IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI'H' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President)
and Ram Lal Negi (Judicial Member)

ITA No. 2406/Mum/19
Assessment year: 2009-10

Kiran Raju Talwar **……..……Appellant**
Plot No 209, Ground floor, Shere Punjab Society
Mahakali Caves Road, Andheri East
Mumbai 400 093 [PAN: ADVPT1256H]

Vs

Principal Commissioner of Income Tax- 24
Mumbai **……Respondent**

Appearances by
Jayesh Kala and Ms JignaShah *for the appellant*
B Srinivas *for the respondent*

Date of concluding the hearing: : December 11,2019
Date of pronouncement : March 6, 2020

ORDER

Per Pramod Kumar, VP:

1. This appeal, filed by the assessee, is directed against the order dated 28th February 2019 passed by the learned Principal Commissioner of Income Tax. in the matter of revision under section 263 r.w.s. 143(3) and 147 of the Income Tax Act, 1961, for the assessment year 2009-10.

2. Grievances raised in the appeal are as follows:

1. On the facts and in the circumstances of the case, the learned Principal Commissioner of Income Tax erred in passing revision order under section 263 of the Income Tax Act, 1961, and reasons assigned for doing so are wrong and contrary to the facts and circumstances of the case and is against the provisions of the Income Tax Act and Rules made thereunder.

2. On the facts and in the circumstances of the case, the learned Principal Commissioner of Income Tax erred in not appreciating the fact that order passed by the learned Income Tax Officer was neither erroneous nor prejudicial

to the interest of the revenue, and hence provisions of Section 263 cannot be invoked.

3. In this case, the assessment under section 143(1) was completed on 29.9.2009. Subsequently, however, the assessment was reopened on the basis of specific information received from the office of the Principal Director of Investigation, Ahmedabad. It was noted that, as per the information so received, the assessee is involved in client code modification through broker B P Equities Pvt Ltd, the ascertained profit shifted is Rs 21,07,873 and that the assessee has taken fictitious loss of Rs 20,900. However, when the reopened assessment was being done, the assessee also claimed F&O loss amounting to Rs 22,91,697. The Assessing Officer, while bringing an income of Rs 20,86,973 to tax on account of modification of client code and bringing an income of Rs 9,65,682 to tax on account of transactions in equity shares, also allowed a loss of Rs 22,91,697. It was in this backdrop that the present revision proceedings were initiated by the Principal Commissioner of Income Tax, on the ground that loss in F&O transactions was not claimed by the assessee is the original return, and it was not open to the Assessing Officer to grant a fresh claim which is not made by way of revising the income tax return. In the revision proceedings, it was contended by the assessee that the assessee had offered income by way of client modification only to buy peace, that the documents relied upon by the Assessing Officer for making the said addition also showed that the assessee had incurred loss, that natural justice requires that if addition is made on account of profits, the claim of loss cannot be declined on the ground On the facts and in the circumstances of the case, the learned Principal Commissioner of Income Tax erred in that the assessee did not make the claim, that even if assessee does not make a claim, which is admissible to him, it is duty of the Assessing Officer to grant assessee the same, that income tax department should not capitalize out of ignorance of the assessee such as in not making a claim, and that when two views are possible, as in this case at the most, the revision powers cannot be exercised merely on the ground that the Assessing Officer has adopted a view in favour of the assessee. None of these arguments, however, impressed the learned PCIT. She was, inter alia, of the view that in the absence of a claim being made in the income tax return, the Assessing Officer did not have powers to grant the same unless it is done by way of revising the income tax return. In support of this proposition, reliance was placed on Hon'ble Supreme Court's judgment in the case of **Goetze India Ltd Vs CIT [(2007) 284 ITR 323 (SC)]**. Learned PCIT also referred to Hon'ble

Supreme Court's judgment in the case of CIT **Vs Sun Engineering Works (Pvt)Ltd [(1992) 198 ITR 297(SC)]** in support of the proposition that when an item unconnected with the escapement of income has been concluded against the assessee, it is not open to the assessee to seek a review of that item during the reassessment proceedings and that the reassessment proceedings are not reopening the finalized issues for the benefit of the assessee. Learned PCIT also referred to a large number of judicial precedents but it is not really necessary to refer to these precedents in much detail. Suffice to note that, in the light of, inter alia, the above observations, the reassessment order dated 29th December 2016 was set aside, aggrieved by which the assessee is in appeal before us.

4. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

5. No matter how equitable and persuasive erudite arguments of the learned counsel seem to be at the first sight, the issue stands concluded against the assessee by Hon'ble Supreme Court's judgment in the case of **Sun Engineering Works***(supra)* wherein Their Lordships have, inter alia, observed that "**The assessee cannot claim recomputation of the income or redoing of an assessment and be allowed a claim which he either failed to make or which was otherwise rejected at the time of original assessment which has since acquired finality**. **Of course, in the reassessment proceedings it is open to an assessee to show that the income alleged to have escaped assessment has in truth and in fact not escaped assessment but that the same had been shown under some inappropriate head in the original return, but to read the judgment in V. JaganmohanRoa's case (supra) as if laying down that reassessment wipes out the original assessment and that reassessment is not only confined to 'escaped assessment' or 'under-assessment' but to the entire assessment for the year and start the assessment proceedings de novo giving right to an assessee to reagitate matters which he had lost during the original assessment proceeding, which had acquired finality, is not only erroneous but also against the phraseology of section 147 and the object of reassessment proceedings**". Once it is an admitted position that the assessee did not claim the said loss in the original return, it was not open to him claim the same in the reassessment proceedings either. In any case, Hon'ble Supreme Court, in Goetze's case (supra) has upheld "The deduction was disallowed by the Assessing Officer on the ground that there was no provision under the

Income-tax Act to make amendment in the return of income by modifying an application at the assessment stage without revising the return" and, in principle, thus, no fresh claim can be admitted at the assessment stage. Of course, the powers of the Tribunal under section 254 are qualitatively different and merely because the Tribunal can admit a fresh claim even at the appellate stage would not empower the Assessing Officer to admit a fresh claim otherwise than by assessee's revising the income tax return. Taking note of this position, and taking note of Hon'ble Supreme Court's decision in the case of **NTPC Limited Vs CIT [(1998) 229 ITR 383 (SC)]**, Hon'ble Supreme Court has observed that "**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.**" Whichever way we look at it, the Assessing Officer was clearly in error in accepting the claim of loss on F&O transactions which was not claimed by the assessee in the original income tax return which had reached finality. This action was erroneous as also prejudicial to the interests of the revenue. As regards the two possible views of the matter, this plea does not hold good for the simple reason that there are direct decisions of Hon'ble Supreme Court on both the above facets and a view contrary to such binding judicial precedents cannot be said to be a possible view of the matter.

6. In view of the above discussions, as also bearing in mind entirety of the case, we approve the order of the learned PCIT and decline to interfere in the matter.

7. In the result, the appeal is dismissed. Pronounced in the open court today on the __th day of March, 2020.

Sd/- Sd/-

Ram Lal Negi **Pramod Kumar**
(Judicial Member) (Vice President)
Mumbai, dated the day of March, 2020

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai