IN THE INCOME TAX APPELLATE TRIBUNAL
"H" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri C.N.Prasad (JM)

I.T.A. No.5325/Mum/2019 (Assessment Year 2013-14)

Hotel Inphom C/o. Adil Coover Bhesadia 1/B, Tata Mills Co-operative Society Ltd, 8th Floor Flat No.35, Elphinstone Road Mumbai-400 013 PAN : AAAFH2020D	Vs.	ACIT-20(1) Piramal Chamber Parel Mumbai-400 013
(Appellant)		(Respondent)

Assessee by	Shri Dalpat Shah
Department by	Shri Hoshang Boman Irani
Date of Hearing	02.11.2021
Date of Pronouncement	03.11.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned Commissioner of Income Tax (Appeals)-32 dated 21.06.2019 and pertains to assessment year 2013-14.

2. Grounds of appeal read as under:-

1 Addition to Long Term Capital Gain by Rs.16.30.302/-:

1.1 On the facts and circumstances of the case, the Commissioner of Income Tax (Appeals)-32, Mumbai, erred in confirming the assessment of Long-Term Capital Gain of Rs.11,40,88,276/- as against the actual Long Term Capital Gain of Rs.11,24,57,974/- resulting into an addition of Rs.16,30,302/-. The said CIT(A) erred in not considering the Revised computation of Long-term Capital Gain submitted by the appellant during the course of assessment proceedings, replacing the correct fair value of cost as on 01.04.1981, which was inadvertently considered at a wrong amount in the return of income.

1.2 The said CIT(A) erred in not appreciating the fact that the power of AO is quasi judicial in nature and he is duty bound to act fairly in the discharge of his functions as directed by C.B.D.T. vide circular No. 14 (XL- 35) dated 11.04.1955.
1.3. The said C1T (A) also erred in not exercising his power u/sec 154 and not assessing Long Term Capital Gain at a correct amount of Rs.11,24,57,974/-ignoring the fact that the appellant has not made a new claim of deduction but has merely corrected the computation of Long Term Capital Gain.

3. Brief facts of the case are that the assesse firm was the owner of land together with the building known as Hotel Inphom. The assessee has filed his return of income for AY 2013-14 on 30.09.2013 declaring total income at Rs. 14,01,88,276/-. The assessment was completed u/s. 143(3) of the Act on 17.02.2016 determining the total income at Rs. 1,40,188,276/- by making assessing the income under the head LTCG of Rs. 1,14,088,276/- and STCG of Rs. 26,100,000/-.

4. Against the above order, assessee appealed before the Ld.CIT(A) raising a ground that assessee has revised the computation before the AO, who has not considered the same. The ground raised before the Ld.CIT(A), reproduced by the Ld.CIT(A) in his order reads as under:-

"1. The Learned Assessing Officer erred in the facts of the case and in law in no considering the appellant's request for the revised computed of toal income and thus erred in assessing the Long Term Capital at Rs. 112,457,974/- as against the correct Long Tem Capital Gain at Rs. 114,088,276/- as per the revised computation filed.
2. The Learned Assessing Officer ought to have considered the error in calculation of computing the Long Term Capital Gain which was bonafide in nature due to which the Long Term Capital Gain was considered at a high amount of Rs. 1,630,302/-. Accordingly, the Assessing Officer should have calculated the correct Long Term Capital Gain and assessee the income of the appellant firm accordingly."

5. The Ld.CIT(A) reproduced the various aspects of submission of the assessee. Despite assessee's submission and noting assessee's reliance upon Hon'ble Bombay High Court decision in the case of CIT vs Pruthvi Brokers and shareholders Pvt.Ltd. 349 ITR 336, Ld.CIT(A) did not dealt with this decision. He referred to the decision

of Hon'ble Bombay High Court in the case of Menezes Fernandes Enterprises vs ITO, Ward-4, Margoa, Goa(2013) 30 taxmann.com 388 for the proposition that "when the assessee had not furnished the return within time allotted to him under sub section (1) and (2) and therefore, his case clearly falls within the provisions of section 139(4). Therefore, section 139(5) was not available to the assesse". The order of Ld.CIT(A) reads as under:-

