आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH : CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री इंटूरी रामा राव, लेखा सदस्य के समक्ष
[BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**]**

आयकर अपील सं./I.T.A. No.463/CHNY/2018
निर्धारण वर्ष **/**Assessment year : 2010-2011.

Indbank Merchant Banking Services Limited, 1st floor, Khivraj Complex, No.480, Anna Salai, Nandanam, Chennai 600 035.	**Vs.**	The Deputy Commissioner of Income Tax, Corporate Circle II(3) Chennai.
[PAN AAACI 2107B] **(अपीलार्थी/Appellant)**		**(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by : Shri. Sanjeev Aditya M. C.A.
प्रत्यर्थी की ओर से /Respondent by : Ms. R. Anitha, IRS, JCIT.

सुनवाई की तारीख/Date of Hearing : 29-08-2019
घोषणा की तारीख /Date of Pronouncement : 26-09-2019

आदेश / O R D E R

PER INTURI RAMA RAO, ACCOUNTANT MEMBER

This is an appeal filed by the Assessee directed against the order of the Commissioner of Income Tax (Appeals)-13, Chennai ('CIT(A)' for short) dated 09.11.2017 for the Assessment Year (AY) 2010-2011.

2. The Assessee raised the following grounds of appeal:

"1. The order of the Commissioner of Income Tax (Appeals)-13, Chennai, confirming the disallowances and additions made by the Assessing Officer, is against the provisions of law and contrary to the facts and circumstances of the case.

2. The Commissioner of Income Tax (Appeals) erred in confirming the action of the Assessing Officer in treating the profit earned on sale of shares (both Short Term and Long Term Gains) as business income, rejecting the appellant's claim for exemption under section 10(38) of the Incometax Act. The Commissioner of Income Tax (Appeals) ought to have held that provision for diminution in value of investments is made only for book purposes and not claimed in the Return and the Long Term Investments, not being stock-in-trade, the profit on sale is eligible for exemption under Section 10(38).

3. The Commissioner of Income Tax (Appeals) is not justified in confirming the action of the Assessing Officer in rejecting the claim of the Appellant to set-off the loss of Rs.4,15,95,000/- incurred on sale of shares of M/s Kamala Tea Company Limited and M/s Karnataka Malladi Biotics Limited, as not having been made in the Return, relying on the decision of the Supreme Court in Goetze (India) Limited (284 ITR 323). The Commissioner of Income Tax (Appeals) ought to have held that the Appellant could not have made the claim in the Return and the capital gains having been assessed as business income, the loss i eligible for the same treatment as business loss.

4. The Commissioner of Income Tax (Appeals) erred in confirming the action of the Assessing Officer in not allowing the reversal of provisions made for NPAs amounting to Rs.3,39,28,647/- in the P&L A/c for want of details. He ought to have held that the provision made for NPAs were not allowed in the earlier years of assessment and relying on the statements/details furnished during assessment and appellate proceedings, and allow the claim.

5. The Commissioner of Income Tax (Appeals) erred in confirming the addition of ₹68,25,052/- and ought to have held that the Assessing Officers has not stated any clear reasoning for making the addition.

For these reasons and for any other reason that may be adduced at the time of hearing, it is prayed that the Hon'ble Tribunal may be pleased to allow the appeal".

3. The brief facts of the case are as under:

The appellant namely Indbank Merchant Banking Services Limited is a company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of merchant banking, stock broking and allied financial services. The return of income for the AY 2010-11 was filed on 29.09.2010 disclosing loss of Rs. 9,56,66,648/-. Against the said return of income, the assessment was completed by the Dy. CIT, Company Circle-II(3), Chennai (hereinafter called "AO") vide order dated 26.03.2013 passed u/s. 143(3) of the Income Tax Act, 1961 (in short 'the Act') at total loss of ₹2,24,82,614/-. While doing so, the AO treated the gain arising on sale of shares of ₹3,24,30,335/- as income from business as against the claim that it is long term capital gain exempt from u/.10(38) of the Act. The Assessing Officer also not allowed the claim of deduction of reversal of provision made on Non Performing Assets credited to the Profit and Loss Account for reason of assessee's failure to substantiate the claim that in the year of creation of provision, no deduction was allowed.

