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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ Date of Decision: 2nd September, 2013.% **Income Tax Appeal 214/2013**

COMMISSIONER OF INCOME TAX Appellant
Through: Mr. Sanjeev Rajpal, Sr. Standing
Counsel.

versus

SAM GLOBAL SECURITIES LTD Respondent
Through: Mr. Salil Kapoor and Mr. Vikas Jain,
Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J. (ORAL)

Revenue in this appeal, which pertains to assessment year 2001-02, rely upon judgment of the Supreme Court in *Goetze (India) Ltd. Vs. CIT*, (2006) 284 ITR 323 (SC). The contention is that the respondent-assessee should be denied deduction under Section 10(35)(a) of the Income Tax Act, 1961(Act) and claim of business loss of Rs.85,18,854/- should be rejected as no revised return was filed under Section 139(5) of the Act.



2. It is an accepted position that the assessee had not claimed the said deduction or business loss in the return of income filed on 31st October, 2001, declaring taxable income of Rs. 1,72,910/-. Subsequently, notice for scrutiny assessment under Section 143(2)(ii) was issued. During the course of the assessment proceedings, the respondent-assessee had filed revised computation of income vide letter dated 12th January, 2004, claiming that dividend of Rs. 80,48,977/- from the units of mutual fund was exempt under Section 10(33) of the Act and loss on sale of units amounting to Rs.85,18,583/- was a business loss and not speculative loss.

3. The claims were rejected by the Assessing Officer on three grounds that the respondent-assessee had not filed a revised return within the time allowed under Section 139(5) of the Act; dividend was received from Sun F&C Mutual Fund, which was not included in the specified list of mutual funds approved by SEBI; and as the assessee was dealing with shares, income/loss from shares/units was speculative loss and not business loss.

4. CIT (Appeals) dismissed the appeal of the assessee, but on remand the matter was restored to the first appellate authority. Thereupon, vide order dated 16th February, 2009, CIT (Appeals) held that Sun F&C Mutual Fund was duly approved mutual fund under Section 10(23D). He observed that dividend from the units of



mutual fund was exempt under Section 10 (35)(a). Similarly with regard to the loss, he observed that units of mutual funds were sold and not shares, and therefore, the adverse effect of *Explanation* to Section 73 was not applicable. Reliance was placed upon decision of the Supreme Court in ***Apollo Tyres Ltd. Vs. CIT***, (2002) 255 ITR 283 (SC). In spite of the said observations, the CIT (Appeals) did not allow the appeal on the ground that the assessee had not filed a revised return within the time allowed under Section 139(5) of the Act, but had only filed a revised computation.

5. The tribunal has reversed the said findings after referring to the factual matrix. Reference was made to the decision of the Supreme Court in ***CIT Vs. Mr. P. Firm***, (1965) 56 ITR 67 (SC) and Circular No. 114 XL-35 of 1955 issued by the Central Board of Direct Taxes on 11th April, 1955, that an officer must not take advantage of ignorance of the assessee as to his rights. Judgment of the Supreme Court in *Goetze India Ltd. (supra)* was distinguished on the ground that the said case was limited to the power of the assessing authority and did not impinge upon the power of the tribunal. The matter was remanded to the Assessing Officer to consider the case on merits and decide accordingly.

6. In ***Commissioner of Income Tax Vs. Jai Parabolic Springs Ltd.***, [2008] 306 ITR 42 (Delhi), a Division Bench of this Court made



reference to the following passage from *National Thermal Power C*

Ltd. Vs. CIT, [1998] 229 ITR 383(SC):-

“The power of the Tribunal in dealing with 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. 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 assesses as well as the Department have 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.”

7. Reference was also made to an earlier decision of the Supreme Court in ***Jute Corporation of India Ltd. Vs. CIT***, [1991] 187 ITR 688 (SC), wherein it has been held as under:-

“An appellate authority has all the powers which the original 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 is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessed in seeking modification of the order of assessment passed by the Income Tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that



the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessed to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.”

8. Decision in the case of Goetze (India) Ltd. (*supra*) was distinguished in Jai Parabolic Springs Ltd. (*supra*) in the following words:-

“In Goetze (India) Ltd. Vs. CIT [2006] 284 ITR 323 (SC) 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.”

9. In ***CIT Vs. Natraj Stationery Products (P) Ltd.***, (2009) 312 ITR 222 reliance placed on Goetze (India) Ltd. (*supra*) by the Revenue was rejected, as the assessee had not made any ‘new claim’ but had asked for re-computation of deduction under Section 80-IB. The said decision may not be squarely applicable but the Courts have taken a pragmatic view and not the technical view as what is required to be determined is the taxable income of the assessee in accordance with the



law. In this sense, assessment proceedings are not adversarial nature.

10. In ***Commissioner of Income Tax Vs. Rose Services Apartment India P. Ltd.***, [2010] 326 ITR 100 (Delhi) relying upon the decision of the Supreme Court in *National Thermal Power Co. Ltd.*(*supra*), a Division Bench of this Court rejected the plea of the Revenue that the tribunal could not have entertained the plea, holding that the tribunal was empowered to deal with the issue and was entitled to determine the claim of loss, if at all, under one section/provision or the other.

11. Decision in *Goetze (India) Ltd.* (*supra*) was again relied upon by the Revenue in ***CIT Vs. Jindal Saw Pipes Ltd.***, [2010] 328 ITR 338 (Delhi) but the contention was not accepted, observing that the tribunal's jurisdiction is comprehensive and assimilates issues in the appeal from the order of the CIT (Appeals) and the tribunal has the discretion to allow a new ground to be raised.

12. In view of the aforesaid discussion, we are not inclined to interfere with order passed by the tribunal. The appeal is dismissed.

SANJIV KHANNA, J.

SANJEEV SACHDEVA, J.

SEPTEMBER 02, 2013
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