IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri N.R.S. Ganesan (JM) and Shri B.R. Baskaran(AM)

I.T.A No.31/Coch/2010
(Assessment year 2006-07)
&
C.O. No.02/coch/2010
(Arising out of ITA No.74/Coch/2010)
(Assessment year 2006-07)

Apollo Tyres Ltd 6th Floor, Cherupushpam BlDG & DTs Ernakulam Shanmugham Road, Ernakulam PAN : AAACA6990Q (Appellant)	vs	the Dy.CIT, Cir.1(1) Range-1, (Respondent)

I.T.A No.74 /Coch/2010
(Assessment year 2006-07)

Dy.CIT, Cir.1(1) Range-1, Ernakulam Ernakulam (Appellant)	vs	M/s Apollo Tyres Ltd Shanmugham Road, (Respondent)

Assessee by :Shri Percy J Pardiwala, sr.counsel/
Shri T.P. Ostwal / Ms. Indra Anand /
Mr. Madhur Agarwal, Adv.

Respondent by :Shri M Anil Kumar, C.I.T. /

Smt. Susan George Verghese

Date of hearing : 27-03-2013
Date of pronouncement: 29-05-2013

O R D E R

Per N.R.S. Ganesan (JM)

Both the appeals of the assessee and the revenue are arising out of the very same order of the C.I.T.(A) for the assessment year 2006-07. The assessee has filed cross objection against the very same order of the C.I.T.(A). Therefore, we heard both the appeals and the cross objection together and disposing of the same by this common order.

2. Let us first take the assessee's appeal in I.T.A. No.31/Coch/2010.

3. The first ground of appeal is with regard to disallowance of Rs.68,68,556 u/s 40(a)(ia) of the Act.

4. Shri PJ Pardiwala, the ld.senior counsel for the assessee submitted that it is not a case of non deduction of tax. According to the ld.senior counsel, in fact, tax was deducted but it was short deduction. Referring to the chart, the ld.senior counsel submitted that in the case of Achuthan Pillai & Co tax was deducted at 16.90%. However, tax should have been deducted at 18.53%. According to the ld.senior counsel, the surcharge was not considered while deducting tax. In many cases like that surcharge was not considered for the purpose of deduction of tax. Referring to column No.6 in the chart, the ld.senior counsel submitted that in the case of Valappila Communications the tax was deducted at 1.13% whereas the tax ought to have been deducted at 2.24%. Likewise, according to the ld.senior counsel, in respect of payment to contractors, like Delhi Gujarat Fleet Carriers, OM Logistic Ltd, etc. the tax was deducted at 1.22%, 1.12%, respectively, whereas the tax ought to have been deducted at 2.24%. According to the ld.senior counsel, the assessee deducted tax applicable to sub contractors instead of the rate applicable to contractors. The ld.senior counsel further submitted that in some cases, the deductees have filed certificates for deducting the tax at a lesser rate. Therefore, according to the ld.senior counsel,

it is not a case of non deduction of tax, but it is a case of short deduction. The ld.senior counsel further submitted that short deduction occurred due to the fact that the surcharge was not included for computation.

5. Referring to section 40(a)(ia) of the Act, the ld.senior counsel submitted that first the tax is deductible at source under Chapter XVII-B of the Act and if not deducted or after such deduction it was not paid before the due date, then the provisions of section 40(a)(ia) would come into operation. According to the ld.senior counsel, in case of short deduction, the provisions of section 40(a)(ia) would not be applicable at all. Referring to provisions of section 201(1A) of the Act, the ld.senior counsel pointed out that the legislature intended to levy penalty in case the person responsible to make payment does not deduct whole or any part of the tax or after deducting fails to pay the tax as required under the Act and shall also pay interest. Therefore, the legislature intended to levy penalty even in case there was a short deduction which is obvious from the language employed in section 201(1A) of the Act. A similar language is not found in section 40(a)(ia) of the Act. In section 40(a)(ia) of the Act, the

legislature does not intend to include the words “whole or any part of tax under Chapter XVII-B”. The very fact that “any part of the tax” is omitted to be included in section 40(a)(ia) of the Act, the ld.senior counsel submitted that merely because there was a short deduction of tax, the provisions of section 40(a)(ia) of the Act would not be applicable.

6. The ld.senior counsel placed his reliance on the unreported judgment of the Calcutta High Court, in ITAT No.183 of 2012 GA No.2069 of 2012 judgment dated 03rd December, 2012, in the case of CIT, Kolkatta-XI vs M/s S.K. Tekriwal, copy of which is filed by the ld.senior counsel The ld.senior counsel submitted that in that case, on identical circumstances, the Kolkatta Bench of this Tribunal found that there is no need in section 40(a)(ia) to treat the assessee as defaulter when there was a short deduction. The Kolkatta Bench of this Tribunal further found that if there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payment falling under various TDS provisions the assessee can be declared as an assessee in default u/s 201 of the Act and no disallowance can be made by invoking the provisions of section

40(a)(ia) of the Act. The Calcutta High Court confirmed the decision of the Kolkata Bench of this Tribunal. Referring to the decision of the Mumbai Bench of this Tribunal in Dy.CIT vs Chandabhoy and Jassobhoy (2012) 49 SOT 448 (Mum), the ld.senior counsel submitted that the Division Bench of the Mumbai Bench of this Tribunal found that section 40(a)(ia) did not apply in case of short deduction and it is applicable only in the event of non deduction of tax. The ld.senior counsel has placed reliance on the judgment of the Andhra Pradesh High Court in P.V. Rajagopal vs UOI(1998) 99 Taxman 475 (AP) and submitted that in this case the Andhra Pradesh High Court for the assessment years 1989-90 to 1993-94 had an occasion to consider the provisions of section 201 as it was then in existence. After referring to the provisions of section 201 as it was in existence at the relevant point of time, the High Court found that section 201 has two limbs. One is – where the employer does not deduct tax and second is where after deducting tax fails to remit it to the government. The High Court found that there cannot be assumption if there is any shortfall due to any difference of opinion as to the taxability of any item the employer can be declared to be an assessee in default. In view of this judgment of the Andhra Pradesh

High Court, according to the ld.senior counsel, there is nothing in section 40(a)(ia) of the Act to disallow the entire amount when there was a lesser or short deduction of tax.

7. On the contrary, Shri M Anil Kumar, the ld.DR submitted that section 40(a)(ia) of the Act requires the assessee to deduct tax at the rate prescribed under Chapter XVII-B of the Act. If the tax was not deducted or after deduction it was not paid before the due date for filing of return u/s 139(1), then the whole of the amount shall be disallowed. Referring to the words “tax is deductible at source under Chapter XVII-B and such tax has not been deducted or after deduction has not been paid on or before the due date specified in sub section (1) of section 139”, the ld.DR submitted that “such tax” refers to the tax prescribed under Chapter XVII-B for deduction of tax. Therefore, it is obligatory on the part of the assessee to deduct tax under Chapter XVII-B of the Act at the rate prescribed and if for any reason such tax was not deducted as prescribed, then the assessee would face disallowance u/s 40(a)(ia) of the Act in respect of the entire such amount. The ld.DR submitted that the assessing officer has not disallowed the entire payment. According to the ld.DR, the

assessing officer restricted himself only in respect of the proportionate amount which was not deducted. Therefore, according to the ld.DR, the provisions of section 40(a)(ia) is applicable even in case of short deduction or lesser deduction of tax.

8. We have considered the rival submissions on either side and also perused the material available on record. We have also carefully gone through the provisions of section 40(a)(ia) of the Act, which reads as follows:

> "(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139:
>
> **Provided** that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due

date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Explanation.- For the purposes of this sub-clause.-

(i) "commission or brokerage" shall have the same meaning as in clause (i) of the Explanation to section 194H;

(ii) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(iii) "professional services" shall have the same meaning as in clause (a) of the Explanation to section 194J;

(iv) "work" shall have the same meaning as in Explanation III to section 194C;

(v) "rent" shall have the same meaning as in clause (i) to the Explanation to section 194-I;

(vi) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;"

Therefore, section 40(a)(ia) enables the assessing officer to disallow any payment towards interest, commission or brokerage, fee for professional service, fees for technical service etc. on which tax is

deductible at source under Chapter XVIIB and if such tax has not been deducted or after deduction has not been paid.

9. We have also carefully gone through the provisions of section 201(1A) which reads as follows:

> "(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest,-
>
> (i) At one per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and
>
> (ii) At one and one-half per cent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid,
>
> and such interest shall be paid before furnishing the statement in accordance with the provisions of sub-section (3) of section 200.)"

Section 201(1A) enables the assessing officer to levy interest in case the tax was not deducted either wholly or partly or after deduction it was not paid as required under the Act. In fact, the provisions of section 201(1A) was amended by Finance Act, 2001 with retrospective effect from 01-04-1962 after the judgment of the Andhra Pradesh High Court in P.V. Rajagopal (supra)

10. As rightly pointed out by the ld.senior counsel for the assessee in section 201(1A) the legislature intended to levy interest even in case of short deduction of tax. In other words, if any part of the tax which required to be deducted was found to be not deducted then interest u/s 201(1A) can be levied in respect of that part of the amount which was not deducted. Whereas the language of section 40(a)(ia) does not say that even for short deduction disallowance has to be made proportionately. Therefore, the legislature has clearly envisaged in section 201(1A) for levy of interest on the amount on which tax was not deducted whereas the legislature has omitted to do so in section 40(a)(ia) of the Act. In other words, the provisions of

section 40(a)(ia) does not enable the assessing officer to disallow any proportionate amount for short deduction or lesser deduction.

11. We have carefully gone through the judgment of the Andhra Pradesh High Court in the case of P.V. Rajagopal (supra). While considering the provisions of section 201 which stood for the assessment years 1989-90 to 1993-94, the Andhra Pradesh High Court found that there is nothing in the section to treat the employer as the defaulter where there is a shortfall in the deduction of tax at source. For the purpose of convenience, we are reproducing below paragraphs 34 and 35 of the judgment of the Andhra Pradesh High Court:

> "34. …….. We may now read the provisions of section 201.
>
> "Consequences of failure to deduct or pay.- (1) If any such person and in the cases referred to in section 194, the principal officer and the company of which he is the principal officer does not deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall, without prejudice to any other consequences

which he or it may incur, be deemed to be an assessee in default in respect of the tax:

Provided that no penalty shall be charged under section 221 from such person, principal, officer or company unless the Assessing Officer is satisfied that such person or principal officer or company, as the case may be, has without good and sufficient reasons failed to deduct and pay the tax.

(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at fifteen per cent per annum on the amount of such tax was deductible to the date on which such tax is actually paid.

(2) Where the tax has not been paid as aforesaid after it is deducted, the amount of the tax together with the amount of simple interest thereon referred to in sub-section (1A) shall be a charge upon all the assets of the person, or the company, as the case may be, referred to in sub-section (1)."

35. This section has two limbs, one is where the employer does not deduct the tax and the second where

> after deducting the tax fails to remit it to the Government. There is nothing in this section to treat the employer as the defaulter where there is a shortfall in the deduction. The Department assumes that where the deduction is not as required by or under this Act, there is a default. But the fact is that this expression 'as required by or under this Act' grammatically refers only to the duty to pay the tax that is deducted and cannot refer to the duty to deduct the tax. Since this is a penal section, it has to be strictly construed and it cannot be assumed that there is a duty to deduct the tax strictly in accordance with the computation under the Act and if there is any shortfall due to any difference of opinion as to the taxability of any item the employer can be declared to be an assessee in default."

12. After considering the provisions of section 201(1A) before amendment by Finance Act, 2001, the Andhra Pradesh High Court found that "as required under this Act" does not refer to mean to deduct tax in accordance with computation under the Act. In fact, the Parliament amended the section 201(1A) after this judgment of Andhra Pradesh High Court by incorporating the words "the whole or any part of tax" by Finance Act, 2001. The Division Bench of the Mumbai Bench of this Tribunal in the case of Chandabhoy and

Jassobhoy (supra) had an occasion to consider an identical issue. The Mumbai Bench found that short deduction of TDS, if any, could have been considered as liability under the Income-tax Act as due from the assessee. Therefore, the disallowance of the entire expenditure, whose genuineness was not doubted by the assessing officer is not justified. A similar view was also taken by the Kokatta Bench of this Tribunal in the case of CIT vs M/s S.K. Tekriwal (supra). In this case, on appeal by the revenue, the Calcutta High Court confirmed the order of the Kolkatta Bench of the Tribunal.

13. In view of the above, this Tribunal is of the considered opinion that section 40(a)(ia) does not envisage a situation where there was short deduction / lesser deduction as in case of section 201(1A) of the Act. There is an obvious omission to include short deduction / lesser deduction in section 40(a)(ia) of the Act. Therefore, this Tribunal is of the considered opinion that in case of short / lesser deduction of tax, the entire expenditure whose genuineness was not doubted by the assessing officer, cannot be disallowed. Accordingly, the orders of lower authorities are set side and the entire disallowance is deleted.

14. The next issue arises for consideration is with regard to disallowance of Rs.5,09,01,000 due to foreign exchange fluctuation loss.

15. Shri PJ Pardiwalla, the ld.senior counsel for the assessee submitted that in order to enhance the efficiency of its business and profitability, the assessee company gave a loan of 314 million Rands to its wholly owned subsidiary company, i.e. Apollo (Mauritius) Holdings Pvt Ltd between March, 2006 and June, 2006 to help the Apollo (Mauritius) Holdings Pvt Ltd to acquire Dunlop Tyres International (Pvt) Ltd, South Africa. Apollo (Mauritius) Holdings Pvt Ltd gave a loan to Apollo (South Africa) Holding Pvt Ltd, another wholly owned subsidiary of the assessee company for acquisition of Dunlop Tyres. In the month of January, 2006 a resolution was passed by the Board of Directors of the assessee company. The ld.senior counsel further pointed out that as per the terms of the loan it has to be paid in South African currency and the loan period shall be for ten years and the repayment shall be made in semi annual instalments starting from fourth year. According to the ld.senior

counsel, the loan given by the assessee to its 100% subsidiary of Mauritius company exposed to risk of increasing rupee liability due to exchange rate fluctuation. Therefore, the assessee entered into foreign exchange forward contract with Citi Bank N.A. in the month of January, 2006 in order to avoid increase in its liability for payment to be made to Mauritius subsidiary company by way of loan in foreign currency. According to the ld.senior counsel the purpose for which the forward contract was taken did not materialize till March, 2006. Therefore, the forward contract has to be settled on due date, i.e. 14th March, 2006. Because of this, the assessee has suffered aggregate loss of Rs.5,09,01,000.

16. The ld.senior counsel for the assessee further submitted that the object of advancing loan to Mauritius subsidiary company is only to help the subsidiary company to acquire another tyre manufacturing company in South Africa. According to the ld.senior counsel Dunlop Tyres is an unlisted South African tyre manufacturing company which owns two tyre manufacturing plants in South Africa. The Mauritius subsidiary company advanced the loan to Apollo (South Africa) Holding Pvt Ltd and accordingly the entire share capital of Dunlop

Tyres was acquired on 21-04-2006. The acquisition of Dunlop Tyres by South African subsidiary company enables the parent company, i.e. the assessee company enhances the productivity, profit and run its business more effectively and efficiently. Apart from that the distribution net work of Dunlop Tyres after acquisition increases the distribution net work and marketing focus of the assessee company. According to the ld.senior counsel, the assessee company acquired lot of advantages and leverages in acquiring Dunlop company in South Africa. According to the ld.senior counsel, the very purpose of advancing loan was to improve the business of the assessee and develop its business in South Africa. The loan advanced by the subsidiary company resulted in loss of Rs.5.09 crores. The loss on cancellation of the forward contract is closely connected with advancing of foreign currency loan. Therefore, according to the ld.senior counsel, it is integral and indivisible component of the loan. Therefore, the loss suffered by the assessee is for the purpose of business, hence, it is to be allowed u/s 37(1) of the Act. Referring to the reasons recorded by the assessing officer, more particularly, at paragraph 10 of the assessment order, the ld.senior counsel pointed out that the loss was incurred in the course of advancing loan to the

subsidiary company. Therefore, it is allowable u/s 37(1) of the Act. According to the ld.senior counsel, the expenditure incurred by the assessee is incidental to the business, therefore, it is to be allowed. According to the ld.senior counsel, the very purpose of entering into the forward contract is to safeguard the assessee against the enhancement of liability in advancing foreign currency loan due to exchange rate fluctuation. The loan was advanced to Mauritius subsidiary for commercial expediency. The assessee company acquired the benefit by way of expanding its distribution net work in South Africa. According to the ld.senior counsel the assessee has not acquired any capital asset by advancing loan to Mauritius subsidiary company. The benefit, if any, acquired by the assessee is only in the revenue field. Therefore, according to the ld.senior counsel, the entire loss due to foreign exchange fluctuation has to be allowed as revenue expenditure. The ld.senior counsel further submitted that acquisition of equity capital of Dunlop Tyres International (proprietory) Ltd by South Africa subsidiary company did not enlarge the profit making apparatus of the assessee company. The advantage of distribution net work acquired by the assessee is in the revenue field. Therefore, the loss suffered by the assessee

company in the forward contract has to be allowed as business expenditure.

17. On the contrary, Shri M Anil Kumar, the ld.DR submitted that admittedly the forward contract was entered into in respect of a loan advanced to Mauritius subsidiary company with an intention to acquire Dunlop Tyres International (proprietory) Ltd. Referring to the assessment order, more particularly, paragraph 10, the ld.DR pointed out that in the director's report it is clearly stated that as a part of expansion programme, the company wanted to acquire Dunlop Tyres International (proprietory) Ltd at South Africa. For acquiring this company, the assessee incorporated a wholly owned company in Mauritius by the name and style "Apollo Mauritius Holding Pvt Ltd". The subsidiary company in Mauritius established another company in South Africa, viz. Apollo (South Africa) Holding Pvt Ltd for acquiring 100% controlling power in Dunlop Tyres International (proprietory) Ltd in South Africa. For acquiring Dunlop Tyres International (proprietory) Ltd the assessee has given the loan in foreign currency. Any expenditure incurred by the assessee for acquisition of capital asset is not an allowable expenditure. Therefore, according to the

ld.DR, the loss said to be incurred by the assessee in entering into forward contract with Citi Bank cannot be allowed as business loss. Therefore, according to the ld.DR, the CIT(A) has rightly confirmed the order of the CIT(A) on the ground that the loss said to be suffered by the assessee is a capital loss which cannot be allowed.

18. We have considered the rival submissions on either side and also perused the material available on record. Admittedly, the assessee is in the business of manufacture and sale of tyre. In order to expand its business in South Africa, the assessee intended to purchase Dunlop Tyres International (proprietory) Ltd. For that purpose, as an intermediary arrangement, a subsidiary company was flouted in Mauritius by name 'Apollo (Mauritius) Holding Pvt Ltd. Apollo (Mauritius) Holding Pvt Ltd, in turn, flouted another company in South Africa called Apollo (South Africa) Holding Pvt Ltd. The assessee company gave a loan of 314 million Rands to Mauritious subsidiary company, which in turn, gave loan to South African subsidiary company for the purpose of acquiring Dunlop Tyres International (proprietory) Ltd. Therefore, the purpose of granting loan is to acquire a company in South Africa. It is an admitted fact

that South Africa has two manufacturing units of Dunlop Tyres International (proprietory) Ltd and has wide range of distributorship networking for sales. In order to safeguard itself from foreign exchange rate fluctuation, the assessee entered into a forward contract with Citi Bank. However, before the due date, i.e. 14-03-2006, the assessee had to settle the forward contract and on that account has suffered a loss of Rs.5,09,01,000. The question arises for consideration is – whether loss suffered by the assessee in settling the forward contract before the due date is a capital loss or a revenue loss? It is well settled principle of law that the expenditure incurred by the assessee in the process of earning of profit is a revenue expenditure. However, if any expenditure was incurred in the process of establishing a capital asset either by expanding the existing unit or by expanding the profit making apparatus it has to be treated as capital expenditure.

19. Now, in the above background, we have to see whether acquisition of tyre manufacturing company along with the distribution network at South Africa would expand the business and profit making apparatus of the assessee or not? The assessee, instead of

acquiring the company directly, established a company in Mauritius as 100% subsidiary company and the said subsidiary company has established another company in South Africa. The motive and intention behind the establishment and creation of two intermediary companies is for the purpose of acquiring Dunlop Tyres International (proprietory) Ltd. The loan in foreign exchange was granted to achieve the above object of acquiring the company in South Africa. This Tribunal is of the considered opinion that by acquisition of a company in South Africa, the manufacturing base and distribution network, in other words, the capital base of the company, expands considerably and the profit making apparatus also expanded. Though the company was acquired through a subsidiary company this Tribunal of the considered opinion that it is only an arrangement made by the assessee to acquire Dunlop Tyres International (proprietory) Ltd. In effect, the assessee is holding and controlling the subsidiary company as well as Dunlop Tyres International (proprietory) Ltd. This Tribunal is of the considered opinion that the entire arrangements made by the assessee by establishing two intermidiary subsidy companies would come to light once the corporate veil is lifted. Therefore, the loss suffered was in the process

of acquisition of Dunlop Tyres International (proprietory) Ltd in South Africa. In other words, the loss was suffered in the process of acquisition of a capital asset which expands the manufacturing facility as well as the profit making apparatus of the company. Therefore, this Tribunal is of the considered opinion that the loss suffered by the assessee by settling the forward contract in the process of acquisition of Dunlop Tyres International (proprietory) Ltd is a capital loss which cannot be allowed as a revenue loss or as an item of expenditure. This is not an expenditure incurred in the course of earning of profit. Therefore, this Tribunal do not find any infirmity in the order of the lower authority. Accordingly the order of CIT(A) on this issue is confirmed.

20. Now coming to the next ground of appeal pertaining to loss of Rs.18,26,47,613 on account of raw material being destroyed in fire.

21. Shri PJ Pardiwalla, the ld.senior counsel submitted that the assessee has suffered a loss of Rs. 18,26,47,613. There was a fire accident at the godown in Maharashtra State Warehousing Corporation at Kalampoli. The assessee had lost shipment worth

Rs.17,72,40,718. The complaint was made by the assessee before the Store Superintendent of the Warehousing Corporation for a total amount of Rs.18,26,47,613 which included cost of raw material and incidental charges. The Maharashtra State Warehousing Corporation in turn lodged a complaint before the Directorate of Insurance, Maharashtra Government. Since there was a delay in settlement, the assessee filed a civil suit against Maharashtra State Warehousing Corporation before the Civil Judge at Pune for recovery of Rs. 22,41,41,390 which includes the principal amount of Rs. 18,26,47,613 and Rs. 4,17,93,777 being the interest. The suit is pending for disposal. Meanwhile, Maharashtra State Warehousing Corporation paid the assessee a sum of Rs.4,24,96,060. For the year ended 31-03-2006, the loss suffered by the assessee on account of fire accident was debited in the accounts. However, it was not claimed in the return of income, for the assessment year 2006-07. In the course of assessment proceedings by a letter dated 11-11-2008 the assessee claimed this amount of Rs.18,26,47,613 as deduction u/s 28 of the Act. However, the assessing officer disallowed the claim of the assessee on the ground that it was not claimed in the return of income by following the judgement of the

Apex Court in the case of Goetze (India) Ltd vs CIT 284 ITR 323 (SC). According to the ld.senior counsel the CIT(A) confirmed the order of the assessing officer on the ground that the assessing authority has no power to entertain any new claim otherwise than by way of revised return.

22. Referring to the judgement of the Apex Court in the case of Goetze (India) Ltd (supra), the ld.senior counsel submitted that the Supreme Court itself clarified that the power of the appellate authority to entertain the additional claim cannot be impinged in any way. Therefore, the CIT(A) ought to have considered the issue as an additional ground and adjudicated the same on merit. The ld.senior counsel has also placed reliance on the judgment of the Apex Court in the case of NTPC vs CIT 229 ITR 383 (SC).

23. On the contrary, Shri M Anil Kumar, the ld.DR submitted that the assessing officer cannot entertain any new claim otherwise than by way of a revised return. Admittedly, the assessee has not made any claim with regard to the loss suffered in the fire in the original return; no revised return was also filed. Therefore, the assessing

officer cannot travel beyond the deduction claimed in the return. Hence, the CIT(A) has rightly confirmed the order of the assessing officer in view of the judgment of the Apex Court in the case of Goetze (India) Ltd (supra).

24. We have considered the rival submissions on either side and also perused the material available on record. Both the authorities below have not examined the claim of the assessee on merit. Though the assessing officer refers that it is a premature claim, he refused to entertain the same on the ground that it was not made through a revised return in view of the judgment of the Apex Court in the case of Goetze (India) Ltd (supra).

25. We have carefully gone through the judgment of the Apex Court in Goetze (India) Ltd (supra) as follows:

> " 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."

In view of the judgment of the Apex Court it is obvious that the power of the Income-tax Appellate Tribunal to entertain an additional claim will not impinge. Therefore, even if the claim of loss was not made in the return of income, the CIT(A) ought to have admitted the claim as an additional ground and examined the issue on merit. This Tribunal also has to entertain the same as additional ground since the claim was made in the course of assessment proceedings in view of the judgment of the Apex Court in the case of CIT vs Shelly Products (2003) 261 ITR 367 (SC). In view of the above, the CIT(A) is not justified in rejecting the claim of the assessee. However, since the assessing officer has not considered the matter on merit, this Tribunal is of the considered opinion that the matter has to be adjudicated by the assessing officer at the first instance. Accordingly, the orders of

lower authorities are set aside and the issue of loss of Rs.18,26,47,613 on account of fire is remitted back to the file of the assessing officer. The assessing officer shall consider the issue on merit and thereafter decide the same in accordance with law after giving reasonable opportunity of hearing to the assessee.

26. The next ground of appeal is with regard to rejection of additional ground of appeal relating to deduction u/s 80IA(4)(iv)(a) of the Act to the extent of R.2,06,20,739.

27. Shri PJ Pardiwalla, the ld.senior counsel for the assessee submitted that the CIT(A) rejected the claim of the assessee with regard to deduction u/s 80IA to the extent of Rs.2,06,20,739 being the profit earned from generation of power in steam form in its gas turbine boiler which is utilized for captive consumption. According to the ld.senior counsel it is not an additional ground. In fact, according to the ld.senior counsel, deduction u/s 80IA was originally made with regard to DG & DT and GT power generating unit at Limda to the extent of Rs.10,87,98,092. However, generation of power in the form of steam by gas turbine boiler was omitted to be included in the

original claim. This was brought to the notice of the CIT(A) by way of an additional ground. Therefore, the CIT(A) is not correct in saying that it was not raised before the assessing officer. In fact, the deduction u/s 80IA was claimed before the assessing officer in the return of income. What was omitted to be claimed is with regard to generation of power in the form of steam by gas turbine boiler. The ld.senior counsel further submitted that even if it is considered as additional ground as observed by the Apex Court in the case of Goetze (India) Ltd (supra), the power of the appellate authority does not impinge upon in any way. Therefore, in view of the judgment of the Apex Court in the case of Goetze (India) Ltd (supra), the CIT(A) ought to have adjudicated upon the same on merit. On a query from the bench how the assessee is entitled for deduction u/s 80IA when the claim was not made in the return in respect of generation of power in the form of steam in view of section 80A(5) and the decision of this Tribunal in “The Kadachira Service Co-operative Bank Ltd” & Others in ITA No 251/Coch/2012 & Others order dated 31-01-2013, the ld.senior counsel very fairly submitted that he has no occasion to go through the decision of this Tribunal in the case of “The Kadachira Service Co-operative Bank Ltd” (supra). However, the provisions of

section 80A(5) is not applicable for the year under consideration since it was introduced by Finance Act, 2009, much after the filing of return of income by the assessee for the year under consideration.

28. We have heard Shri M Anil Kumar, the ld.DR also.

29. We have considered the rival submissions on either side and also perused the material available on record. Though a claim was made with regard to deduction u/s 80IA in respect of DG & DT & GT power generating unit at Limda, admittedly, the power generated in the form of steam by gas turbine boiler was not claimed in the return of income. For the first time, the assessee makes the claim with regard to generation of power in the form of steam from its gas turbine boiler. No doubt, section 80A(5) says that no deduction shall be allowed under Chapter VIA under the heading, “C.-Deductions in respect of certain incomes”, unless the same is claimed in the return of income. As rightly pointed out by the learned senior counsel section 80A(5) was brought in the statute book by Finance Act, 2009, of course, with retrospective effect from 01-04-2003. Therefore, on the date of filing of return of income for the assessment year under

consideration, the assessee would not have anticipated the retrospective amendment that would be brought in the statute by finance Act, 2009. The assessee was expected to file the return of income as per the law as it existed on the 01st day of April of the respective assessment year. Therefore, this Tribunal is of the considered opinion that it may not be proper to apply the provisions of section 80A(5) for the year under consideration. In view of the above, the decision of this Tribunal in The Kadachira Service Co-operative Bank Ltd (supra) may not be applicable for the year under consideration. In view of the judgment of the apex court in the case of Geotze (India) Ltd (supra), the claim has to be made before the assessing officer by way of revised return. However, as observed in the earlier part of the order, the judgment of the Apex Court in the case of Goetze (India) Ltd (supra) does not impinge upon the power of the appellate authority as observed by the Apex Court itself in the very same judgment. Therefore, this Tribunal is of the opinion that the CIT(A) having co-terminus jurisdiction with that of the assessing officer ought to have considered the issue on merit. Since the CIT(A) has not considered the matter on merit, this Tribunal is of the considered opinion that the matter needs to be considered by the

assessing officer at the first instance. Therefore, order of CIT(A) is set aside and the issue is restored to the file of the assessing officer with a direction to consider the same on merit in respect of deduction u/s 80IA(4)(iv)(a) with regard to generation of power in the form of steam from its gas turbine boiler.

30. Now coming to next ground of appeal with regard to deduction u/s 35(2AB) of the Act, we heard the ld.senior counsel and the ld.DR. This claim has also not been made before the assessing officer either in the return of income or by way of revised return. In view of the judgment of the Apex Court in the case of Goetze (India) Ltd (supra) and Shelly Products (supra) as discussed above, the CIT(A) ought to have considered the issue in exercise of his appellate powers. Since the CIT(A) has not considered the matter on merit, this Tribunal is of the considered opinion that the matter needs to be considered by the assessing officer at the first instance. Therefore, the order of CIT(A) is set aside and the matter is restored to the file of the assessing officer to consider the case merit in respect of deduction u/s 35(2AB) of the Act. The assessing officer shall consider the issue on merit

and decide the same in accordance with law after giving reasonable opportunity of hearing to the assessee.

31. Now coming to the departmental appeal in ITA No.74/Coch/2010, the first ground of revenue's appeal relates to disallowance of Rs. 50,09,299 towards club expenses.

32. Smt. Susan George Varghese, the ld.DR submitted that payment of Rs.50,09,299 towards club expenditure were in the nature of personal expenditure, therefore, it cannot be allowed.

33. On the contrary, Shri PJ Pardiwalla, the ld.senior counsel for the assessee submitted that the assessee company has paid fringe benefit tax on the expenditure incurred towards club expenditure. Therefore, there is no question of any disallowance. According to the ld.senior counsel, for the assessment year 1988-89 a similar issue arose before this Tribunal. This Tribunal by an order dated 29-07-1992 in ITA No.301/Coch/1991 allowed a similar expenditure. For the assessment years 1996-97 and 1997-98 this Tribunal by following its earlier order for the assessment year 1998-99 allowed similar

expenditure in ITA No.43/Coch/2001. Therefore, according to the ld.senior counsel, there is no question of any disallowance.

34. We have considered the rival submissions on either side and also perused the material available on record. We find that for the assessment year 2005-06 in the assessee's own case in ITA No.729/Coch/2008 order dated 08-02-2013, this Tribunal remitted the matter back to the file of the assessing officer for reconsideration. This Tribunal specifically observed that expenditure incurred towards entrance fee / subscription fee can be termed as business expenditure and the cost of service could be allowed if the commercial expediency in incurring the expenditure is proved. Since the matter was remitted back to the file of the assessing officer for 2005-06 on identical set of facts, this Tribunal is of the considered opinion that the CIT(A) was not justified in deleting the disallowance made by the assessing officer. Accordingly we set aside the order of the lower authority and restore the issue back to the file of the assessing officer. The assessing officer shall decide the issue afresh in the light of observation of this Tribunal for the assessment year

2005-06 in accordance with law after giving reasonable opportunity of hearing to the assessee.

35. The next ground of appeal is with regard to bad debt written off to the extent of Rs.1,31,23,552.

36. Smt. Susan George Varghese, the ld.DR submitted that the CIT(A) allowed the claim of the assessee u/s 37(1) of the Act. According to the ld.DR, the provisions of section 37(1) cannot be taken aid unless it is established that the provisions of sections 30 to 36 are not applicable. According to the ld.DR, the provisions of section 36(2) of the Act were not complied with, therefore, it cannot be allowed as bad debt.

