IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 695 OF 2014

The Commissioner of Income Tax-I,
Nashik .. Appellant

v/s.
The Nashik Road Deolali Vyapari Sahakari
Bank Ltd. .. Respondent

Mr. Sham V. Walve for the appellant
Mr. Mihir Naniwadekar for the respondent

CORAM : M.S. SANKLECHA &
G.S.KULKARNI, J.J.

DATED : 5th OCTOBER, 2016.

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 30th May, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2008-09.

2. The Revenue has urged following question of law for our consideration :-

(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in accepting the claim of the assessee that profit on sale of the plot of land be

> *assessed under the head of "Capital Gains" even though the receipt from sale of the said plot of land was shown by the Assessee itself as business receipts?"*

3. The respondent assessee is in the business of banking. It had purchased a plot of land with a view to construct its administrative building. However, during the subject assessment year, the respondent assessee decided not to construct the administrative building. Therefore, it sold the plot of land. The respondent assessee in its return of income had claimed that the sale of plot of land was a sale of capital asset and subject to long term capital gain. However, it had credited the consideration received on the sale of the plot to the profit and loss account. But thereafter, it omitted to reduce it while arriving at its taxable income under the head of business income. In the above view, the Assessing Officer held that the profit / gain on the sale of plot of land is to be assessed as a business income and not under the head capital 'Capital Gain' as canvassed by the respondent assessee.

4. On further appeal, the Commissioner of Income Tax (Appeals) [CIT(A)] upheld the order of assessment of the Assessing Officer. Being aggrieved, the assessee preferred an appeal before the Tribunal. The Tribunal in the impugned order *inter alia* records the fact that the

respondent assessee is a bank and not in the business of trading in land. Consequently, the amounts received by it on the sale of plots cannot be treated as a part of its business activity. Moreover, the plot of land was also shown as a part of its fixed asset and not as stock-in-trade in its Balance-Sheet. In the above circumstances, the Tribunal held that once the amount is brought to tax under the head "Capital Gain" the same cannot be again assessed as profit on account of trading activity of the respondent assessee. In the above view, the Tribunal directed Assessing Officer to reduce the amount of profit element on the sale of plot from the profits of business as declared by the respondent assessee. Thus, allowing the respondent assessee's appeal.

5. The grievance of the Revenue before us with the impugned order is in it having allowed / accepted the claim as of the assessee as capital gains and directed the Assessing Officer to reduce the profit element on sale of plot from its profits. This was not a claim made in the return of income or even by filing a revised return. In these circumstances, the Assessing Officer in the absence of revised return of income could not decide the same. Therefore, the order of the Assessing Officer could not be faulted with. In support of the aforesaid submission, reliance is placed upon the decision of the Apex Court in ***Goetze (India) Ltd. Vs.***

Commissioner of Income Tax, 284, ITR 323.

6. We find that the impugned order of the Tribunal has rendered a finding of fact to the effect that the plot of land is owned by the respondent assessee. This plot was a subject matter of sale during the previous year relevant to the subject assessment year and had always been shown as a fixed asset in its balance-sheet. Further, the Tribunal records the fact that the business of the respondent assessee was not of trading in plots of land and, therefore, the amounts received on sale of plot of land which was originally purchased for construction of administrative building could never be taxed as a business income. The impugned order of the Tribunal is unexceptionable in its reasoning. The grievance of the Revenue by placing reliance upon the Goetze (India) Ltd. (supra) is that no fault can be found with the order of the Assessing Officer in not entertaining a claim in the absence of a Revised return of income. However, this submission overlooks the fact that in Goetze (India) Ltd. (supra), it was clarified that the same does not deal with the power of Appellate Authority to consider a new point of law. In any case, this Court in ***Commissioner of Income Tax Vs. Pruthvi Brokers and Shareholders P. Ltd. 349 ITR 336***, on consideration of the Apex Court's decisions in *Goetze (India) Ltd.* (supra) and ***National***

Thermal Power Co. Ltd. Vs. Commissioner of Income Tax, 229 ITR 383, held that the assessee is entitled to raise additional grounds before the Appellate Authority which may not have been raised before the Assessing Officer. Thus, the grievance of the Revenue is unsustainable in view of the decision of this Court in *Pruthvi Brokers and Shareholders P. Ltd.* (supra).

7. Therefore, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

8. Appeal dismissed. No order as to costs.

(G.S. KULKARNI, J.) **(M.S. SANKLECHA, J.)**