

rrpillai

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 1392 OF 2014
WITH
INCOME TAX APPEAL NO. 1531 OF 2014**

The Commissioner of Income Tax –I ... Appellant
Pune

vs.

B. G. Shirke Construction ... Respondent
Technology Pvt. Ltd.

.....

Mr.Suresh Kumar i/b. Mr.Vipul Arun Bajpayee for Appellant in both Appeals.
Mr.Mihir Naniwadekar a/w. Mr. Prasad Shenoy and Mr. Rohan Deshpande for the
Respondent in both the Appeals.

.....

**CORAM : M.S.SANKLECHA &
A.K. MENON, JJ.
DATE : 6th MARCH, 2017**

P.C. :

1. Both these Appeals under Section 260-A of the Income Tax Act, 1961 (the Act) challenge the order dated 31st October, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The common impugned order disposes of the petitioner's appeals for Assessment Years 2003-04, 2006-07, 2007-08 and 2008-09 emanating from notices under Section 153A r.w.s. 143(3) of the Act. These two appeals relate to the Assessment year 2007-08 and 2008-09 being two years in which the pending assessment proceedings had abated on issue of notice under Section 153A of the Act.

2. The Revenue has urged the following substantial question of law for our consideration :-

(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the respondent-assessee was entitled to make a claim which was not made in the return of income originally filed under Section 153A r.w.s. 143(3) of the Act before the Assessing Officer and also before the appellate Authorities under the Act ?

3. The respondent-assessee is engaged in the execution of construction contracts. On 18th December, 2008 there was a search and seizure action under Section 132 of the Act upon the respondent-assessee. Consequent thereto a notice under Section 153A of the Act was issued to the respondent for the assessment years 2003-04, 2006-07, 2007-08 and 2008-09. However, as the assessment for the subject assessment year 2007-08 and 2008-09 were pending before the Assessing Officer they stood abated in view of the second proviso to Section 153A(1) of the Act.

4. Consequent to the above, the respondent-assessee filed its return of income for the subject assessment years under Section 153A r.w.s. 139(1) of the Act. In its return of income filed consequent to notice under Section 153A of the Act, in both the assessment years, respondent-assessee had while offering its income on account of execution of the contracts had not excluded the amounts retained by its customers till the completion of the defect liability period after completion of the contract. This amount could not be quantified in the short time available to

file its return of income. Therefore, the respondent filed a note alongwith its returns of income pointing out the aforesaid facts and its seeking appropriate deduction when completing the assessments. The note also pointed out that the aforesaid amounts had inadvertently not been claimed as a deduction in its original return of income filed in the regular assessment proceedings, which now stand abated. During the assessment proceeding the respondent assessee quantified its claim year wise placing reliance upon relevant clause of the contract with its customers so as to claim deduction of the taxable income to the extent the customers have retained i.e. 5-10% of the contract amount till the completion of the defect liability period.

5. The Assessing Officer by its two separate Orders dated 31st December, 2010 passed under Section 153A r.w.s. 143(3) of the Act did not entertain the aforesaid claim when quantified during the assessment proceedings. This by holding himself bound by the decision of the Apex Court in ***Goetze (India) Ltd. vs. Commissioner of Income Tax [2006]284 ITR 323*** to hold that he has no power to allow deduction which is not been claimed either in the return of income as originally filed or claimed by way of filing a revised return of income.

6. Being aggrieved the respondent carried the issue in appeal to the Commissioner of Income Tax Appeals (CIT(A)). By order dated 23rd December, 2011, the CIT(A) dismissed the respondent's appeal upholding the Orders dated 31st December, 2010 of the Assessing Officer for the subject Assessment years in

applying the decision of the Apex Court in the case of Goetze (India) Ltd. (supra) to reject consideration of the claim.

7. On further appeal, the Tribunal by the impugned order held that although it is undisputed that the computation of income did not reflect the actual quantification of the amount of retention money held by the customers which cannot be subjected to tax, yet the note filed alongwith the return of income indicated the claim in principle (absent quantification). This quantification was explained during the assessment proceeding alongwith relevant clauses of each contract with its customers. Thus the impugned Order held that the decision of Goetze (India) Ltd. (supra) will not apply in the present facts as in this case the claim for deduction on account of retention money had been made alongwith the return of income, only the quantification of the amount was made during the assessment proceedings. Thus the impugned order of the Tribunal holds that on merits that the claim made for deduction of retention money as quantified during Assessment proceedings was to be allowed. In any event, the impugned order further proceeds to hold that even if the quantification made during the course of the assessment proceeding is considered to be a fresh claim and could not have been entertained by the Assessing Officer, there was no bar / impediment in raising the claim before the Appellate Authorities under the Act for consideration. Thus as the facts are already on record the same could have been considered by the Appellate Authorities. In that regard reliance was placed upon decision of

Delhi High Court in *Commissioner of Income-Tax vs. Jai Parabolic Springs Ltd [2008] 306 ITR 42*. Thus allowed the respondent-assessee's appeal before it.

8. The grievance of the Revenue before us is that the impugned order is unsustainable as it is a passed in the face of the Apex Court Order in Goetze India Ltd.(supra). It is submitted that the impugned order could not have held that the claim for deduction could be entertained by the Assessing Officer in the absence of the same finding a place either in return of income or in the revised return of income. It is further submitted that in view of the decision of the Apex Court in *Commissioner of Income Tax v. Sun Engineering Works (P) Ltd. [1992]198 ITR 297* a re-assessment consequent to re-opening of the assessment cannot lead to reduction of income which had been originally assessed to tax. In the above view, it is submitted that the impugned order of the Tribunal is not justified and admission of the appeal is warranted.

9. For the purpose of the present appeal, the issue whether or not the claim of quantification made by the respondent before the Assessing Officer for the subject assessment years would be a fresh claim or not is academic. This in view of the fact that the impugned order has held that even if one accepts that the quantification of the amount of deduction made during the course of assessment proceedings is a fresh claim it is a settled position so far as this Court is concerned that it can be made before and could be considered by the Appellate Authorities. The right of an assessee to raise a fresh claim before the Appellate

Authorities is no longer res-integra in view of the decision of this Court in ***Commissioner of Income Tax v. Pruthvi Brokers and Shareholders Pvt.Ltd [2012]349 ITR 336*** wherein the reference has also been made amongst other decisions, to the decision of the Delhi High Court in *Jai Parabolic Springs Ltd.* (supra) wherein it has been held that there is no prohibition in the Tribunal to entertaining additional ground / claims which was not placed before the lower Authorities. In view of the above, we are not called upon to decide the applicability of the decision of *Goetze (India) Ltd.* in the present facts viz. whether or not claim for quantification was a fresh claim which is not made in the return of income or in the revised return of income.

10. The reliance on the decision of the Apex Court in ***Commissioner of Income Tax v. Sun Engineering Works (P) Ltd.[1992] 198 ITR 297*** by the Revenue is misplaced. The above case dealt with re-opening of an assessment under Section 147 of the the Act. It was in that context that the Apex Court observed that the Order passed under Section 147 / 148 and the Assessing Officer is primarily restricted to such income which has escaped assessment and does not permit reconsideration of issue which are concluded in the earlier assessment years in favour of the Revenue.

11. In the present facts for the subject assessment years it is an undisputed position that the pending assessment before the Assessing Officer consequent to return filed under Section 139(1) of the Act for the subject Assessment years had

abated. This was on account of the search and as provided in second proviso to Section 153A(1) of the Act. The consequence of notice under Section 153A(1) of the Act is that assessee is required to furnish fresh return of income for each of the six assessment years in regard to which a notice has been issued. It is this return which is filed consequent to the notice which would be subject of assesment by the Revenue for the first time in the case of abated assessment proceedings. Consequent to notice under Section 153A of the Act the earlier return filed for the purpose of assessment which is pending, would be treated as non est in law. Further, Section 153A(1) of the Act itself provides on filing of the return consequent to notice, the provision of the Act will apply to the return of income so filed. Consequently, the return filed under Section 153A(1) of the Act is a return furnished under Section 139 of the Act. Consequently, the respondent-assessee is being assessed in respect of abated assessment for the first time under the Act. Therefore the provisions of the Act which would be otherwise applicable in case of return filed in the regular course under Section 139(1) of the Act would also continue to apply in case of return filed under Section 153A of the Act and the case laws on the provision of the Act would equally apply.

12. This Court in Pruthvi Brokers and Share holders P.Ltd. (supra) while dealing with a return of income filed under Section 139(1) of the Act has held that an assessee is entitled to raise a fresh claim before the Appellate Authorities, even if the same was not raised before the Assessing Officer at the time of filing return of

income or by filing a revised return of income. This Court also placed reliance upon decision of the Apex Court in *National Thermal Power Co. Ltd. V CIT [1998] 229 ITR 383* wherein while dealing with the powers of the Assessing Officer it had held that a claim not made in the return of income, the Court may lead to non entertainment of claim by the Assessing Officer. However, this restriction in the power of the Assessing Officer will not affect the power of the appellate Tribunal to entertain a fresh claim.

13. In view of the fact that the issue stands concluded by the decision of this Court in *Pruthvi Brokers and Shareholders P. Ltd (supra)* the question as proposed does not give rise to any substantial question of law. Thus not entertained.

14. Accordingly, both the Appeals are dismissed. No order as to costs.

(A.K. MENON,J.)

(M. S. SANKLECHA,J.)