IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri George Mathan, JM & Shri Ramit Kochar, AM

ITA No. 742/Coch/2019
(Assessment Year: 2002-03)

Deputy Commissioner of Income Tax, Circle-1(1), Thiruvananthapuram Kerala	v.	Brahmos Aerospace (Thiruvananthapuram) Ltd., Chackai, Beach Post, Tiruvananthapuram, Kerala
		PAN – AABCK2217K
Appellant		**Respondent**

Appellant by :Smt. Jamunna Devi, Sr.DR
Respondent by :Shri Abraham Joseph Markos, Adv.

Date of Hearing : 23.02.2022
Date of Pronouncement : 23.02.2022

O R D E R

Per Shri Ramit Kochar, AM:

This appeal, filed by Revenue, being ITA No.742/Coch/2019, is directed against the appellate order dated 10.10.2019 in Appeal ITA No.9/TVM/CIT(A)/TVM/2013-14 passed by learnedCommissioner of Income Tax (Appeals)-Thiruvananthapuram (hereinafter called "theCIT(A)"),for assessment year(ay):2002-03, the appellate proceedingshad arisen before learned CIT(A) from order giving effect to ITAT's order, dated 12.03.2013 passed by learned Assessing Officer (hereinafter called "the AO"). This is second round of litigation before Income Tax Appellate Tribunal , Cochin Bench, Cochin(hereinafter called " the tribunal") , where in the first round of litigation the tribunal was pleased to set aside the appellate order passed by ld. CIT(A) and restore the matter to the file of the AO with direction to assess the income/loss of the assesse on the basis of audited financial statements and other material in accordance with law, vide appellate order dated 29.03.2012 in ITA No. 601/Coch/2010 for ay:2002-03. We have heard this appeal in open court.

2. The Revenue has raised the following grounds of appeal in memo of appeal filed with the tribunal, in ITA No. 742/Coch/2019 for ay: 2002-03, which is a second round of litigation before tribunal, as reproduced hereunder:

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1. *The Learned CIT (Appeals), Thiruvananthapuram erred in concluding that "the action of the Assessing Officer is without any basis". The Assessing officer has denied the claim of carry forward of loss as per Section 80 of the Incometax Act, by which "no loss which has not been determined in pursuance of a return filed in accordance with the provisions of section 139(3) of the Act, shall be carried forwarded and set off .....".*
2. *The Learned CIT (Appeals), Thiruvananthapuram erred in concluding that" since the appellant had filed return on time it is eligible to carry forward the business loss also". The appellant filed the original return in time by claiming the carry forward loss as per the provisional accounts which was likely to undergo change on audit of the accounts.*
3. *The Ld.CIT(A) ought to have noticed that the appellant had enough time to file the revised return of income by claiming loss as per the audited accounts as the audit was completed on 05.02.2003 and the time limit for filing revised return for AY2002-03 was 31.03.2004. The assessment was completed only on 28.02.2005.*
4. *The Hon'ble ITAT had set aside the entire issue to the file of Assessing Officer with a direction to assess the income/loss of the assessee on the basis of audited financial statements and other materials "in accordance with law". Thus, the Ld. CIT(A) erred in stating that the Assessing Officer has exceeded the mandate given by the Tribunal "to determine the loss as per audited books" (para 4.2 of the order).*
5. *The constitutional validity of Section 80 of the Income tax Act is under challenge as the CIT(A) has failed to appreciate the specific provision that business loss which has not been determined in pursuance of a return filed cannot be carried forwarded.*
6. *For these and other grounds that may be advanced at the time of hearing the order of the learned Commissioner of Incometax (Appeals), Thiruvananthapuram on the above points may be set aside and that of the Assessing Officer restored."*

3. The brief facts of the case are that the assessee is engaged in the business of Manufacturing of Engineering goods. This is second round of litigation before the tribunal. The assessee filed its return of income for the year under consideration declaring loss of Rs. 2,96,55,033/- within prescribed time viz. 31.10.2002 u/s 139(3) read with Section 139(1) of the 1961 Act. However, while filing aforesaid return of income with Revenue on 31.10.2002, the assessee admittedly enclosed provisional financial

