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

% **Judgment reserved on: 16 July 2024**
Judgment pronounced on: 30 July, 2024

\+ W.P.(C) 12911/2021 & CM APPL. 40691/2021 (Interim Stay)

MITSUBISHI CORPORATION .....Petitioner

Through: Mr. Mayank Nagi & Mr. Tarun Singh, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE INTERNATIONAL TAX (2)(2)(1) DELHI & ANR. .....Respondents

Through: Mr. Sanjay Kumar & Ms. Easha Kadian, Advocates.
Ms. Nidhi Raman, CGSC with Mr. Zubin Singh & Ms. Rashi Kapoor, Advocates for R-2/ UOI.

\+ W.P.(C) 12941/2021& CM APPL. 40734/2021 (Interim Stay)

MITSUBISHI CORPORATION .....Petitioner

Through: Mr. Mayank Nagi & Mr. Tarun Singh, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE INTERNATIONAL TAX (2)(2)(1) DELHI & ANR. .....Respondents

Through: Mr. Sanjay Kumar & Ms. Easha Kadian, Advocates.
Ms. Nidhi Raman, CGSC with Mr. Zubin Singh & Ms. Rashi Kapoor, Advocates for UOI.
Mr. Sarthak Sharma, Advocate for R-2 with Mr. Amit Kumar,

Assistant Manager, Legal
Concor.

\+ W.P.(C) 12943/2021 & CM APPL. 40774/2021 (Interim Stay)

MITSUBISHI CORPORATION .....Petitioner

Through: Mr. Mayank Nagi & Mr. Tarun Singh, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE INTERNATIONAL TAX (2)(2)(1) DELHI & ANR. .....Respondents

Through: Mr. Sanjay Kumar & Ms. Easha Kadian, Advocates.
Ms. Nidhi Raman, CGSC with Mr. Zubin Singh & Ms. Rashi Kapoor, Advocates for R-2/ UOI.

\+ W.P.(C) 12944/2021 & CM APPL. 40775/2021 (Interim Stay)

MITSUBISHI CORPORATION .....Petitioner

Through: Mr. Mayank Nagi & Mr. Tarun Singh, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE INTERNATIONAL TAX (2)(2)(1) DELHI & ANR. .....Respondents

Through: Mr. Sanjay Kumar & Ms. Easha Kadian, Advocates.
Ms. Nidhi Raman, CGSC with Mr. Zubin Singh & Ms. Rashi Kapoor, Advocates for R-2/ UOI.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

1. The writ petitions impugn the order dated 30 September 2021 passed by the **Assessing Officer**[1], the first respondent herein, and who while framing a draft assessment order has chosen to rely upon CBDT Circular No. 549 dated 31 October 1989, to hold that the petitioner cannot be accorded relief which would result in the assessed income falling below that which was disclosed in the Return of Income. It has, in the aforesaid context, also sought to draw sustenance for the aforesaid view by relying upon the judgment of the Supreme Court in **Commissioner of Income Tax vs. Sun Engineering Works**[2].

2. This becomes evident from a reading of the following paragraphs as forming part of that draft order:-

> "14. The detailed contentions on various aspects are considered. However, it should be noted that while the formula was agreed for AY. 1998-99 to A.Y. 2004-05, the assessee on its own offered its income based on formula in A.Y. 2005-06. Thereafter, additional claims are being filed requesting to reduce the income below returned income of the assessee is not tenable as per CBDT Circular No. 549 dated 31-10-1989, wherein it is held that assessed income shall not be less than returned Income. Reference can also be placed on the SC judgment the in case of Commissioner of Income-tax vs Sun Engineering Works (P.) Ltd (Civil Appeals No. 3251-52 of 1979) wherein in context of s. 147, the SC held as under:
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> **"The assessee cannot claim re-computation of the income or redoing of an assessment and be allowed a claim which he either failed to make"**
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> 15. In view of above, considering the assessee has itself filed revised return by revising its original return and thereafter, again filed additional grounds requesting to make correction in revised return is nothing but a change in stance by the assessee multiple times.

[1] AO
[2] (1992) 4 SCC 363

> 16. Thus, the claims made by the assessee in respect of additional claim raised before the Hon'ble Tribunal, as regards Liaison office is not accepted. Further, the considering the preceding and succeeding years the gross profit 2.75% was taken by the assessee by itself therefore, the same rate is considered for attribution of profit for LO income."

3. After the writ petition had been entertained, we had also taken note of a final assessment order which had come to be framed pursuant to the aforesaid draft and was dated 30 November 2021. Accepting the challenge to the aforesaid, we had on 21 December 2021, passed the following order:-

> "Learned senior counsel for the applicants/petitioners states that vide order dated 17th November, 2021, this Court was pleased to issue notices on the present writ petitions as well as the applications seeking interim stay. He states that, despite this, the final assessment orders dated 30th November, 2021 under Section 254 r/w Section 144C (3) and 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') were passed by the respondent/AO, whereby the determination/observation in the draft orders were made final. He states that the final assessment orders are also accompanied by the notices of demand issued under Section 156 of the Act and the show cause notices for initiation of penalty proceedings under Section 274 r/w Section 271(1)(c) of the Act alleging concealment of particulars of income on part of the applicants/petitioners. He states that the date of compliance of the penalty notices is 30th December, 2021
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> Learned senior counsel for the applicants/petitioners states that granting status quo/interim stay on the operation of the final assessment orders dated 30th November, 2021 will avert multiplicity of proceedings before various forums emanating from the final assessment orders and the penalty notices as well as the demand notices impugned herein.
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> xxx xxxx xxxx
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> