the assessee has shown the status to be of foreign company is not enough to conclude that assessee is a foreign company. Similarly, merely because in earlier years the assessee has shown its status to be a foreign company is not enough to hold that assessee is a foreign company. The registered address of the assessee is available with the Assessing Officer. It is clear from the above facts that Sikkim is a part of India. Therefore, Income Tax Act is applicable to the state of Sikkim as per the notification referred to by the ld counsel for the assessee. Even this fact is not disputed before us by ld DR. Therefore, all the facts are available with the authorities below to verify the status of the assessee company. Since the deduction under section 80-GGA is clearly dependent on the findings given on the point of status. Now if it is treated as foreign company apparently the deduction under section 80GGA would not be available. Bur ii it is an Indian Company the assessee would be entitled to the same. Therefore, determination of correct residential status of the company is very crucial and goes to the very root of the issues involved in the appeals. The point in issue as raised in the additional ground is clearly legal in nature and requires no investigation of fact and the same would also decide the correct tax liability of the assessee. Considering die above facts and decision of Hon. Supreme Court in the National Thermal Power Co. Ltd, we are of the view that in the interest of the justice the additional ground so raised deserves admission after all appeal proceedings are continuation assessment proceedings and aims at determining the correct income and tax liability of the assessee. We accordingly admit the above additional ground in all the assessment years i.e. 1992- 93, 1993-94, 1995-96. However, equally we are of the view since the point is raised for the first time before the Tribunal, therefore, proper opportunities should also be given to the authorities below. Therefore, instead of deciding the additional ground by the Tribunal, we restore additional ground in all the above mentioned assessment years to the file of CIT(A) with direction to decide the same as per law after allowing reasonable opportunity of being heard to the assessee as well as Assessing Officer. The remaining ground of appeal are entirely dependent upon findings given on this issue as to whether the assessee is an Indian company under the provisions of Section 2(26) of the IT. Act. Therefore, we feel that the other grounds should also be restored to the file of CIT(A) with direction to re-decide these grounds on merits for deduction under section 80GGA after determining whether the assessee was an Indian company or a foreign company. We accordingly set aside the orders of the CIT(A) and restore all these appeals to his file for denovo orders both on additional ground on merits and remaining issues raised in appeals before us after allowing a reasonable and sufficient opportunity of being heard to the assessee as well as Assessing Officer. As a result the appeals of the assessee in ITA No. 451, 452 and 454 of 1999 for assessment years 1992-93, 93-94 and 95-96 are allowed for statistical purpose."

3. Our attention was invited to the order dated 17.3.2006 in ITA 1095 & Others pertaining to assessment years 1993-94, 1996-97 to 1999-2000 wherein following identical direction, the issue was also restored back to the ld. Commissioner of Income Tax(A). Relevant extract of the said decision is reproduced as under:-

> *"9. We have heard both the parties and perused the orders of both the lower authorities and deliberated upon the submissions before us. Since the appeals of the earlier years are restored before ld. CIT(A) for deciding the issue whether the assessee is a domestic company or a foreign company. In our considered view it would not be proper on our part to decide these appeals pertaining to the assessment years 96-97, 97-98, 98-99 and 99-2000 on merits. Hence, we deem it proper to remand these appeals also to the file of the ld. CIT(A) for denovo order on additional ground of status of the company and on merits on non-granting of deduction u/s 80GGA of the Act against interest income in light of the decision taken for the status of the assessee whether it is a domestic company or a foreign company for the earlier assessment years after affording sufficient opportunity of being heard to the assessee as well as the Assessing Officer. As a result, the appeals of the assessee are allowed for statistical purposes."*

4. Accordingly, it was his submission that since the basic issue which arose for consideration is that the assessee is an Indian entity and not a foreign entity as wrongly disclosed by the assessee itself before the tax authorities in the years under consideration, thus in terms of the directions of the Hon'ble Court and the precedent available, it was his limited request that the issue may be restored with identical directions to the file of the ld. Commissioner of Income Tax(A).

5. The ld. C.I.T. DR Mr. S.S. Rana on going through the directions of the Hon'ble High Court and the orders of the ITAT posed no objection to the said request

6. We have heard the submissions and perused the material on record. In light of the submissions of the parties before the Bench and the precedent

available, the issues arising in the appeals are restored back to the file of the ld. Commissioner of Income Tax(A) with the direction to pass a speaking order in accordance with law after giving a reasonable opportunity of being hearing heard to the assessee. The other issues arising in the present appeal can be decided only after the basic issue is decided. Accordingly, respectfully following the judicial precedent cited, the impugned orders are set aside in toto. Said order was pronounced in the Court on the date of hearing itself.

7. In the result, the appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open court on 21st December, 2018.

Sd/- Sd/-

(N.S. SAINI) **(DIVA SINGH)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Dated: 21st DECEMBER, 2018
'GS'

Copy forwarded to: -

1) Appellant
2) Respondent
3) CIT(A)
4) CIT
5) DR True Copy

By Order

ASSTT. REGISTRAR

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	