4. Being aggrieved by the above additions, the assessee-company preferred an appeal before ld. CIT(A) and contended that shares which were sold during the year are held as investments and an alternative claim was made that loss arising on account of sale of

shares of M/s. Kamala Tea Company and M/s. Karnataka Malladi of ₹4,15,95,000/- should be set off against the profit made. It is further contended that the provisions on NPA accounts of ₹3,39,28,647/- credited to profit and loss account should be allowed as deduction in the year of reversal of provision as the same was not allowed as deduction in the year of creation of provision. The ld. CIT(A) considering the submissions made by the assessee dismissed the appeal.

5. Being aggrieved by the order of the ld. CIT(A), the appellant is in appeal before us in the present appeal. It is contended that profit arising on sale of shares should be assessed under the head capital gains in view of Circular No.6/2016 of Central Board of Direct Taxes dated 29.02.2016. It is further contended that there is no bar to make a claim otherwise than by way of filing of return, therefore loss arising on sale of shares of M/s. Kamala Tea Company and M/s. Karnataka Malladi should be allowed as deduction. Further, it is submitted reversal of provision made for NPA of ₹3,39,28,647/-, the same should be allowed as deduction.

6. On the other hand, the ld. Sr. Departmental Representative placed reliance on the orders of lower authorities.

7. We heard the rival submissions and perused the material on record. Ground No.1 is general in nature therefore, does not require any adjudication.

8. Ground No.2 challenges the decision of the lower authorities to treat the income arising on sale of shares as business income as against the claim of long term capital gains. Admittedly, the transaction of purchase of shares was shown as stock in trade in the books of accounts. This is demonstrated by the fact that assessee had shown diminution and appreciation in the value of shares in the profit and loss account. Therefore, even the CBDT Circular No.6/2016, dated 29.02.2016 does not come to the rescue of the assessee as the CBDT circular specifically excluded investment portfolio which are treated as stock in trade in the books of account. Therefore the decision of Co-ordinate Bench in assessee's own case in ITA No.2654/CHNY/2017 for assessment year 2009-2010, dated 05.04.2018 holds the field which is held as under:-

> 4. *We have considered the rival contentions and perused the orders of the authorities below. On the question as to treatment of surplus arising to the assessee on sale of investments, whether to be treated as capital gains or business profits, what was held by this Tribunal in its order dated 17.04.2012 in ITA Nos.72 & 73/Mds/2012, for assessment years 2007-08 and 2008-09 is reproduced hereunder*:-
>
> > *''11.We considered the matter in detail. We also considered the decision relied on by the counsel appearing for the assessee in the case of ACIT v.*

Stargate Investments (P) Ltd. (10 ITR (Trib) 211) (Chennai). The Commissioner of Income-tax(Appeals) in his order has given a direction to the Assessing Officer to examine whether the shares sold by the assessee were subject matter of revaluation on account of depletion in the value of those shares and to decide the exact nature of shares held by the assessee, to find out whether the shares were held as investments or stock-in-trade. Among other things, it is necessary for the Assessing Officer to look into the length of period the assessee has held the shares, the frequency of transactions in shares carried out by the assessee, the nature of funds utilized by theassessee to acquire the shares, whether the fund is own funds or interest bearing borrowed funds, the market tendency of the shares held by the assessee, etc. Therefore, it is not fair to suggest that the nature of the shares held by the assessee company should be decided on a singular test.

12. Apart from the above, what are the facts available in the present case? As stated by the Assessing Officer, the assessee itself has submitted before the assessing authority in one of its letters that the shares are held by the assessee company as part of its business stock and, therefore, any surplus arising on sale of those shares would be in the nature of business income. This submission made by the assessee company is more explicitly reflected in Schedule K. Schedule K contains notes on accounts. Item E of Schedule K reads as under :

> *"E Investments*
> *The investments held by the Company are all long-term investments. Long terms investments are carried at cost less provision for diminution, other than temporary in nature. The Company has reckoned diminution in value of shares/debentures as permanent in nature by relying on market value of quoted shares and book value/fair value whichever is higher in respect of unquoted shares."*