statements along with its return of income as accounts were not audited by that time. The assessee's accounts were finally audited on 05th February, 2003, which were filed by the assesse with Revenue during the course of original assessment proceedings conducted by the AO u/s 143(2) read with Section 143(3) of the 1961 Act ,in the first round of litigation , but admittedly the assesse did not file revised return of income after getting its accounts audited with revised figure of income(loss) post audit. The revenue initiated proceedings against the assesse for infringement of provisions of Section 44AB of the 1961 Act , for not getting tax-audit done within the prescribed time. The AO completed assessment vide assessment order dated 28.02.2005 in first round of litigation by accepting returned loss but with the rider that the loss returned cannot be allowed to be carried forward on the ground that the same was arrived provisionally without audit. The assesse being aggrieved filed first appeal, the ld. CIT(A) was pleased to allow the appeal of the assesse. Thereafter, the matter reached tribunal at behest of Revenue in the first round of litigation , and the tribunal was pleased to pass an appellate order in ITA No.601/Coch/2010 for ay:2002-03, vide appellate order dated 29.03.2012, wherein tribunal set aside the appellate order passed by ld. CIT(A) and restored the matter to the file of AO with directions to assess the income/loss of the assesse on the basis of audited financial statements and other material in accordance with law, by holding as under:

"5. We have heard the rival contentions. Admittedly, the return of income was filed by the assessee with provisional financial statements, since the statutory audit was not completed by that date. It is also undisputed fact that the profit/loss declared in the provisional financial statements might undergo a change during the course of audit. There cannot be any dispute that under the Income tax Act, the income/loss of the assessee has to be determined on the basis of audited financial statements. Hence, in our view, the AO was not right in law in completing the assessment on the basis of provisional statements, particularly in view of the fact that the audited financial statements were available before completion of the assessment. When it was pointed out to the contesting parties, both the parties expressed no objection in remitting the matter to the file of AO for determination of correct amount of loss on the basis of audited accounts.

6. The carry forward of loss is governed by the provisions of the Income tax Act. Inour view, the AO can deny carry forward of loss only in accordance with the saidprovisions. In the instant case, the AO has not taken support of any provisions in the Actto show that the assessee is not entitled to carry forward the loss. Hence, in our view, thedecision of the AO to deny the right of carry forward of loss,does not

appear to be inaccordance with law. Since the entire issue is set aside to the file of AO, we do not findit necessary to express any view on the decision of ld CIT(A) on this issue.

7. In view of the foregoing discussions, we set aside the order of LdCIT(A) andrestore the entire issue to the file of AO with the direction to assess the income/loss of theassessee on the basis of audited financial statements and other materials in accordancewith law. The assessee is also directed to furnish all the details that may be called for bythe AO".

Thus, in nutshell the tribunal set aside the appellate order passed byLd.CIT(A) in first round of litigation and restored the entire issue to the file of AO with a direction to assess the income/loss of the assessee on the basis of the audited financial statements and other materials in accordance with law.

4.The AO while giving effect to the ITAT's order dt.29.03.2012, passed an order dated 12-03-2013 and again did not allow the carry forward of business loss to the tune of Rs.1,34,50,050/- as the assessee has not filed the revised return of income. However, loss on account of depreciation, to the tune of Rs.1,62,04,983/- was allowed by the AO , in the second round of litigation . The matter again travelled to Ld.CIT(A) at the behest of the assessee, who was pleased to hold vide appellate order dated 10.10.2019 in second round of litigation , that the assessee has filed return of income in time and hence the assessee will be eligible to carry forward business loss also. The Ld.CIT(A) observed that the ITAT directed the AO to assess the loss of the assessee on the basis of the audited financial statements and other material in accordance with law. The assessee having filed the return of income within prescribed time although on the basis of the un-audited accounts ,and the directions of the tribunal in the first round, was to allow loss on the basis of audited accounts . The ld. CIT(A)held that the AO has exceeded his mandate to determine the loss as per the audited books of accounts and the action of the AO in denying the carry forward of loss is without any basis.

5. Aggrieved, the Revenue has come in appeal before the tribunal. TheLd.Sr.DR submitted that this is the second round of litigation and the

AO has again refused to allow carry forward of business loss while loss on account of depreciation was allowed to be carried forward. It was fairly admitted by the Ld.Sr.DR that the assesseehas filed return of income within prescribed time although it was not supported by the audited accounts. It was submitted that the accounts of the assesse were audited much later on 05th February 2003. The Ld.Sr.DRrely on the ground Nos.3 and 5 and also provisions of Section 80 of the Act.

5.2 The Learned Counsel for the assessee submitted that the return of income was filed in time and that the only grievance of the Revenue on which the claim of carry forward of loss was denied to the assesse is that the revised return of income was not filed based upon the audited accounts.

6.We have heard contentions of both the parties in open court hearing and perused the material on record. We have observed that the return of income was filed by the assesse for impugned ay with Revenue in time u/s.139(1) read with Section 139(3) of the 1961 Act , on 31.10.2002 with a claim of loss of Rs.2,96,55,033/-. The said return of income was accompanied with the provisional financial statements , as the audited accounts were not available by that time nor tax-audit report was filed while filing of return of income. It is an admitted position that the assessee'saccounts were audited by the statutory auditory on 5th February 2003 which was much later beyond the due date prescribed for filing of return of income under the provisions of Section 139(3) read with Section 139(1) of the Act. The case of the assesse was selected by AO for framing scrutiny assessment u/s 143(3) read with Section 143(2) of the 1961 Act . The assesse during the course of assessment proceedings have filed audited financial statements and audit reports as contemplated under the provisions of Section 44AB of the 1961 Act, although it is an admitted position that the returned loss was not revised by filing revised return of income. Before proceeding further, it is important to refer to provisions of Section 80, 139(1), 139(3) and 139(9) of the 1961 Act , as were in force during the relevant period, which are reproduced hereunder:

"Submission of return for losses.

80. *Notwithstanding anything contained in this Chapter, no loss which has not been determined in pursuance of a return filed [in accordance with the provisions of sub-section (3) of section 139], shall be carried forward and set off under sub-section (1) of section 72 or sub-section (2) of section 73 or sub-section (1)[or sub-section (3)] of section 74 [or sub-section (3) of section 74A]."*

"139. [1]**[***(1) Every person*[2]*,—*

(a) being a company; or

(b) being a person other than a company, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax,

shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form[3] *and verified in the prescribed manner and setting forth such other particulars as may be prescribed:*

Provided*that a person referred to in clause (*b*), who is not required to furnish a return under this sub-section and residing in such area as may be specified by the Board in this behalf by notification*[4] *in the Official Gazette, and who at any time during the previous year fulfils any one of the following conditions, namely:—*

(i) is in occupation of an immovable property exceeding a specified floor area, whether by way of ownership, tenancy or otherwise, as may be specified[5] *by the Board in this behalf; or*

(ii) is the owner or the lessee of a motor vehicle other than a two-wheeled motor vehicle, whether having any detachable side car having extra wheel attached to such two-wheeled motor vehicle or not; or

(iii) is a subscriber to a telephone; or

(iv) has incurred expenditure for himself or any other person on travel to any foreign country; or

(v) is the holder of a credit card[6]*, not being an "add-on" card, issued by any bank or institution; or*

(vi) is a member of a club where entrance fee charged is twenty-five thousand rupees or more,

shall furnish a return, of his income during the previous year, on or before the due date in the prescribed form[7] *and verified in the prescribed manner and setting forth such other particulars as may be prescribed:*

Provided further*that the Central Government may, by notification*[8] *in the Official Gazette, specify the class or classes of persons to whom the provisions of the first proviso shall not apply:*

Providedalso *that every company shall furnish on or before the due date the return in respect of its income or loss in every previous year.*

Explanation 1.—*For the purposes of this sub-section, the expression "motor vehicle" shall have the meaning assigned to it in clause (*28*) of section 2*[9] *of the Motor Vehicles Act, 1988 (59 of 1988).*

Explanation 2.—*In this sub-section, "due date" means,—*

(a) where the assessee is—

(i) a company; or

(ii) a person (other than a company) whose accounts are required to be audited under this Act or under any other law for the time being in force; or

(iii) a working partner of a firm whose accounts are required to be audited under this Act or under any other law for the time being in force,

the 31st day of October of the assessment year;

(b) in the case of a person other than a company, referred to in the first proviso to this sub-section, the 31st day of October of the assessment year;

(c) in the case of any other assessee, the 31st day of July of the assessment year.

Explanation 3.—*For the purposes of this sub-section, the expression "travel to any foreign country" does not include travel to the neighbouring countries or to such places of pilgrimage as the Board may specify in this behalf by notification*[10-19] *in the Official Gazette.***]**

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(3) If any person who[***] has sustained a loss in any previous year under the head "Profits and gains of business or profession" or under the head "Capital gains" and claims that the loss or any part thereof should be carried forward under sub-section (1) of section 72, or sub-section (2) of section 73, or sub-section (1) [or sub-section (3)] of section 74,[or sub-section (3) of section 74A], he may furnish, within the time allowed under sub-section (1)[***], a return of loss in the prescribed form and verified in the prescribed manner and containing such other particulars as may be prescribed, and all the provisions of this Act shall apply as if it were a return under sub-section (1).

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[(9) Where the[Assessing] Officer considers that the return of income furnished by the assessee is defective, he may intimate the defect to the assessee and give him an opportunity to rectify the defect within a period of fifteen days from the date of such intimation or within such further period which, on an application made in this behalf, the[Assessing] Officer may, in his discretion, allow; and if the defect is not rectified within the said period of fifteen days or, as the case may be, the further period so allowed, then, notwithstanding anything contained in any other provision of this Act, the return shall be treated as an invalid return and the provisions of this Act shall apply as if the assessee had failed to furnish the return :

Provided that where the assessee rectifies the defect after the expiry of the said period of fifteen days or the further period allowed, but before the assessment is made, the[Assessing] Officer may condone the delay and treat the return as a valid return.

Explanation.—For the purposes of this sub-section, a return of income shall be regarded as defective unless all the following conditions are fulfilled, namely:—

(*a*) the annexures, statements and columns in the return of income relating to computation of income chargeable under each head of income, computation of gross total income and total income have been duly filled in;

(*b*) the return is accompanied by a statement showing the computation of the tax payable on the basis of the return;

[(*bb*) the return is accompanied by the report of the audit referred to in section 44AB, or, where the report has been furnished prior to the furnishing of the return, by a copy of such report together with proof of furnishing the report;]

(*c*) the return is accompanied by proof of—

(*i*) the tax, if any, claimed to have been deducted at source and the advance tax and tax on self-assessment, if any, claimed to have been paid;

(*ii*) the amount of compulsory deposit, if any, claimed to have been made under the Compulsory Deposit Scheme (Income-tax Payers) Act, 1974 (38 of 1974);

(*d*) where regular books of account are maintained by the assessee, the return is accompanied by copies of—

(*i*) manufacturing account, trading account, profit and loss account or, as the case may be, income and expenditure account or any other similar account and balance sheet;

(*ii*) in the case of a proprietary business or profession, the personal account of the proprietor; in the case of a firm, association of persons or body of individuals, personal accounts of the partners or members; and in the case of a partner or member of a firm, association of persons or body of individuals, also his personal account in the firm, association of persons or body of individuals;

(*e*) where the accounts of the assessee have been audited, the return is accompanied by copies of the audited profit and loss account and balance sheet and the auditor's report [59][and, where an audit of cost accounts of the assessee has been conducted, under section 233B[60] of the Companies Act, 1956 (1 of 1956), also the report under that section];

(*f*) where regular books of account are not maintained by the assessee, the return is accompanied by a statement indicating the amounts of turnover or, as the case may be, gross receipts, gross profit, expenses and net profit of the business or profession and the basis on which such amounts have been computed, and also disclosing the amounts of total sundry debtors, sundry creditors, stock-in-trade and cash balance as at the end of the previous year.]

The perusal and conjoint reading of aforesaid provisions reveal that if the taxpayer claims that it has sustained loss under the head profit and gains of business or profession or under the head capital gains, and it claims to carry forwards and set off such loss under Section 72(1), 73(2), 74(1), 74(3) or 74A(3), it is required to file its return of income within the prescribed time u/s 139(1) of the 1961 Act which return of income is to be in the prescribed form and verified in the prescribed manner and containing such other particulars as may be prescribed, **and all the provisions of the 1961 Act shall apply as if it is a return filed u/s 139(1) of the 1961 Act(Ref. Section 139(3))**. The provisions of Section 139(1) stipulates that in case of company, the return of income is to be filed on or before 31.10.2002. The provisions of Section 80 stipulates that notwithstanding anything contained in the Chapter VI , no loss which has not been determined in pursuance of return filed u/s 139(3) , shall be carried forward and set off u/s 72(1), 73(2) , 74(3) and 74A(3) of the 1961 Act. Thus, Section 80 also refers to the time line provided u/s 139(3), which in turn refers to prescribed time u/s 139(1) for filing of return of income and Section 139(3) also stipulates that **all the provisions of the 1961 Act shall apply as if it is a return filed u/s 139(1) of the 1961 Act** . Thus, by virtue of Section 139(3) stipulating that all the provisions of the 1961 Act shall apply as if it is a return filed u/s 139(1) of the 1961 Act, Section 139(9) will get applied to a return filed u/s 139(3) of the 1961 Act. In the instant case, the assesse did filed its return of income on 31.10.2002 i.e. within time provided u/s 139(1) of the 1961 Act. The return , however , was not accompanied along with audited accounts and tax audit report as is required u/s 44AB , as the accounts were finally audited on 5th February, 2003 which is much later than the last date of filing of return of income viz. 31.10.2002. However, the assesse filed provisional financial statements along with its return of income filed u/s 139(3) read with Section 139(1), while filing return of income on 31.10.2002. The Explanation to Section 139(9) clearly stipulates that tax-audit report as well audited accounts are to be accompanied with return of income , otherwise return will be a defective return and consequences are also