37. On the contrary, Shri PJ Pardiwalla, the ld.senior counsel for the assessee submitted that the assessee company entered into an agreement with M/s S Kumar Tyre Manufacturing Co for acting as its conversion agent for manufacture of automobile tyres and tubes. The raw material for manufacture of tyres and tubes would be supplied by the assessee to its conversion agent. Advance amounts were also

paid by the company to the conversion agent over a period of time which will be adjusted against the bill raised by the conversion agent. According to ld.senior counsel the advance amount was given to the commission agent for smooth running of its manufacturing activity so that uninterrupted supplies of its product could be maintained. Subsequently, the business relationship with S Kumar Tyre Manufacturing Co was terminated and the advances paid to the said company could not be recovered in spite of best efforts of the assessee. Therefore, the Board of Directors of the company decided to write it off as irrecoverable balance. Hence, this loss incurred by the assessee company in the course of its business activity is a business loss, as such, it has to be allowed while computing the total income as revenue loss.

38. We have considered the rival submissions on either side and also perused the material available on record. It is not in dispute that the advance was made to S Kumar Tyre Manufacturing Co in the course of business activity of the assessee for manufacturing tyres and tubes. When the assessee advanced the amount in the course of its business activity for the purpose of manufacturing tyre and

tubes, the irrecoverable part of the advance has to be treated as business loss. Therefore, any business loss has to be allowed while computing the taxable income. This Tribunal is of the considered opinion that though the claim of the assessee cannot be allowed u/s 37(1) as a business expenditure it has to be deducted as a business loss while computing the taxable income. In view of the above, the order of the CIT(A) on this issue is confirmed.

39. The next ground of appeal is with regard to payment of Rs.10,23,403 towards employees' contribution to provident fund.

40. We heard the ld.DR and the ld.senior counsel for the assessee. The CIT(A) allowed the claim of the assessee after finding that the payments were made before filing of return of income. Second Proviso to section 43B was deleted and all sub clauses under section 43B were brought under the First Proviso to section 43B. Therefore, the payments covered by section 43B needs to be allowed if the same was paid before the due date for filing the return of income. In this case, it is not in dispute that the contribution to provident fund was paid before the due date for filing the return of

income. Therefore, this Tribunal is of the considered opinion that the CIT(A) has rightly deleted the disallowance. We confirm his order on this issue.

41. The next ground of appeal is with regard to depreciation on the office premises at Gurgaon.

42. We heard the ld.DR and the ld.senior counsel for the assessee. The depreciation on the very same property was disallowed by this Tribunal for the assessment year 2001-02. Following the order of this Tribunal for the assessment year 2001-02, a similar disallowance was also made for the assessment years 2002-03 and 2004-05. The depreciation was also disallowed for the assessment year 2005-06. In view of the above orders of the Tribunal, this Tribunal is of the considered opinion that the CIT(A) is not justified in allowing the claim of the assessee. Accordingly, the order of CIT(A) is set aside with regard to depreciation on Gurgaon office premises and the order of the assessing officer is restored.

43. The next ground of appeal is with regard to deduction u/s 80IA in respect of DG & DT Power Generation unit which was used for captive consumption.

44. We heard the ld.DR and the ld.senior counsel for the assessee. In respect of the very same DG & DT Power Generation unit which was used for captive consumption was considered by this Tribunal in assessee's own case for the assessment year 2005-06 in ITA No.429/Coch/2006. This Tribunal, by following its earlier order for assessment year 2002-03 found that the assessee is eligible for deduction u/s 80IA of the Act. By following the earlier order of this Tribunal for the assessment year 2002-03 and for the reasons stated therein we uphold the order of CIT(A).

45. Now coming to the cross objection filed by the assessee, the assessee has raised only one ground, i.e. with regard claim of bad debt on account of advance given to S Kumar Tyre Manufacturing Co by supporting the order of the CIT(A). This Tribunal is of the considered opinion that the cross objection to support the order of the CIT(A) is not maintainable since the order of the CIT(A) could be

supported even without filing any cross objection. Even otherwise, on the appeal filed by the revenue, this Tribunal in the earlier part of this order upheld the order of the CIT(A). Therefore, this Tribunal is of the considered opinion that the cross objection is not maintainable.

46. In the result, both appeal of the assessee and the revenue are partly allowed and the cross objection filed by the assessee is dismissed.

Order pronounced in the open court on this 29th May, 2013.

Sd/-	sd/-
(B.R. Baskaran)	(N.R.S. Ganesan)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Cochin, Dt : 29th May, 2013
pk/-

copy to:
1. The appellant
2. The respondent
3. The Commissioner of Income-tax
4. The Commissioner of Income-tax(A)
5. The DR

(True copy) By order

Asstt. Registrar, Income-tax Appellate Tribunal, Cochin Bench