13. This disclosure makes it clear that even long term capital investments held by the assessee are valued at the end of every previous year so as to provide for the diminution in value when compared to the market value of the shares as on that date. It means that even in the case of long term investments, the assessee has claimed the depletion in value of shares as loss in those concerned assessment years. It means even in the case of shares held by the

assessee for a long time and characterized as long term investments, annual valuation of stock has been done and functionally the assessee has treated all those investments as stock-in-trade, particularly for the purpose of computing its income and thereby for the purpose of taxation as well. It is, therefore, to be seen that what is long term investment and what is short term investment, what is stock-in-trade in the handsof the assessee are all matters of its own business prudence. The assessee might classify the shares as long term investments on the basis of length of period for which those shares were held by the assessee. But that is not the matter to be considered for computing the income for income-tax purpose. For income-tax purpose, the question is whether surplus is capital gains or business income. The surplus can be treated as capital gains only if the assessee has not valued the shares year after year to account for the depletion in the value of those shares. Wherever the assessee provides for such depletion in the value of shares in the assessment after assessment, those shares have to be treated as stock-in-trade for the purpose of income-tax. There is nothing on record to show that the shares of Punj Lloyd Ltd. and Numeric Power Systems Ltd. was different from the above stated position. Therefore, in the facts and circumstances of the case, we find that the Assessing Officer has rightly treated the surplus as business income. The orders of the Commissioner of Income-tax(Appeals) on this issue are set aside".

What we can understand from the above order of the Tribunal is that even the long term capital investments held were valued by the assessee at the end of every previous year, after providing for the deplenishment in value thereof, vis-à-vis its market value. It is also observed that shares held by the assessee, though characterized as long term investments, its annual valuation was done by treating it as stock in trade for the purpose of computing income. Once the assessee had valued the investments after providing for diminution of its value, when compared to the market value of such investments effectively the stock in trade stood valued at net realizable value. This being the case, we are of the opinion that submissions made by the ld. Authorised Representative for valuing the closing stock of shares, at cost or at net realizable value is ill conceived. We thus do not find any reason to interfere with the order of the ld. CIT(A).

Accordingly, the grounds of appeal No.2 raised by the assessee stands dismissed.

9. Ground No.3 challenges the decision of ld. CIT(A) disallowing the claim for loss on account of sale of shares of M/s. Kamala Tea Company and M/s. Karnataka Malladi. Admittedly, the claim was not made before the Assessing Officer and the issue had not gone the process of assessment by the Assessing Officer and therefore no such new claim can be entertained by the ld. CIT(A) which has not undergone the process of assessment by the Assessing Officer. This view was affirmed by the decision of Hon'ble Bombay High Court in the case of *Ultratech Cements vs. Addl. CIT, in ITA No.1060 of 2014, dated 18th April, 2017* after referring to the decision of the Apex Court in the case of *National Thermal Power Co. Ltd vs. CIT, 229 ITR 383,* wherein it was held as follows:

> *'23] Therefore, before an additional ground is allowed to be raised, the appellate authority must be satisfied that the ground raised could not have been raised earlier for good reasons. The underlying basis for allowing the raising the additional ground in the case of Ahmedabad Electricity Co.Ltd. (supra) was the subsequent decision rendered by this Court in Amalgamated Electricity Co.Ltd. (supra) when appeal was pending. As held by the subsequent decisions of the Apex Court in NTPC Ltd. (supra), a judicial decision when an appeal is pending will entitle raising of additional ground.*
>
> *24] In any view of the matter, the aforesaid decision does not deal with the situation which arises for consideration in this case viz. relying Uday S. Jagtap 22 of 28 IT Appeal 1060/14 upon the evidence on record for a subsequent assessment year to hold that*

the assessee is entitled to a benefit of deduction u/s 80IA of the Act for an earlier assessment year. A deduction under Chapter VIA of the Act under which Section 80IA of the Act falls would depend, as pointed out above, upon the satisfaction of the facts necessary for claiming a deduction. The allowing of a deduction in a subsequent year's assessment order cannot determine the facts as existing in the earlier assessment year, such as in this case so as to allow the deduction.

25] In fact, the issue with regard to the raising of new grounds in the absence of any evidence on record is no longer res integra in view of decision of the Apex Court in Addl. Commissioner of Income Tax Vs. Gurjargravures Pvt. Ltd.,(supra). In the above case, it has been held that an additional ground cannot be raised before the appellate Authority when no claim for a particular deduction was made before the original authority nor Uday S. Jagtap 23 of 28 IT Appeal 1060/14 was there any material on record to support such a claim. Further the Court held that merely by allowing the deduction for a subsequent assessment year, it could not be held that conditions for availing the deduction in the subject assessment were also satisfied. In the present facts also, the claim for deduction under Section 80IA of the Act was not made before the Assessing Officer or the CIT(A) but was made for the first time only before the Tribunal nor was there any evidence in support of the claim for the subject assessment year on record. Thus it stands covered by the above decision in Gurjargravures Pvt. Ltd. (supra). The aforesaid decision of the Apex Court was subject matter of consideration in Jute Corporation of India Ltd.(supra) wherein the Court while distinguishing Gurjargravures Pvt. Ltd. (supra) held that the additional ground could also be raised before the appellate Authority if such ground could not have been raised at the earlier stage i.e. when the return of income was filed. This is only when the assessee is able to satisfy the appellate Authority Uday S. Jagtap 24 of 28 IT Appeal 1060/14 that the ground now raised was bona fide and the same could not have been raised earlier for good reasons. In such cases, the raising of additional ground could be allowed. In this case, there is nothing on record to indicate as to what was the reason which prevented the appellant assessee from raising a claim for deduction under Section 80IA of the Act for subject assessment year during the proceedings before the Assessing Officer and the CIT(A). Therefore, in the above facts , the view taken by the Tribunal in not allowing the appellant to raise additional ground in appeal is in line with the decision of the Apex Court in Gurjargravures Pvt.Ltd. (supra), NTPC Ltd. (supra) and Jute Corporation of India Ltd.

26] None of the decisions cited by the appellant would render the decision of the Supreme Court in Gurjargravures Pvt.Ltd. (supra),

read with Jute Corporation of India Ltd. and NTPC Ltd. (supra) inapplicable to the present facts.

27] There can be no dispute that whether or not to allow an additional ground to be raised before the appellate authority is to be decided by the appellate authority in exercise of its discretion considering the facts and circumstances of the case before it. Where only a pure question of law arises from facts which are already on record, then there is no reason why the appellate authority should not consider the question of law so as to determine the correct tax liability of an assessee in accordance with law. However, where evidence is to be examined and that is not on record, then it will be considered only if the parties seeking to raise the additional ground satisfies the authority concerned that for good and sufficient reasons, the ground could not be raised before the lower authorities. In the present facts, no such ground has been made out by the assessee before the Tribunal. In the present facts, as pointed out above and being reiterated once more, the additional ground, which is raised, is not a pure question of law, but would depend upon the satisfaction of the authority as to Uday S. Jagtap 26 of 28 IT Appeal 1060/14 the facts existing in the subject assessment year for allowing the benefit of Section 80IA of the Act. The additional ground is being raised for the first time before the Tribunal without relevant evidence being on record.

In the light of the above judgment, the claim made by the assessee cannot be allowed as deduction. Accordingly, the grounds of appeal No.3 raised by the assessee stands dismissed.

10. Ground No.4 challenges the decision of lower authorities confirming the addition of ₹3,39,28,647/- made on account of provision on NPAs. The Assessing Officer had disallowed the claim on the ground that assessee had failed to demonstrate with evidence that in the year of creation of provision of NPA account, the same was not allowed as deduction. Even before us, no evidence was filed

demonstrating this contention. Hence, we affirm the orders of the lower authorities. The grounds of appeal No.4 filed by the assessee stands dismissed.

11. Ground No.5 challenges the addition of ₹68,25,052/-. This addition was made by the Assessing Officer on account of difference in the amount of exempt income. Nothing was shown to us that the finding of the Assessing Officer is erroneous and therefore we confirm the order of the lower authorities. The grounds of appeal No.5 filed by the assessee also stands dismissed.

12. In the result, the appeal filed by the assessee stands dismissed.

Order pronounced on 26th day of September, 2019, at Chennai.

Sd/-	Sd/-
(एन.आर.एस. गणेशन**)**	**(**इंटूरी रामा राव**)**
(N.R.S. GANESAN)	**(INTURI RAMA RAO)**
न्यायिक सदस्य**/JUDICIAL MEMBER**	लेखा सदस्य**/ACCOUNTANT MEMBER**

चेन्नई/Chennai
दिनांक/Dated:26th September, 2019
KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF