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

INCOME TAX APPEAL NO.141 OF 2017

The Pr.Commissioner of Income Tax-1 … Appellant

V/s.

B.G.Shirke Construction … Respondent

Mr.Suresh Kumar for the Appellant.
Mr.Ruturaj Gujar i/by Mr.Mihir Naniwadekar for the Respondent.

CORAM : AKIL KURESHI AND
SARANG V.KOTWAL, JJ.
DATE : MARCH 12, 2019.

P.C.:-

1. Revenue has filed this appeal against the judgment of the Income Tax Appellate Tribunal raising following questions for our consideration:

> "I. Whether on the facts and the circumstances of the case and in law, the Income-tax Appellate Tribunal was justified in failing to appreciate that the claim of assessee for exclusion of income on retention money withheld by contractees was rejected as any such income offered in the return of income originally filed u/s 139(1) of the Act could not be excluded in proceedings finalized u/s

143(3) of the Act?
II. Whether on the facts and in the circumstances of the case and in law, the Income-tax Appellate Tribunal was justified in not considering the judgment of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. Vs. CIT (2006) 284 ITR 323 (SC) wherein it has been held that such claim for deduction can only be made by way of a revised return?"
III. Whether on the facts and in the circumstances of the case and in law, the Income-tax Appellate Tribunal was justified in not considering the judgment of Hon'ble Supreme Court in the case of CIT Vs. Sun Engineering Works Pvt. Ltd.(1992) 198 ITR 297 wherein it has been held that the income for purposes of "reassessment" cannot be reduced beyond the income originally assessed ?"

2. The issues relate to the assessee's claim of non-taxability of retention money withheld/deducted by the customers till the deficit liability period is over and arises in the context of the fact that in the original return the assessee had offered the same to tax, but during the course of assessment argued that the same was erroneously done.

3. In case of this very assessee both these aspects have been examined by this Court in case of **Commissioner of Income Tax**

Vs. B. G. Shirke Construction Technology P. Ltd.[1] making following observations:-

> "11. In the present facts for the subject assessment years it is an undisputed position that the pending assessment before the Assessing Officer consequent to return filed under Section 139(1) of the Act for the subject Assessment years had abated. This was on account of the search and as provided in second proviso to Section 153A(1) of the Act. The consequence of notice under Section 153A(1) of the Act is that assessee is required to furnish fresh return of income for each of the six assessment years in regard to which a notice has been issued. It is this return which is filed consequent to the notice which would be subject of assessment by the Revenue for the first time in the case of abated assessment proceedings. Consequent to notice under Section 153A of the Act the earlier return filed for the purpose of assessment which is pending, would be treated as non est in law. Further, Section 153A(1) of the Act itself provides on filing of the return consequent to notice, the provision of the Act will apply to the return of income so filed. Consequently, the return filed under Section 153A(1) of the Act is a return furnished under Section 139 of the Act. Consequently, the respondent-assessee is being assessed in respect of abated assessment for the first time under the Act. Therefore the provisions of the Act which would be otherwise applicable in case of return filed in the regular course under Section 139(1) of the Act would also continue to apply in case of return filed under Section 153A of the Act and the case laws on the provision of the Act would equally apply.
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> 12. This Court in Pruthvi Brokers and Shareholders P.Ltd. (supra) while dealing with a return of income

1 (2017) 395 ITR 371 (Bom)

filed under Section 139(1) of the Act has held that an assessee is entitled to raise a fresh claim before the Appellate Authorities, even if the same was not raised before the Assessing Officer at the time of filing return of income or by filing a revised return of income. This Court also placed reliance upon decision of the Apex Court in National Thermal Power Co. Ltd. V CIT [1998] 229 ITR 383 wherein while dealing with the powers of the Assessing Officer it had held that a claim not made in the return of income, the Court may lead to non entertainment of claim by the Assessing Officer. However, this restriction in the power of the Assessing Officer will not affect the power of the appellate Tribunal to entertain a fresh claim."

4. In the result, this appeal is dismissed.

(SARANG V.KOTWAL,J.) **(AKIL KURESHI,J.)**

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