stipulated u/s 139(9) of the 1961 Act. However, the provision of Section 139(9) did not stipulate that such return which is not accompanied with the prescribed documents shall be treated as non-est, but it is treated as a defective return. The AO is under obligation u/s 139(9) to issue notice to the assesse giving fifteen days time or such further extended time to rectify the defect , and once the assesse rectifies the defect within stipulated time , the return will be treated as valid return. It is only when the assesse fails to rectify the defect within stipulated time , then the return will be treated as invalid return and it will be deemed that the assesse has never filed return of income. The Section 139(9) further grants power to AO to condone the delay and treat the return as valid , even if the said defect is not rectified within the period stipulated by AO in its notice u/s 139(9) of the 1961 Act, but the said defect stood rectified before assessment is completed. It is admitted position that the AO did not issue any such notice u/s 139(9) to the assesse calling assesse to rectify the aforesaid defect. It is also an admitted position that the audited accounts and tax-audit return was filed by the assesse during the course of assessment proceedings, albeit the assesse did not file revised return of income. Further, as held by Hon'ble Bombay High Court in the case of CIT v. Pruthvi Brokers & Shareholders (2012) 23 taxmann.com 23(Bom), the assesse can always present its claim before the appellate authorities for the first time even if the said claim is not made in the return of income filed with the Revenue, wherein Hon'ble Bombay High Court held as under:

***"10**. A long line of authorities establish clearly that an assessee is entitled to raise additional grounds not merely in terms of legal submissions, but also additional claims not made in the return filed by it. It is necessary for us to refer to some of these decisions only to deal with two submissions on behalf of the department. The first is with respect to an observation of the Supreme Court in Jute Corpn. of India Ltd. v . CIT [1991] 187 ITR 688/[1990] 53 Taxman 85. The second submission is based on a judgment of the Supreme Court in Goetze (India) Ltd. v. CIT [2006] 157 Taxman 1.*

***11**. (A) In Jute Corpn. of India Ltd. (supra) for the assessment year 1974-75 the appellant did not claim any deduction of its liability towards purchase tax under the provisions of the Bengal Raw Jute Taxation Act, 1941, as it entertained a belief that it was not liable to pay purchase tax under that Act. Subsequently, the*

appellant was assessed to purchase tax and the order of assessment was received by it on 23rd November, 1973. The appellant challenged the same and obtained a stay order. The appellant also filed an appeal from the assessment order under the Income Tax Act. It was only during the hearing of the appeal that the assessee claimed an additional deduction in respect of its liability to purchase tax. The Appellate Assistant Commissioner (AAC) permitted it to raise the claim and allowed the deduction. The Tribunal held that the AAC had no jurisdiction to entertain the additional ground or to grant relief on a ground which had not been raised before the Income Tax Officer. The Tribunal also refused the appellant's application for making a reference to the High Court. The High Court upheld the decision of the Tribunal and refused to call for a statement of case. It is in these circumstances that the appellant filed the appeal before the Supreme Court.

The Supreme Court held as under :-

> *"5. In CIT v. Kanpur Coal Syndicate, a three Judge bench of this Court discussed the scope of Section 31(3)(a) of the Income Tax Act, 1922 which is almost identical to Section 251(1)(a). The court held as under: (ITR p. 229)*
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> *"If an appeal lies, Section 31 of the Act describes the powers of the Appellate Assistant Commissioner in such an appeal. Under Section 31(3)(a) in disposing of such an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment; under clause (b) thereof he may set aside the assessment and direct the Income Tax Officer to make a fresh assessment. The Appellate Assistant Commissioner has, therefore, plenary powers in disposing of an 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." (emphasis supplied)*
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> *6. 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." [Emphasis supplied]*

(B) It is clear, therefore, that an assessee is entitled to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before them. The appellate authorities have the discretion whether or not to permit such additional claims to be raised. It cannot, however, be said that they have no jurisdiction to consider the same. They have the jurisdiction to entertain the new claim. That they may choose not to exercise their jurisdiction in

a given case is another matter. The exercise of discretion is entirely different from the existence of jurisdiction.

12. *At page 694, after referring to certain observations of the Supreme Court in Addl. CIT v. Gurjargravures (P.) Ltd., [1978] 111 ITR 1, the Supreme Court observed at Page 694 as under :-*

> *"The above observations do not rule out a case for raising an additional ground before the Appellate Assistant Commissioner if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made, or that the ground became available on account of change of circumstances or law. There may be several factors justifying raising of such new plea in appeal, and each case has to be considered on its own facts. If the Appellate Assistant Commissioner is satisfied he would be acting within his jurisdiction in considering the question so raised in all its aspects. Of course, while permitting the assessee to raise an additional ground, the Appellate Assistant Commissioner should exercise his discretion in accordance with law and reason. He must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The satisfaction of the Appellate Assistant Commissioner depends upon the facts and circumstances of each case and no rigid principles or any hard and fast rule can be laid down for this purpose." [Emphasis supplied]*

13. *The underlined observations in the above passage do not curtail the ambit of the jurisdiction of the appellate authorities stipulated earlier. They do not restrict the new/additional grounds that may be taken by the assessee before the the appellate authorities to those that were not available when the return was filed or even when the assessment order was made. The sentence read as a whole entitles an assessee to raise new grounds/make additional claims :-*

> *"if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made...."*
>
> *"or"*
>
> *if "the ground became available on account of change of circumstances or law"*

The appellate authorities, therefore, have jurisdiction to deal not merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. The first part viz. "if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made..." clearly relate to cases where the ground was available when the return was filed and the assessment order was made but "could not have been raised" at that stage. The words are "could not have been raised" and not "were not in existence". Grounds which were not in existence when the return was filed or when the assessment order was made fall within the second category viz. where "the ground became available on account of change of circumstances or law."

14. *The facts in Jute Corpn. of India Ltd. (supra) various judgments referred to therein as well as in subsequent cases, which we will refer to, establishes this beyond doubt. In many of the cases, the grounds were, in fact, available when the return was filed and/or the assessment order was made. In Jute Corpn.of India Ltd. (supra) the ground was available when the return was filed. The assessee did not claim any deduction of its liability to pay purchase tax as "it entertained a belief*

that it was not liable to pay purchase tax under the Bengal Raw Jute Taxation Act, 1941". Thus, the ground existed when the return was filed. The assessment order was even made and received by the assessee. It is only after the appeal was filed that the assessee claimed a deduction in respect of the amount paid towards the purchase tax under the said Act. It is also significant to note that the assessee's entitlement to claim deduction had been held to be valid in view of an earlier judgment of the Supreme Court in Kedarnath Jute Mfg. Co. Ltd. v. CIT [1971] 82 ITR 363. This was, therefore, a case of error in perception/judgment. Despite the same, the Supreme Court upheld the decision of the Appellate Assistant Commissioner in allowing the deduction. The words "could not have been raised" must, therefore, be construed liberally and not strictly.

15. *It is indeed a question of exercise of discretion whether or not to allow an assessee to raise a claim which was not raised when the return was filed or the assessment order was made. As held by the Supreme Court there may be several factors justifying the raising of a new plea in appeal and each case must be considered on its own facts. However, such cases include those, where the ground though available when the return was filed or the assessment order was made, was not taken or raised for reasons which the appellate authorities may consider valid. In other words, the jurisdiction of the appellate authorities to consider a fresh or new ground or claim is not restricted to cases where such a ground did not exist when the return was filed and the assessment order was made.*

16. *(A) A Full Bench of this Court in Ahmedabad Electricity Ltd. v. CIT [1993] 199 ITR 351 considered a similar situation. In that case, the appellant/assessee did not claim a deduction in respect of the amounts it was required to transfer to contingencies reserve and dividend and tariff reserve either before the Income Tax Officer or before the Appellate Assistant Commissioner in appeal. Subsequently, this Court had, in Amalgamated Electricity Co. Ltd. v. CIT [1974] 97 ITR 334, held that such amounts represented allowable deductions on revenue account. The appellant, therefore, raised a new claim and additional grounds before the Tribunal in that connection. The Tribunal rejected the same. The second question which was raised in the reference before the Division Bench was as under :-*

> *"(2) Whether, on the facts and in the circumstances of the case, the Tribunal erred in not allowing the assessee leave to raise in its own appeals additional grounds and in the departmental appeals cross objections regarding the deductibility of the sums transferred to contingency reserve and tariff and dividend control reserve?"*

(B) The Division Bench which heard the reference, finding that there was a conflict of decisions, placed the papers before the Hon'ble Chief Justice for constituting a larger bench to resolve the controversy. The Full Bench answered the reference in the affirmative and in favour of the assessee. The Full Bench held :-

> *"Thus, the Appellate Assistant Commissioner has very wide powers while considering an appeal which may be filed by the assessee. He may confirm, reduce, enhance or annul the assessment or remand the case to the Assessing Officer. This is because, unlike an ordinary appeal, the basic purpose of a tax appeal is to ascertain the correct tax liability of an assessee in accordance with law. Hence an Appellate Assistant Commissioner also has the power to enhance the tax liability of the assessee although the Department does not have a right of appeal before the Appellate Assistant Commissioner. The Explanation to subsection (2), however, makes it clear that for the purpose of enhancement, the Appellate Assistant Commissioner cannot travel beyond the*

proceedings which were originally before the Income-tax Officer or refer to new sources of income which were not before the Income-tax Officer at all. For this purpose, there are other separate remedies provided under the Income-tax Act."

