$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) 5331/2014**

Reserved on: 24th May, 2017
Date of decision: 3rd July, 2017

RITES LIMITED ..... Petitioner
Through: Mr. R.P. Garg with Mr. K.N. Ahuja, Advocates.

Versus

COMMISSIONER OF INCOME TAX, DELHI-V ..... Respondent
Through: Mr. Dileep Shivpuri, Senior standing counsel with Mr. Sanjay Kumar, Junior standing counsel.

**CORAM:**
**JUSTICE S.MURALIDHAR**
**JUSTICE CHANDER SHEKHAR**

**J U D G M E N T**

**% 03.07.2017**

**Dr. S. Muralidhar, J.**

1. The Petitioner, Rites Limited, has filed the present petition under Article 226 of the Constitution challenging the order dated 24th March 2014 passed by the Respondent, Commissioner of Income Tax ('CIT'), rejecting its application under Section 264 of the Income Tax Act, 1961 ('Act').

2. The facts in brief are that the Petitioner, Rites Limited, is a Government of India Undertaking engaged in the business of providing technical consultancy services in India and abroad. It is stated that pursuant to the recommendation of the 5th Pay Commission in respect of revised salary with

effect from 1st January 1996, the Petitioner made a provision of wages arrears in the books of Financial Year ('FY') relevant to the Assessment Year ('AY') 1997-98 in the sum of Rs. 2,50,00,000.

3. However, since the relevant notification giving effect to the Pay Commission recommendations was issued only on 4th March 1998, the Assessing Officer ('AO') disallowed in AY 1997-98 the claim in respect of the revised salary. This disallowance was upheld by the CIT(A) in AY 1997-98 confirming the action of the AO on the ground that the notification dated 4th March 1998 was relevant to AY 1998-99. Significantly, the CIT(A) observed that the claim could be considered in AY 1998-99. However, by the time the order of the CIT(A) was issued, the assessment for AY 1998-99 was complete, and in the return filed for the said AY, no claim for provision for arrears of wages was made.

4. To complete this narration it must be noticed that on 26th November 1998 the Petitioner filed its return of income for the AY 1998-99 declaring a total income of Rs. 23,50,62,778.

5. On 14th March 2001, the assessment order for the AY 1998-99 was made by the AO under Section 143(3) of the Act at the total income of Rs. 23,95,62,720. On 21st March 2001, the Petitioner made an application under Section 154 of the Act before the AO for allowing the deduction in respect of the revised pay. This request was rejected more than eight years thereafter on 21st October 2009 on the ground that the claim was not based on entries in the books of accounts of the AY in question and since the claim was debatable.

6. By order dated 10th December 2010, the CIT(A) dismissed the consequent appeal filed by the Petitioner holding that that the claim could not be allowed by way of rectification in a proceeding under Section 154 of the Act. The CIT(A) referred to the decision of the Supreme Court in ***Goetze India Limited v. Commissioner of Income Tax (2006) 284 ITR 323*** and held that a claim not made in the original return could not be made subsequently during assessment proceedings by way of letter.

7. The Income Tax Appellate Tribunal ('ITAT') also dismissed the further appeal filed by the Petitioner against the aforementioned order. In its order dated 21st October 2011, the ITAT held the claim to be time barred. Further, a claim not made before the AO could not give rise to a mistake apparent on the record.

8. The further appeal filed by the Petitioner before this Court being ITA No. 370 of 2012 was disposed of by the Division Bench on 4th September 2012 as under:

> "It is evident from the above discussion that the Assessee pursued the wrong remedy and also omitted to make a claim, by sheer inadvertence, or make any mention of the notification which was a material and relevant fact, in the return filed on 227th August 1998. These wrong remedies have taken almost a decade and led the Assessee to approach this Court. The Court is satisfied that the question of law sought to be urged i.e. jurisdiction of the income tax authorities under Section 154 does not arise in the circumstances of the case. However, the above observations are not conclusive of the matter. This Court is aware of the fact that the Assessee was bound to follow and implement the directions as a consequence of the notification dated 4th March 1998. Its misfortune was that this material was not revealed to the authorities at the appropriate stage.

