IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G", MUMBAI

Before Shri R.S.Syal, AM and Smt.Asha Vijayaraghavan, JM

ITA No.4238/Mum/2010 : Asst.Year 2001-2002

The Dy.Commissioner of Income-tax Central Circle 6 Mumbai.	Vs.	M/s.Eversmile Construction Co.Pvt.Ltd. Conwood House, Yashodham Dindoshi GenA.K.Vaidya Marg, Goregaon (East) Mumbai – 400 063. **PAN :AAACE0875E.**
(Appellant)		(Respondent)

Appellant by : Shri Pavan Ved
Respondent by : Ms.Aarti Vissanji

Date of Hearing : 24.08.2011		**Date of Pronouncement : 30.08.2011**

O R D E R

Per R.S.Syal, AM :

This appeal by the Revenue arises out of the order passed by the Commissioner of Income-tax (Appeals) on 30.03.2010 in relation to the assessment year 2001-2002.

2. The Revenue has raised following grounds:-

"(i) On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in giving relief to the assessee on the income disclosed by him in the return of income filed u/s 153A ignoring the fact that the Assessing Officer has merely assessed the total income at the returned income.

(ii) On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in determining the total income at a figure lower than the returned income ignoring the fact that the assessee did not resort to the provisions of filing revised return within the prescribed time as it envisaged by the Supreme Court in the case of Goetz (India) Ltd. 284 ITR 323."

3. Briefly stated the facts of the case are that the assessee filed its return u/s 139(1) on 31.10.2001 declaring loss of Rs.3,93,88,570. Search action was taken upon the assessee on 22.03.2007. Accordingly notice u/s 153A was issued, in response to which the assessee filed its return of income on 03.03.2008 declaring total loss of Rs.3,43,19,413. It is pertinent to note that the original return filed by the assessee on 31.10.2001 was subjected to scrutiny assessment and in the order u/s 143(3) dated 31.03.2004, the A.O. disallowed interest of Rs.58,86,483. The assessee-company did not agitate the disallowance of interest before the first appellate authority. In other words, the disallowance so made in the original assessment attained finality. However, while filing the return in response to notice u/s 153A on 03.03.2008, the assessee voluntarily disallowed the disallowance of interest of Rs.58.86 lakh made in the original assessment subject to the reservation of right for contesting the allowability of entire interest during the course of assessment proceedings. Copy of computation of income along with the Notes furnished along with the return filed on 03.03.2008, is available on record and Note No.3.5, which is relevant for our purpose, reads as under:-

> *"In quantifying business loss for the year, the assessee company has disallowed said disallowance of Rs.58,86,483/-, subject to reservation of right to make such submissions, as it may consider appropriate, for allowability of entire interest expenditure for the year, in assessing income for the year."*

4. During the course of assessment proceedings u/s 153A, the assessee made submissions in support of the deductibility of interest of Rs.58.86 lacs. The Assessing Officer simply accepted the total loss as returned at Rs.3.43 crore without any further deliberation on the interest aspect. Thus the disallowance of interest as made in the original assessment was impliedly upheld, *albeit* without any discussion of the issue. When the matter came up before the first appellate authority, it was contended that the funds available in the hands of the assessee

were mixed and there was no question of apportionment of such funds available for business as well as for granting interest free loan on one hand and investment in shares on the other. The assessee also put forth that a detailed submission, in support of deduction of interest, was filed before the Assessing Officer on 24.12.2008 and the assessing authority had not taken it into consideration. The learned CIT(A) required the assessee to establish nexus between the utilization of funds borrowed at interest with the the carrying on of business. The assessee made submissions in support of the deduction of interest, which the learned CIT(A) forwarded to the A.O. seeking his comments. The Assessing Officer sent his remand report on 24.03.2010 quantifying the disallowable interest in relation to granting of loans and advances and investments made in shares. Considering such remand report, the learned CIT(A) directed the A.O. to disallow interest of Rs.10,81,326 and ordered for the deletion of the remaining disallowance. The Revenue is in appeal on the above extracted grounds.

5. After considering the rival submissions and perusing the relevant material on record it is found as an undisputed fact that in the original assessment made u/s 143(3), the A.O. disallowed interest of Rs.58.86 lakh which was not assailed by the assessee in appeal. However after the search, it filed return in response to notice issued by the AO u/s 153A declaring income by voluntarily making the disallowance of the interest made in the original assessment and keeping the right reserved for making submission at the stage of assessment in support of the deduction. The view point of the learned Departmental Representative is that the assessee was not entitled to seek relief on any addition which was finally made in the original assessment as the provisions of section 153A do not permit the assessment at income lower than the one finally assessed in original assessment completed before the date of search. In order to appreciate this contention it would be relevant to note down the provisions of section 153A which is as under:-

"153A. Assessment in case of search or requisition.—

(1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 ;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made :

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years :

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this section pending on the date of initiation of the search under section 132 or making of requisition under section 132A, as the case may be, shall abate.