(C) It is unnecessary to refer to all the judgments that the Full Bench referred to while answering the reference. The Full Bench referred to the observations of the Supreme Court in Jute Corpn. of India Ltd. (supra) set out above. It is important to note that even in this case, therefore, the ground existed when the return was filed. The mere fact that a decision of a court is rendered subsequently does not indicate that the ground did not exist when the law was enacted. Judgments are only a declaration of the law. The assessee could have raised the ground in its return itself. It did not have to await a decision of a court in that regard. Indeed, even if a judgment is against an assessee, it is always open to the assessee to claim the deduction and carry the matter higher. The words "could not have been raised", therefore, cannot be read strictly. Neither the Supreme Court nor the Full Bench of this Court meant them to be read strictly. They include cases where the assessee did not raise the claim for a reason found to be reasonable or valid by the appellate authorities in the facts and circumstances of a case.

***17.** The next judgment to which our attention was invited by Mr.Mistri is the judgment of a Bench of three learned Judges of the Supreme Court in National Thermal Power Co. Ltd. v. CIT [1998] 229 ITR 383. In that case, the assessee had deposited its funds not immediately required by it on short term deposits with banks. The interest received on such deposits was offered by the assessee itself for tax and the assessment was completed on that basis. Even before the Commissioner of Income-tax (Appeals), the inclusion of this amount was neither challenged by the assessee nor considered by the Commissioner of Income-tax (Appeals). The assessee filed an appeal before the Tribunal. The inclusion of the amount was not objected to even in the grounds of appeal as originally filed before the Tribunal.*

Subsequently, the assessee by a letter, raised additional grounds to the effect that the said sum could not be included in the total income. The assessee contended that on a erroneous admission, no income can be included in the total income. It was further contended that the ITO and the Commissioner of Income-tax (Appeals) had erred and failed in their duty in adjudicating the matter correctly and by mechanically including the amount in the total income. It is pertinent to note that the assessee contended that it was entitled to the deduction in view of two orders of the Special Benches of the Tribunal and the assessee further stated that it had raised these additional grounds on learning about the legal position subsequently.

The Tribunal declined to entertain these additional grounds. The Supreme Court did not answer the question on merits, but framed the following question and held as under :-

"4. The Tribunal has framed as many as five questions while making a reference to us. Since the Tribunal has not examined the additional grounds raised by the assessee on merit, we do not propose to answer the questions relating to the merit of those contentions. We reframe the question which arises for our consideration in order to bring out the point which requires determination more clearly. It is as follows:

"Where on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of the assessee, whether the Tribunal has jurisdiction to examine the same."

Under Section 254 of the Income Tax Act the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with the appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income Tax (Appeals). Both the assessee as well as the Department have a right to file an appea1/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier."

18. *In the case before us, the CIT(A) and the Tribunal have held the omission to claim the deduction of Rs.40,00,000/- to be inadvertent. Both the appellate authorities held, after considering all the facts, that the assessee had inadvertently claimed a deduction of Rs.20,00,000/-paid after the end of the year in question. We see no reason to interfere with this finding. We see less reason to interfere with the exercise of discretion by the appellate authorities in permitting the respondent to raise this claim. That the respondent is entitled to the deduction in law is admitted and, in any event, clearly established. In the circumstances, the respondent ought not be prejudiced.*

19. *The orders of the CIT(A) and the Tribunal clearly indicate that both the appellate authorities had exercised their jurisdiction to consider the additional claim as they were entitled to in view of the various judgments on the issue, including the judgment of the Supreme Court in National Thermal Power Corpn. Ltd. (supra) . This is clear from the fact that these judgments have been expressly referred to in detail by the CIT(A) and by the Tribunal.*

20. *We wish to clarify that both the appellate authorities have themselves considered the additional claim and allowed it. They have not remanded the matter to the Assessing Officer to consider the same. Both the orders expressly direct the Assessing Officer to allow the deduction of Rs. 40,00,000/- under section 43B of the Act. The Assessing Officer is, therefore, now only to compute the respondent's tax liability which he must do in accordance with the orders allowing the respondent a deduction of Rs. 40,00,000/- under section 43B of the Act.*