> "The appellant has made a claim before the A.O, in the course of assessment proceedings to rectify the mistake committed by the appellant while computing the long term capital gain from the sale of land by way of revised calculation of such long term capital gain which would result in the reduction of income shown under this head by Rs. 16,30,302/-. The A.O *as* accepted the income shown by the appellant in the return of income under the heads long term capita] gain and short term capital gain and apparently, has not considered such claim of the appellant.
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> "The appellant has made detailed submission stating that such new claim can be considered by the appellate authorities in view of the decision of the Hon'ble Bombay High Court in the[1] case of CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd., 349 ITR 336 and other .such decisions, reproduced in the submission above.
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> In this regard, 1 find that the appellant. firm has filed its return of income on 30.09.2013 and one of the reasons for selecting the case for scrutiny was that appellant had made delayed payment of tax and had filed its return late. I find that interest u/s. 234A has also been levied for late filling of return. Thus, when the appellant has not filed its return on or before the due date prescribed u/s. 139(1) then if is precluded from filing a revised return u/s. 139(5) of the Act . Thus, if the appellant has made some error in the computation of income and it is not permitted by law to rectify the same by way of a revised return u/s. 139(5) of the Act, it cannot make such claim for rectification of error committed, in the course of assessment proceedings or in the appellate proceedings, fn this regard, reliance is placed on the decision of Hon'ble High Court of Bombay in the case of Menezes Fernandes Enterprises vs. ITO, Word 4, Margoa, Goaa (2013) 30 taxmann.com 388 wherein it was held as under:
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>> A Perusal of the said section as it existed then and more particularly sub clause 5 of the above provision clearly stipulates that it is applicable in respect of applications which are filed under section 139 sub clause 1 and 2. It does not make any reference to a delayed return or a return filed after the stipulated time, as envisaged under section 139 (4). [Para 7]

In view of the above, the benefits of sub clause 5 of Section 139 would not apply to the applications which are filed under section 139 (4)

The assessee contended that the order of assessment was not served on the appellant and, therefore, the provisions of sub clause 5 were clearly attracted in favour of the appellant. We are unable to accept the said submission when sub clause 5 has to be read in context with the other provisions of the said section.

In the instant case, it is an admitted position where the appellant had not furnished the return within time allotted to him under sub sections (1) and (2) and therefore, his case clearly falls within the provision of section 139 (4). Section 139 (5) merely stipulates that it is applicable to any person who has furnished the return under sub sections (1) or (2).

From the aforesaid provisions it can be seen that the Legislature in its wisdom had intended to give the benefits of filing a revised return only to those persons who fall within the four corners of section 139 sub sections (1) and (2) of the said Act. If the legislature had intended to also give the same benefits to an assessee who had not furnished the return within time, it would have said so in sub clause (5). The very fact that sub clause 4 is not referred to in sub clause (5) clearly indicates the intention of the legislature. [Para8]

Thus in view of the specific provisions of section 139 (5), it is not open for the appellant to either rectify or revise his return after there was a delay in filing a said return in time. Viewed from any angle, therefore, there is no infirmity in the order passed by the Tribunal [para11]

The appeal, therefore, is dismissed. [Para 12]

In view of above discussion, I do not find merit in the grounds raised by the appellant to modify its claim of long term capital gain, since it had filed its return of income beyond the lime prescribed u/s. 139(1) of the Act and it is not permissible under law 10 revise or modify the income shown by the appellant in its return of income so as to reduce it below the returned income. The grounds taken are dismissed."

6. Against the above order, assessee is in appeal before us.

7. We have heard both the parties and perused the records. We find that the issue in the present case is not whether assessee can claim the benefit u/s. 139(5) of the Act. The issue here is that whether the assessee's claim can be admitted by the revenue

authorities without filing revised return or whether additional ground can be raised or not.. The decision of Hon'ble Bombay High Court in the case of CIT vs. Pruthvi Brokers and shareholders (supra) mandates that assessee's claim should be considered and the decision should be taken as per law. We further note that Hon'ble Supreme Court in the case of Goetze (India) Limited Vs CIT (284 ITR 323) has expounded that the decision in that case would not impinge upon the powers upon the ITAT to consider assessee's claim otherwise than by revised return. In accordance with the aforesaid case laws, we remit the issue to the file of the AO and AO is directed to considered the claim of the assessee and pass an order as per law, after giving the assessee proper opportunity of being heard .

8. In the result, assessee appeal is allowed for statistical purpose.

Pronounced in the open court on 03 .11.2021.

Sd/-
(C.N.PRASAD)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 03 /11/2021
Thirumalesh, Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai