IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "H" DELHI

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
AND
SHRI SUDHIR KUMAR, JUDICIAL MEMBER

ITA No.430/Del/2021
Assessment Year 2013-14

Ritika Pvt. Ltd. 280, Udyog Vihar, Phase-I Gurgaon, Haryana	Vs.	**ACIT, Central Circle-4** New Delhi
TAN/PAN: AABCR5510N		
(Appellant)		(Respondent)

Applicant by:	Shri Ved Jain, Advocate Ms. Supriya Mehta, Chartered Accountant		
Respondent by:	Ms. Beenu, Sr.DR		
Date of hearing:	10	06	2024
Date of pronouncement:	19	06	2024

O R D E R

PER PRADIP KUMAR KEDIA - A.M.:

The captioned appeal has been filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-23, New Delhi ('CIT(A)' in short) dated 10.02.2021 arising from the assessment order dated 22.03.2016 passed by the Assessing Officer (AO) under Section 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2013-14.

2. The grounds of appeal raised by the assessee read as under:

"1. For that on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the assessee was not eligible to raise fresh claim/s in the course of assessment/appeal which was not claimed in the return of income.

2. For that on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in rejecting the assessee's claim for deduction for trade deposits and other receivables written off amounting to Rs.11,47,669/-.

3. For that on the facts and in the circumstances of the case and in law,

the Ld. CIT(A) erred in rejecting the assessee's claim of irrecoverable deposits and advances written off aggregating to Rs.1,49,97,104/- which were given in the course of business and therefore allowable in terms of Section 28/37 of the Act.

4. For that on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not allowing the deduction for rates and taxes of Rs.1,15,000/-.

5. For that on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in rejecting the assessee's claim for deduction for the service tax of Rs.64,42,880/- deposited on the rent paid to landlords.

6. For that on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating that the service tax paid was to be allowed on payment basis u/s. 43B of the Act.

For that on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not allowing the claim of electricity and water charges of Rs.8,79,714/- which pertained to prior years."

3. When the matter was called for hearing, the ld. counsel for the assessee pointed out that the ground raised in the present appeal were also raised before the CIT(A).

3.1 It was submitted that the grounds raised in the present appeal correspond to grounds no.8 to 13 raised before the CIT(A). The CIT(A) however declined to entertain these grounds on the premise that these grounds do not arise from the order of the AO and are in the nature of new claims which are neither borne out from the return of income nor from the assessment order. The CIT(A) has observed that claim raised for the first time before him are not included in the return of income and therefore, such claim are not verified as true and correct by the assessee. Hence, Grounds raised from 8 to 13 cannot be entertained for adjudication. The ld. counsel in this regard submitted that it is trite that Revenue cannot take advantage of the mistake or ignorance of the assessee towards his rights the claim of expenses which do not form part of the original return or even the revised return, can still be considered by the appellate authorities and can examine the admissibility of such expenses / deduction in accordance with law. A reference was made to the judgment rendered in the case of *Goetze India Ltd. Vs. CIT (2006)*

157 Taxman 1 (SC); *CIT vs. Pruthvi Brokers & Shareholders, 349 ITR 336 (Bom)*; *CIT vs. Jai Parabolic Spring Ltd. (2008) 306 ITR 462 (Del)* and plethora of other judgments to support the consideration of new claims for the first time before the CIT(A) or before ITAT. The ld. counsel also referred to the decision rendered before the Co-ordinate Bench in the case of *AppDyanamics International Ltd. vs. ACIT, ITA No.2413/Del/2023 order dated 29.02.2024* wherein identical issue has been dealt with in favour of assessee.

4. The ld. DR for the Revenue, on the other hand, supported the order of the CIT(A) and submitted that in the absence of any verification in the return of income, such new claims arising outside the return of income should not be entertained as the department is not made available with any remedy by way of penalty and prosecution etc. against the assessee, if such new claims are found to be incorrect or false subsequently. The ld. DR thus submitted that no interference with the order of the CIT(A) is called for.

5. We have carefully considered the rival submissions and perused the first appellate order as well as assessment order and also the case law cited.

6. The assessee for the first time has made certain claims before the CIT(A) by way of grounds / statements. The CIT(A) declined to entertain these claims on the ground that they do not either form part of the original return or the revised return. The CIT(A) ruled that fresh claims made by the assessee could not be entertained *de hors* the ROI. The relevant part of the first appellate order is reproduced herein for ready reference:

> *"6.6.1 In Ground No. 8, the appellant has contended that facts and in the circumstances of the case, the AO be directed to allow deduction for trade deposits and other receivable written off amounting to Rs. 11,47,669/- in computing business income.*
>
> *6.6.2 This ground of appeal does not arise from the order of Assessing Officer.*

Hon'ble Mumbai High Court in the case of Ultratech Cement td Vs AddI.CIT [2017: TIOL-785-HC-MUM-IT] held that an additional ground for claiming deduction u/s 80IA cannot be allowed by the Tribunal, when no claim was made before the original authority and there is nothing on record to indicate as to what prevented the assessee from raising such a claim before lower authorities.

Hon'ble Supreme Court in the case of Addl. CIT Vs Gurjargravures (P.) Ltd [1978] 111 ITR 1 (SC) held that the High Court was not justified in holding that if an item of income was taxed, the question of its non-taxability should be taken to have been considered by the ITO though no such claim had been made before him by the assessee.

Hon'ble Kerala High Court in the case of C.K. Gopinathan Vs CIT [20031 127 Taxman 416 (KeralaV/2003) 260 ITR 213 (Kerala) held that since assessee had not raised alternate contention that credits made in his books should be treated as income of earlier years before Assessing Officer or first appellate authority, he should not be allowed to raise such contention before second appellate authority.

Hon'ble Supreme Court in the case of Goetze India Ltd Vs CIT [2006] 284 ITR 323 (SC) held that assessee cannot claim deduction without filing the revised return of income.

6.6.3 This ground of appeal does not arise from the order of Assessing Officer. The appellant has duly signed verification in the income tax return stating that the facts therein are true and correct. It cannot, now, raise grounds of appeal claiming that certain deductions had wrongly been claimed by it in its return of income. Moreover, the facts required to decide the issue are not available on record of the Assessing Officer. In view of above discussion and judicial decisions, it is held that the appellant cannot raise this ground of appeal. Hence, Ground No. 8 is dismissed.

6.7.1 In Ground No. 9, the appellant has contended that facts and in the circumstances of the case, the AO be directed to allow deduction for bad and irrecoverable loans, deposits and advances written off amounting to Rs. 1,49,97,104/- in computing business income.

6.7.2 This ground of appeal does not arise from the order of Assessing Officer. In view of detailed reasons given in Ground No. 8 above, Ground No. 9 is dismissed.

6.8.1 In Ground No. 10, the appellant has contended that facts and in the circumstances of the case, the AO be directed to allow deduction for rates and taxes of Rs. 1,15,000/-.

6.8.2 This ground of appeal does not arise from the order of Assessing Officer. In view of detailed reasons given in Ground No. 8 above, Ground No. 10 is dismissed.

6.9.1 In Ground No. 11, the appellant has contended that facts and in the circumstances of the case, the AO be directed to allow deduction for Rs. 64,42,880/-which represented the service tax levied on rent and which was paid during the relevant year.

6.9.2 This ground of appeal does not arise from the order of Assessing Officer. In view of detailed reasons given in Ground No. 8 above, Ground No. 11 is dismissed.

6.10.1 In Ground No. 12, the appellant has contended that facts and in the circumstances of the case, the appellant having not accounted service tax on rent in the earlier years on the basis of stay granted by the High Court, ought to have allowed the deduction for service tax in the year under consideration on actual payment basis.

6.10.2 This ground of appeal does not arise from the order of Assessing Officer. In view of detailed reasons given in Ground No. 8 above, Ground No. 12 is dismissed.

6.11.1 In Ground No. 13, the appellant has contended that facts and in the circumstances of the case, the AO be directed to allow deduction for electricity and water charges of Rs. 8,79,714/-

6.11.2 This ground of appeal does not arise from the order of Assessing Officer. In view of detailed reasons given in Ground No. 8 above, Ground No. 13 is dismissed."

7. In defense, the assessee claims that the tax can be levied and collected only as provided under the Act. If an assessee under a mistake or misconception or not being properly instructed is over assessed, the authorities under the Act are required to ensure that only legitimate tax dues are collected. The omission to make rightful claim towards expenses/deduction etc. in the return of income would not *ipso facto* bar an assessee from claiming an expense or disputing an addition if it is otherwise permissible under law.

8. We find that in such fact situation, the Co-ordinate Bench of Tribunal in *AppDynamics International Ltd. (supra)* has observed as under:

"12. The taxability of receipts on sale of software under the provisions of the Act r.w. applicable DTAA is the core of the controversy. The incidental question that arises is whether the AO was justified in assessing the receipts on sale of software as 'Royalty Income' in the factual matrix merely because the assessee has offered such income as taxable income in its ITR. Similar question extends to receipts from Bharti Airtel on account of sale of software not included in the return of income.

12.1 It is trite that the authorities under the Act are under sacrosanct obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or not being properly instructed is over assessed, the authorities under the Act

are required to ensure that only legitimate tax dues are collected. This is the view which flows form innumerable judgments including CIT vs. Shelly Products (2003) 261 ITR 367 (SC), S. R. Koshti vs. CIT (2005) 276 ITR 165 (Guj), Ester Industries vs. CIT (2009) 185 TAXMAN 266 (Delhi) and CIT vs. Pruthvi Brokers & Shareholders (P.) Ltd. [2012] 349 ITR 336 (Bom). The essence of these decisions are that mere admission on the part of the assessee with respect to an addition/disallowance in its original return or in revised return would not ipso facto bar an assessee from claiming an expense or disputing an addition if it is otherwise permissible under law. It is thus well settled that if a particular income is not taxable under the Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. The Revenue Authorities cannot enforce untenable actions of the assessee against it which led to declaration of income of higher amount incorrectly. It is thus open to assessee to show that it was over assessed under erroneous impression of law or facts even if it is attributable to the mistake of assessee.

12.2 So viewed, we do see potency in the argument laid on behalf of the assessee that the Assessing Officer committed error in denying the relief claimed. In our considered view, the action of the AO is in defiance of the judicial precedents on the issue and thus cannot be countenanced. In our view, the assessee cannot be prevented from raising a claim that receipts from sale of software wrongly offered as royalty income and not chargeable to Indian Taxation merely because such income was wrongly offered in the ROI and which was not revised. The factual matrix towards the nature and character of sale proceeds qua the underlying evidences however does not appear to have been verified by the AO at any stage of the proceedings.

12.3 Without any expression of opinion on merits on taxability of such receipts, in our view, it would be in fitness of things to remit the issue back to the file of AO. It shall be open to the assessee to demonstrate that receipts from various customers in India arises on account of sale of software and does not give rise to any chargeable income in law. The assessee shall be at liberty to adduce such evidences as it may deem expedient to demonstrate that income arising on sale of software were wrongly reported as royalty income and is not chargeable to tax in India in terms of the provisions of the Act read with provisions of DTAA. Similarly, the Assessee may take appropriate plea on taxability or otherwise of receipt from Bharti Airtel which went unreported in the ITR. The issue is accordingly set aside to the file of the AO for fresh determination of taxability of impugned receipts from Bharti Airtel not offered in ITR and other customers included under the ITR in question in accordance with law.

13. Consequently, Ground No.1 to 4 of the appeal of the assessee is allowed for statistical purposes in terms of observations hereinabove."

9. As can be seen from the decision noted above, it is open to the assessee to show that it was over assessed under erroneous impression of law or facts even if it is attributable to the mistake of the assessee. The effect of judgment rendered in the case of *Goetz India Ltd. (supra)* was

examined by the Hon'ble Delhi High Court in the case of *CIT vs. Jai Parabolic Spring Ltd. (2008) 306 ITR 462 (Del).* The Hon'ble High Court observed that the issue raised in *Goetz India Ltd. (supra)* was limited to the power of the assessee authority and did not impinge upon the power of the Tribunal as was in the case of *National Thermal Power Co. Ltd. vs. CIT; (1998) 229 ITR 383 (SC)* and other judgments. The appellate forum is thus not prevented from entertaining the claims made by the assessee before the CIT(A) *per se*.

10. Hence, the dismissal of Grounds No.8 to 13 of the appeal of the assessee before CIT(A) *in limine* is not in consonance with judicial dicta available on the issue. Hence, we set aside the summary order of the CIT(A) on such issues and restore the matter to the file of the AO rather than the CIT(A) for examination of fresh claims raised and for determination of correction and admissibility of such claims in accordance with law. The AO shall give reasonable opportunity to the assessee to enable it to corroborate such claims with direct and circumstantial evidences as may be considered expedient.

10. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 19th June, 2024.

Sd/-
[SUDHIR KUMAR]
JUDICIAL MEMBER

Sd/-
[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER

DATED: June**, 2024**
Prabhat