

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

ITA/845/2008
M/S. DEVELOPMENT CONSULTANTS PVT. LTD.
VS.
COMMISSIONER OF INCOME TAX, KOLKATA-IV, KOLKATA & ANR.

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 9th February, 2023

Appearance :
Mr. J.P. Khaitan, Sr. Adv.
Ms. Nilanjana Banerjee Pal, Adv.
... for Appellant

Ms. Smita Das De, Adv.
... for Respondent

The Court : This appeal by the assessee filed under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order 14th August, 2008 passed by the Income Tax Appellate Tribunal, 'B' Bench, Kolkata (Tribunal) in ITA No. 237/Kol/2008, for the assessment year 2003-04.

The appeal was admitted on 12th January, 2009 on the following substantial questions of law :

“a) Whether in view of the fact that the excess depreciation debited earlier to the profit and loss account is written back to the profit and loss

account as a credit entry, the omission to deduct the same while computing the taxable income is a mistake apparent from the record and the Commissioner of Income Tax (Appeals) having held that the Assessing Officer should have done it himself and as such the amount of excess depreciation debited earlier to the profit and loss account and written back to the profit and loss account should have been allowed as a deduction in computing the taxable income the same being a mistake apparent from record ?

b) Whether on the facts and circumstances of the case, the Tribunal was erred in law in not considering the principles laid down by the Apex Court in the case of National Thermal Power Co. Limited vs. CIT (229 ITR 383) ?”

We have heard Mr. J.P. Khaitan, learned senior counsel, assisted by Ms. Nilanjana Banerjee Pal, learned counsel appearing for the appellant and Ms. Smita Das De, learned standing counsel appearing for the respondent.

The short question involved in this appeal is whether the claim for depreciation on account of write back of depreciation could have been allowed when the assessee failed to make such a claim in the original return. The learned Tribunal dismissed the assessee’s appeal by referring to the decision of the Hon’ble Supreme Court in *Goetze India Limited vs. C.I.T., 2006 (284) ITR 323 (SC)* and held that such a claim made by the assessee having not been made before the Assessing Officer is not entertainable. In this appeal the correctness of the finding of the learned Tribunal has to be examined.

We need not labour much to find an answer to the query in the light of the recent decision of the Supreme Court in *Wipro Finance Limited vs. Commissioner of Income tax, (2022) 443 ITR 250 (SC)* wherein identical argument was made by the revenue before the Hon'ble Supreme Court placing reliance on *Goetzee India Limited*. The said argument was rejected by the Hon'ble Supreme Court and it was held that such a limitation would apply to the assessing authority only but it will not impinge upon plenary powers of the Tribunal under Section 254 of the Act. The operative portion of the decision reads as follows :

“Learned Additional Solicitor General had placed reliance on the decision of this court in Goetze (India) Ltd. vs. CIT in support of the objection pressed before us that it is not open to entertain fresh claim before the Income-tax Appellate Tribunal. According to him, the decision in National Thermal Power Co. Ltd. merely permits raising of a new ground concerning the claim already mentioned in the returns and not an inconsistent or contrary plea or a new claim. We are not impressed by this argument. For, the observations in the decision in Goetze (India) Ltd. itself make it amply clear that such limitation would apply to the “assessing authority”, but not impinge upon the plenary powers of the Income-tax Appellate Tribunal bestowed under section 254 of the Act. In other words, this decision is of no avail to the Department.”

Thus, in the light of the above settled legal position, the order passed by the learned Tribunal necessarily calls for interference.

For the above reasons, the appeal is allowed.

The order passed by the Tribunal is set aside and it is held that the assessee is entitled to make the claim for depreciation though not made in the original return.

Consequently, the order passed by the Commissioner of Income Tax (Appeals) stands restored and the substantial questions of law are answered in favour of the assessee.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

S.Pal/SN.