(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner.

Provided that such revival shall cease to have effect, if such rder of annulment is set aside.

Explanation.–For the removal of doubts, it is hereby declared that,—

(i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this section ;

(ii) in an assessment or reassessment made in respect of an assessment year under this section, the tax shall be chargeable at the rate or rates as applicable to such assessment year."

6. From the prescription of the above section, the following features are noticeable in so far as we are concerned with the instant appeal :-

- Assessment pursuant to search is to be made notwithstanding anything contained *inter alia* in section 147;
- Clause (a) of sub-section (1) provides that the relevant provisions shall apply as if the return filed in response to notice u/s 153A(1) is a return required to be furnished under section 139 ;
- First proviso to sub-section (1) states that the Assessing Officer is required to assess or reassess "total income" in respect of each assessment falling within the relevant six assessment years.
-The second proviso to sub-section (1) provides that the assessment or reassessment, if any, relating to any of the six assessment years pending on the date of search u/s 132 or making requisition u/s 132A, shall abate.
- Sub-section (2) of section 153A provides that if due to one reason or the other the assessment made u/s 153A is annulled in any appeal or any other proceedings then the assessment or reassessment which had abated in second proviso to sub-section (1) shall stand revived with effect from the date of receipt of the order of such annulment.

7. A close look at the above provision manifests that the Assessing Officer is required to make assessment afresh and compute the `*total income'* in respect of each of the relevant six assessment years. As there is no specific inhibition on the jurisdiction of the Assessing Officer in not including any new income to such fresh total income pursuant to search which was not added during the original assessment, in the like manner, there is no restriction on the assessee to claim any deduction which was not allowed in the original assessment. The requirement of section 153A is to compute the total income of each of such assessment years. Such determination of the total income has to be done afresh without any reference to what was done in the original assessment. Of course, the AO is entitled to make any addition in the fresh assessment, which he made in the original assessment, provided he is satisfied with the merits of the addition. But the mere fact that there was some addition in the original assessment, would not preclude the assessee from contesting the addition in the subsequent proceedings. As it is going to be a fresh exercise of framing assessment or reassessment of the total income at the end of the AO, the assessee cannot be stopped from not even arguing about the merits of his case *qua* the addition which was made in the original assessment. Debarring the assessee from making a claim about the deductibility of any item, which was earlier disallowed, counters the very concept of fresh assessment of total income.

8. The reliance of the learned Departmental Representative on the judgement of the Hon'ble Supreme Court in the case of *CIT Vs. Sun Engineering Works Pvt.Ltd. [(1992) 198 ITR 297 (SC)]* is misconceived. The reason for the same is that in that case the Hon'ble Supreme Court was considering the provisions of section 147 and it was held that once an assessment is validly reopened it is not open to an assessee to seek a review of concluded items unconnected with the escapement of income. Here it is pertinent to note that the conditions for taking action u/s 147 *vis-à-vis* under section 153A are altogether different. Even though assessment u/s 147 is made read with section 143(3), but the initiation of

assessment or reassessment u/s 147 originates from the belief of the AO, on the basis of some tangible material, that income chargeable to tax has escaped assessment. After forming such belief, the AO is called upon to record reasons for the reopening of the assessment before issuing mandatory notice u/s 148. If the foundation of reassessment, being the reasons about the escapement of some income do not exist, then it is impermissible to go ahead with the assessment u/s 147. It is *sine qua non* that some escaped income must be brought to charge in order to make a fresh assessment u/s 147. On the contrary, the search action itself mandates on the Assessing Officer to pass orders u/s 153A computing total income for all the relevant six assessment years, irrespective of the fact whether some concealed income has surfaced as a result of search or not. It is thus apparent that the ambit of assessment u/s 147 cannot be imported into the scope of section 153A.

9. It is further important to note that the provisions of assessment in the case of search u/s 153A etc. have been inserted by the Finance Act, 2003 with effect from 01.06.2003. These provisions are successor of the special procedure for assessment of search cases under Chapter XIV-B starting with section 158B. Whereas Chapter XIV-B required the assessment of "undisclosed income" as a result of search, which has been defined in section 158B(b), section 153A dealing with assessment in case of search with effect from 01.06.2003 requires the Assessing Officer to determine "total income" and not "undisclosed income".

10. If any deduction is claimed by the assessee in the proceedings u/s 153A that cannot be rejected simply on the ground that it was not claimed in the original assessment or was disallowed. The starting point of assessment is the amount of income declared in the return of income, which is further enhanced with the additions. We are unable to appreciate the qualitative difference between the two situations viz., the first in which the assessee files return in response to notice u/s 153A disclosing lower income than the one originally assessed u/s 143(3) and the

second situation in which the income is disclosed at the increased level, that is, after considering the additions so made in the original assessment and then agitates during the assessment proceedings about the deductibility of the amount(s) which was/were not allowed earlier. Probably the second course is adopted so as to pre-empt any move on the part of the Revenue to impose concealment penalty, if the addition is sustained in the assessment u/s 153A. In our considered opinion when the Assessing Officer has to compute the total income of the assessee on the basis of return filed after considering the submissions made during the course of hearing before him. There cannot be any scope for arguing that the assessee has been rendered powerless to even lodge a claim in respect of which deduction was not allowed earlier. Here it is important to note that the total income is not reduced simply on the basis of making a claim. The Assessing Officer is fully empowered to consider the question of deductibility as per the provisions of the Act. If after going through such claim, he feels that addition is called for, he will obviously make addition and *vice versa*.

11. Adverting to the facts of the instant case it is seen that the assessee made a claim of deduction of interest of Rs.58.86 lakh which was not allowed in the original assessment. In the remand report the A.O. himself came to the conclusion that the disallowance only to the tune of Rs.10.81 lakh was warranted and the learned CIT(A) has sustained the disallowance to this extent thereby deleting the remaining amount of disallowance. Thus, the examination made by the Assessing Officer in the remand proceedings has clearly upheld the claim of the assessee *qua* the deduction of interest to the tune of Rs.48.05 lakh.

12. The Revenue has pressed into service the judgement of the Hon'ble Supreme Court in the case of *Goetze (India) Ltd. Vs. CIT [(2006) 284 ITR 323 (SC)]*. The learned Departmental Representative contended that the claim for a deduction not made in the return cannot be entertained by the Assessing Officer otherwise than

by filing a revised return. In the light of the above judgement, it was argued that since the assessee did not file revised return u/s 153A, the A.O. was right in not considering deductibility of interest of Rs.58.86 lakh on the basis of notes to the computation of total income.

13. There is no quarrel on the proposition laid down by the Hon'ble Supreme Court in the afore-noted case that the claim for deduction not made in the return of income cannot be entertained by the A.O., otherwise than by filing a revised return. However it is not the end of the matter. The Hon'ble Supreme Court in para 4 of the same judgment has clarified the position by further holding : "*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 u/s 254 of the Income-tax Act, 1961.*" From this judgement it is obvious that the restriction has been placed on the Assessing Officer for not entertaining any claim for deduction otherwise than by filing a revised return. However this judgement does not lay down that the appellate authority shall have any fetters on its powers in entertaining the claim made otherwise than by filing a revised return which is sustainable in law.

14. The Hon'ble Supreme Court in the case of *National Thermal Power Company Ltd. Vs. CIT [(1998) 229 ITR 383 (SC)]* has held that the Tribunal has the jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on tax liability of the assessee notwithstanding the fact that it was not raised before the learned CIT(A). The purpose of assessment proceedings is to assess correctly the tax liability of an assessee in accordance with law. When we consider the judgement of the Hon'ble Supreme Court in *Goetze (India) Ltd. (supra)* in juxtaposition to *National Thermal Power Company Ltd. (supra)*, it becomes patent that although the assessee cannot make a claim before the Assessing Officer otherwise than through the return of

income, but there are no restrictions on the powers of the Tribunal to entertain such claim for examination provided the facts exists on record.

15. Coming back to the facts of the instant case we note that the assessee made a claim for deduction of Rs.58.86 lakh by way of Note to the return of income on account of interest expenditure, which the Assessing Officer in the remand proceedings found to be acceptable to the tune of Rs.48.05 lakh. Under such a situation the Department cannot take the shelter of the judgement of the Hon'ble Supreme Court in the case of *Goetze (India) Ltd.(supra)* before the Tribunal contending that the addition so held by the first appellate authority be restored.

16. For the foregoing reasons, we uphold the impugned order.

17. In the result, the appeal is dismissed.

Order pronounced in the open Court on this **30th day of August, 2011.**

Sd/-	**Sd/-**
(Asha Vijayaraghavan)	**(R.S.Syal)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai : **30th August, 2011.**
Devdas*`
Copy to :
1. The Appellant.
2. The Respondent.
3. The CIT concerned
4. The CIT(A) - XXXVI, Mumbai.
5. The DR/ITAT, Mumbai.
6. Guard File. TRUE COPY.

By Order

Assistant Registrar, ITAT, Mumbai.