

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No.2650/Bang/2019
Assessment year: 2006-07

Shri Thimmareddy Krishnareddy, No.1/1, Panathur Village & Post, Bengaluru East, Bengaluru – 560 087. PAN: ATWPK 3029J	Vs.	The Income Tax Officer, Ward 4(2)(4), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Anand Bhat, CA
Respondent by	:	Shri Pradeep Kumar, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	21.12.2020
Date of Pronouncement	:	04.01.2021

ORDER

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order of CIT(Appeals)-2, Bengaluru dated 18.10.2019 for the assessment year 2006-07.

2. The assessee has raised the following grounds:-

“The Grounds mentioned hereinafter are without prejudice to one another.

1. That the appellate order passed by the Commissioner of Income-tax (Appeals)-2 Bangalore (hereinafter referred to as the Learned Commissioner) u/s 250 of Income-tax Act, 1961 in appeal ITA No. TR

242/CIT(A)-2/2017-18 dated 18th October 2019 is arbitrary, erroneous, bad in law and liable to be quashed.

2. That the order passed by the Learned Commissioner of Income-tax is without appreciating the factual position, underlying documentation and is contrary to the provisions of Income-tax Act.

3. That the Learned Commissioner has erred in confirming the action of AO of erroneously and incorrectly computing long term capital gains at INR.13,90,206 and short term capital gains of INR.37,14,599.

4. That the learned Commissioner has erred in not considering exemption u/s 54B of Rs.40,95,341 for acquisition of agricultural land against sale of agricultural lands being short term capital gains Rs.37,71,014 as well as against long term capital gains of Rs.3,24,327.

5. That the learned Commissioner is not justified in rejecting the claim of the appellant on the ground that the exemption u/s 54B is not claimed in the original return and in original grounds of appeal before the learned Commissioner though the revised grounds of appeal are duly considered and not expressly rejected by the learned Commissioner.

6. That the learned Commissioner is not justified in incorrectly applying the Supreme Court decision in Goetze (India) Ltd v. CIT [2006] 284 ITR 323(SC) and incorrectly holding that if the power of CIT (Appeals) are coterminous with Assessing Officer, the Hon'ble Supreme Court's decision rendered in the case of Goetze India Limited is applicable as well.

7. That the learned Commissioner is not justified in not following the order of jurisdictional Income-tax Appellate Tribunal Bangalore decision in Rakesh Singh v. ACIT [2012] 26 taxmann.com 240 (Bang) and the learned Commissioner is not justified in not admitting and

adjudicating the claims made by the appellant before the learned Commissioner u/s 54B and 5F.

8. That the learned Commissioner has erred in not considering exemption u/s 54F with respect to construction of house property amounting to Rs.43,54,152 out of the total investment in residential property of Rs.65,00,000.

9. That the learned Commissioner has erred in directing the AO to levy tax and interest.

10. That the appellant craves leave to add to and/ or to alter, amend, rescind, modify, the grounds above produce further documents before or at the time of hearing of this appeal.”

3. The facts of the issue are that the assessee claimed that he has sold an agricultural land in March, 2006 for a consideration of Rs.61 lakhs and after deducting the cost of acquisition, the long term capital gain was worked out @ Rs.52,85,489. Against this, claim for deduction u/s. 54F of the Act is that the sale proceeds are invested in residential building constructed at Panathur Village, Bangalore at an estimated cost of Rs.65 lakhs. The assessee filed supporting evidences of cost of construction. The AO granted deduction u/s. 54F of Rs.38,95,283 and brought the balance amount of Rs.13,90,206 as taxable long term capital gain.

4. Further, the assessee offered short term capital gain at Rs.36,88,161. However, the AO worked it out at Rs.37,14,599. Before the CIT(Appeals), the assessee claimed deduction u/s. 54B on the reasoning that the assessee is entitled for claim of deduction u/s. 54B of the Act at Rs.37,71,014 in respect of short term capital gain and Rs.3,24,327 with regard to long term capital gain. The CIT(Appeals) rejected the claim of assessee on the reasoning that assessee has not filed the necessary

revised return before the AO. Aggrieved, the assessee is in appeal before us.

5. Regarding exemption u/s. 54F, we are of the opinion that the assessee has to place necessary evidence in support of the same since the order of the CIT(Appeals) is cryptic on the issue. We therefore direct the assessee to place necessary evidence before the AO and the AO shall examine the issue, whether the assessee is entitled for additional deduction of Rs.13,90,206 u/s. 54F with regard to long term capital gain.

6. With regard to exemption u/s. 54B of the Act, we find that the reason for rejection by the CITA is that assessee has not filed revised return of income before the AO. The assessee relied on the order of Tribunal in the case of *Rakesh Singh v. ACIT, 139 ITD 128 (Bang)* wherein it was held that the first appellate authority could entertain new claim of assessee, though there is no revised return filed by the assessee before the AO.

7. Now the question before us is, whether the first appellate authority could have examined the claim of assessee u/s. 54B of the Act, though there was no revised return filed by the assessee. In our opinion, at this stage it is proper to go through certain case laws on this issue:-

8. The Hon'ble Supreme Court in the case of *Jute Corpn. of India Ltd. v. CIT [1991] 187 ITR 688/[1990] 53 Taxman 85* was considering the following facts:-

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.

9. 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)

"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 AAC 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 AAC has, therefore, plenary powers in disposing of an appeal. The scope of his power is co-terminus with that of the ITO. He can do what the ITO can do and also direct him to do what he has failed to do".

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 ITO, 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 ITO. 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 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 ITO".

[Emphasis supplied].

10. 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.

11. The Full Bench of the Hon'ble Mumbai High Court in the case of *Ahmedabad Electricity Co. Ltd. v CIT [1993] 199 ITR 351/66 Taxman 27* 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, the Hon'ble Bombay High Court in the case of

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 Hon'ble Division Bench of Mumbai High Court 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?

12. 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 sub-section (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".

13. The Hon'ble Supreme Court in the case of *National Thermal Power Co. Ltd. v. CIT* [1998] 229 ITR 383 was considering a case where 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 an 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."

14. 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 has a right to file an appeal/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.

15. The Hon'ble Supreme Court in the case of *Goetze (India) Ltd. (supra)* relied on by the CIT is distinguishable on the facts. 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 CIT(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]

16. The Hon'ble 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 appellate authorities.

17. A Division Bench of the Hon'ble Delhi High Court in the case of *CIT v. Jai Parabolic Springs Ltd. [2008] 306 ITR 42/172 Taxman 258* had distinguished the Hon'ble Apex Court judgement in the case of *Goetze (India) Ltd. (supra)*. The Hon'ble Delhi High Court, 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 Hon'ble High Court 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.

18. In the present case also, whether the assessee is entitled for exemption u/s. 54B or not, should have been examined by the CIT(Appeals). However, he rejected the claim of capital gain on the reason that the assessee has not filed revised return of income by placing reliance on the judgment of Hon'ble Supreme Court in the case of *Goetze (India) Ltd. v. CIT [2006] 284 ITR 323 (SC)*. In our opinion, this judgment is applicable with regard to claim before the AO, and not before the first appellate authority or the appellate Tribunal. Even if there is no revised return, the assessee can claim exemption before the appellate authorities. It being so, we set aside the order of the CIT(Appeals) on this issue and remand the same to the AO with a direction to consider the claim of assessee u/s. 54B of the Act and decision afresh on merits. The assessee shall place necessary evidence in respect of the claim of deduction u/s. 54B of the Act and the same shall be examined by the AO on merits in accordance with law.

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

Pronounced in the open court on this 4th January, 2021.

Sd/-

(N V VASUDEVAN)
VICE PRESIDENT

Bangalore,

Dated, the 04th January, 2021.

/Desai S Murthy /

Sd/-

(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.