> That was compounded by seeking wrong remedies i.e. through rectification, having regard to the law. In those circumstances then the Assessee may have to approach the Commissioner of Income Tax, in respect of the original assessment order framed in March, 2001 in the present case under Section 264 of the Act. The revision application should be considered on its merits having regard to the peculiar facts and circumstances of this case and the fact that the appellant pursued a wrong remedy for the period from 2001 till date, if the appellant approaches the CIT under Section 264 within a month. Liberty to file an application under Section 264 is granted. The appeal is disposed of in the above terms."

9. On the basis of the above observations, the Petitioner filed an application before the CIT(A) under Section 264 of the Act on 27th September 2012. The Additional CIT Range-15 in a report dated 5th February 2014 stated that there was no dispute about the genuineness of the claim and that there was no loss of revenue.

10. By the impugned order dated 24th March 2014, the CIT(A) rejected the application filed by the Petitioner under Section 264 of the Act. The CIT(A) held that the Petitioner had not claimed the deduction in respect of provision for wage arrears by revising the return for AY 1998-99. Therefore, the issue did not emanate from the assessment order. A reference was made by the CIT(A) again to the decision of the Supreme Court in ***Goetze India*** (*supra*) and the order dated 17th October 2012 of the Orissa High Court in Review Petition No. 8 of 2012 arising out of Writ Petition (Civil) No. 4554 of 2011 ***(Orissa Rural Housing Development Corporation Ltd. v. ACIT (2014) 44 Taxman.com 341 (Orissa))***.

11. This Court has heard the submissions of Mr. R.P. Garg, learned counsel

for the Petitioner and Mr. Dileep Shivpuri, learned Senior standing counsel for the Revenue.

12. Mr. Garg submitted that the entire approach of the CIT(A) in the impugned order was contrary to the directions issued by this Court in its decision dated 4th September 2012 in ITA No. 370 of 2012. This was despite the AO in its remand report dated 5th February 2014 confirming the genuineness of the claim and pointing out that there would be no loss of revenue if the claim were to be allowed. Section 264 of the Act as such did not provide for any period of limitation for making such claim. Reliance was placed *inter alia* on the decisions in ***Smt. Phool Lata Somani v. Commissioner of Income Tax (2005) 276 ITR 216 (Cal)***, and ***Ramdev Exports v. Commissioner of Income Tax (2002) 120 Taxman 315 (Guj).*** In particular, a reference was made to the decision to decisions in ***C. Parikh & Co. v. CIT (1980) 122 ITR 610 (Guj)*** and ***Assam Roofing Limited v. CIT (2014) 43 Taxman.com 316 (Gauhati).***

13. Mr. Garg submitted that there was nothing under Section 264 of the Act which placed any restriction on the CIT's revisional power to give relief to the Assessee in a case where the Assessee detected a genuine mistake after the assessment was completed. Reference was also made to the decision in ***Smt. Sneh Lata Jain v. CIT (2004) 192 CTR 50***, ***Parekh Brothers v. CIT (1984) 150 ITR 105 (Ker)*** and ***CIT v. Sam Global Securities Limited (2014) 360 ITR 682 (Del).*** Mr. Garg sought to distinguish the decision of the Orissa High Court in ***Orissa Rural Housing Development Corporation Ltd*** (*supra*)**.** In support of the proposition that a beneficial provision is to be

liberally construed, Mr. Garg placed reliance on the decisions in ***CIT v. Naga Hills Tea Co. Limited (1973) 89 ITR 240 (SC)*** and ***Bajaj Tempo Limited v. CIT (1992) 196 ITR 188 (SC).*** It was submitted that the matter concerning revised wages was part of the assessment record. The power under Section 264 was not restricted to the material available on record of the AO alone. Reliance was placed on the decision in ***CIT v. Shree Manjunatheswar Packing Products & Camphor Works (1998) 231 ITR 53.***

14. Mr. Shivpuri, on the other hand, submitted that Section 264 was not applicable in the case where the assessment order had been the subject matter of an appeal before the ITAT. Reliance was placed on the decision in ***Hindustan Aeronautics Limited v. CIT (2000) 243 ITR 808 (SC).*** It was further submitted that there is no provision in the Act which allows the entertaining of a fresh claim for deduction not made by the Assessee in the original return or even by filing a revised return. Reliance was again placed on the decision in ***Goetze (India) Limited*** (*supra*). He submitted that the CIT was bound to function within the frame work of the statute. He cannot indirectly permit that which cannot be permitted directly in the revisionary jurisdiction in the facts and circumstances of the case. Reliance was placed on the decision in ***Orissa Rural Housing Development Corporation*** (*supra*).

15. The above submissions have been considered. As regards the preliminary objection on the maintainability of the present petition under Article 226 of the Constitution when the remedy of challenging the decision of the AO by way of an appeal has been exhausted, the Court is of the view

that the Petitioner went before the CIT with a petition under Section 264 of the Act only pursuant to the leave granted by this Court in its order dated 4th September 2012, the relevant part of which has been extracted above. It is not, therefore, open to the Revenue to raise a preliminary objection as to maintainability.

16. The impugned order of the CIT appears to have ignored the history of the litigation leading to the filing of the revision petition. The Petitioner has already exhausted the remedies that were available to it. In light of the order of this Court disposing of the Petitioner's appeal in the first round, the CIT ought to have considered the claim of the Petitioner on merits. The Petitioner's revision petition under Section 264 of the Act ought not to have been dismissed on a mere technicality.

17. In ***C. Parikh & Co. v. CIT*** (*supra*), the Gujarat High Court observed as under:

> "It is clear that under Section 264, the Commissioner is empowered to exercise revisional powers in favour of the Assessee. In exercise of this power, the Commissioner may, either of his own motion or on an application by the Assessee, call for the record of any proceeding under the Act and pass such order thereon not being an order prejudicial to the Assessee, as the thinks fit. Sub-sections (2) and (3) of s. 264 provide for limitation of one year for the exercise of this revisional power, whether *suo motu*, or at the instance of the Assessee. Power is also conferred on the Commissioner to condone delay in case he is satisfied that the Assessee was prevented by sufficient cause from making the application within the prescribed period. Sub-section (4) provides that the Commissioner has no power to revise any order under s. 264(1) : (i) while an appeal against the order is pending before the AAC, and (ii) when the order has been subject to an appeal to the Income-tax Appellate Tribunal. Subject to

the above limitation, the revisional powers conferred on the Commissioner under s. 264 are very wide. He has the discretion to grant or refuse relief and the power to pass such order in revision as he may think fit. The discretion which the Commissioner has to exercise is undoubtedly to be exercised judicially and not arbitrarily according to his fancy. Therefore, subject to the limitation prescribed in s. 264, the Commissioner in exercise of his revisional power under the said section may pass such order as he thinks fit which is not prejudicial to the Assessee.

There is nothing in s. 264 which places any restriction on the Commissioner's revisional power to give relief to the Assessee in a case where the Assessee detracts mistakes on account of which he was over-assessed after the assessment was completed. We do not read any such embargo in the Commissioner's power as read by the Commissioner in the present case. It is open to the Commissioner to entertain even a new ground not urged before the lower authorities while exercising revisional powers. Therefore, though the petitioner had not raised the grounds regarding under-totalling of purchases before the ITO, it was within the power of the Commissioner of admit such a ground in revision."

18. Likewise, the Kerala High Court in ***Parekh Brothers v. CIT*** (*supra*) observed:

"We hold, that even though a mistake was committed by the Assessee and it was detected by him after the order of assessment, and the order of assessment is not erroneous, none the less it is open to the Assessee to file a revision before the Commissioner under Section 264 of the Act and claim appropriate relief. But it should not be forgotten that the power to be exercised under Section 264 is a revisionary one. The limitations implicit in the exercise of such power are well known. The jurisdiction is discretionary; Whether in a particular case, on the basis of facts disclosed, the Commissioner will exercise his jurisdiction and interfere in the matter, is a matter of discretion. It is certainly a judicial discretion vested in the Commissioner, to be exercised in accordance with law. We are not called upon to pronounce on the scope and amplitude of the revisional power. The only question

> mooted for our consideration in this case is whether the Commissioner has got revisional jurisdiction at all, where the Assessee having included the income for assessment, can claim the relief of weighted deduction under Section 35B of the Act, for the first time, in a petition filed under Section 264 of the Act. On that aspect of the question, we have no doubt in our mind that the Commissioner has jurisdiction to entertain a revision petition under Section 264 of the Act."

19. In ***Sneh Lata Jain v. CIT*** (*supra*), the High Court of Jammu & Kashmir followed the above decisions and observed that in its revisionary jurisdiction the CIT has the power to call for the record of any proceedings under this Act and is also entitled to make any enquiry himself or cause any inquiry to be made and to pass such order as he thinks fit.

20. In the present case, therefore, the mere fact the Petitioner did not make any claim in the original return and also in its revised return before the passing of the assessment order by the AO would not stand in the way of the CIT exercising revisionary jurisdiction to grant relief. The Supreme Court in its decision in ***Goetze India Limited v. Commissioner of Income Tax*** (*supra*) held that while the AO could not permit a claim to be made after the filing of the return without the Assessee revising it prior to the assessment order, it did not impinge on the scope of the revisionary jurisdiction of the CIT.

21. The decision in ***Orissa Rural Housing Development Corporation*** (*supra*) is distinguishable on facts. In the instant case, the order of the CIT(A) in the first round for AY 1997-98 itself recognized that the Petitioner could claim the deduction for provision for the arrears of revised

wages in the subsequent AY 1998-99. The observations in ***Goetze India Limited*** (*supra*) were explained by this Court in ***Sam Global Securities Limited*** (*supra*) where in para 8 it held that "wherein deduction claimed by way of a letter before the Assessing Officer, was disallowed on the ground that there was no provision under the Act to make amendment in the return without filing a revised return. Appeal to the Supreme Court, as the decision was upheld by the Tribunal and the High Court, was dismissed making clear that the decision was limited to the power of the assessing authority to entertain claim for deduction otherwise than by a revised return, and did not impinge on the power of the Tribunal."

22. Further, in ***CIT v. Mithlesh Impex (2014) 46 taxman.com 30*** it was clarified that the decision of the Supreme Court in ***Goetze India Limited*** (*supra*) is confined to the powers of the AO. However, "when it comes to the power of Appellate Commissioner or the Tribunal, the Courts have recognized their jurisdiction to entertain a new ground or a legal contention."

23. Consequently, the Court is satisfied that in the present case, the CIT erred in rejecting the revision application of the Petitioner on the ground of maintainability. The CIT ought to have entertained the revision petition on merits.

24. One possible consequential direction is to remand the revision application of the Petitioner to the file of the CIT for a fresh decision on merits. However, considering that the issue has been pending for a number of years, remanding the matter to the CIT would only delay the proceedings

further. Consequently, the Court is of the view that there is sufficient material on record already, which is not disputed by the Revenue, to grant relief to the Petitioner on merits in the present petition itself.

25. The Court directs that the revision application filed before the CIT should be treated as having been allowed on merits. Consequently, while setting aside the impugned order of the CIT dated 24th March 2014, the Court allows the revision petition filed by the Petitioner before the CIT and directs the AO now to give effect to this order by computing the tax liability of the Petitioner for the AY 1998-99 after allowing the claim for provision made for wages arrears as per the 5th Pay Commission which became effective on 1st January 1996.

26. The writ petition is disposed of in the above terms with no orders as to costs.

**S.MURALIDHAR, J**

**CHANDER SHEKHAR, J**

**JULY 03, 2017**
*Rm*