21. *The conclusion that the error in not claiming the deduction in the return of income was inadvertent cannot be faulted for more than one reason. It is a finding of fact which cannot be termed perverse. There is nothing on record that militates against the finding. The appellant has not suggested, much less established that the omission was deliberate, mala-fide or even otherwise. The inference that the omission was inadvertent is, therefore, irresistible.*

22. *It was then submitted by Mr. Gupta that the Supreme Court had taken a different view in Goetze (India) Ltd (supra). We are unable to agree. The decision was rendered by a Bench of two learned Judges and expressly refers to the judgment of the Bench of three learned Judges in National Thermal Power Comp. Ltd. (supra). The question before the Court was whether the appellant-assessee could make a claim for deduction, other than by filing a revised return. After the return was filed, the appellant sought to claim a deduction by way of a letter before the Assessing Officer. The claim, therefore, was not before the appellate authorities. The deduction was disallowed by the Assessing Officer on the ground that there was no provision under the Act to make an amendment in the return of income by modifying an application at the assessment stage without revising the return. The Commissioner of Income-tax (Appeals) allowed the assessee's appeal. The Tribunal, however, allowed the department's appeal. In the Supreme Court, the assessee relied upon the judgment in National Thermal Power Co. Ltd. (supra) contending that it was open to the assessee to raise the points of law even before the Tribunal. The Supreme Court held :-*

> *"4. 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. There shall be no order as to costs." [Emphasis supplied]*

23. *It is clear to us that the Supreme Court did not hold anything contrary to what was held in the previous judgments to the effect that even if a claim is not made before the assessing officer, it can be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim has not been negated by the Supreme Court in this judgment. In fact, the Supreme Court made it clear that the issue in the case was limited to the power of the assessing authority and that the judgment does not impinge on the power of the Tribunal under section 254.*

24. *A Division Bench of the Delhi High Court dealt with a similar submission in CIT v.Jai Parabolic Springs Ltd. [2008] 306 ITR 42 / 172 Taxman 258. The Division Bench, in paragraph 17 of the judgment held that the Supreme Court dismissed the appeal making it clear that the decision was limited to the power of the assessing authority to entertain a claim for deduction otherwise than by a revised return and did not impinge on the powers of the Tribunal. In paragraph 19, the Division Bench held that there was no prohibition on the powers of the Tribunal to entertain an additional ground which, according to the Tribunal, arises in the matter and for the just decision of the case.*

Moreover, if the assesse has not got its statutory audit done under Companies Act, 1956(Now Companies Act, 2013) within the prescribed time, or has not got its tax audit done under the provisions of Section 44AB of the 1961 Act, there are penal provisions provided under the

statute for such non-compliances. There could be several reasons for not getting the statutory audit/tax-audit done within prescribed time, but unless there is specific/express provision which stipulates that if the audit is not done within prescribed time, the loss shall not be allowed to be carried forward, we cannot expand the scope of the statute. Section 80 stipulates that return of income is to be filed within the prescribed time, which assesse did complied with although provisional financial statements were filed along with return of income. Moreover, the tribunal in first round of litigation has directed AO to assess income/ loss of the assesse on the basis of audited financial accounts and other materials in accordance with law .Thus, under the above facts and circumstances, we are of the considered view, that there is no justification for denying the carry forward of the business loss for the year under consideration based on the audited financial statements keeping in view applicable and relevant provisions of the 1961 Act for computing such loss, and we confirm the appellate order of the ld. CIT(A). The appeal filed by Revenue stand dismissed. We order accordingly.

7. In the result, the appeal filedby Revenue in ITA no. 742/Coch/2019 for ay: 2002-03 stands dismissed.

Order pronounced in the open Court on 23rd February, 2022

Sd/-	Sd/-
(George Mathan)	**(Ramit Kochar)**
Judicial Member	**Accountant Member**

Cochin, Dated: 23rd February, 2022

Copy to:

1. *The Appellant- The Deputy Commissioner of Income Tax, Circle 1(1), 3rd Floor, AayakarBhawan, Kowdiar, Thirvanthapuram, Kerala*
2. *The Respondent-Brahmos Aerospace (Thiruvanthapuram) Limited , Chackai , Beach Post, Thiruvanthapuram,Kerala*
3. *The CIT(A) –Thiruvananthapuram*
4. *The Pr.CIT, Thiruvananthapuram*

5. *The Sr.DR, ITAT, Cochin*
6. *Guard File*

By Order

//True Copy//

Assistant Registrar
ITAT, Cochin

TNMM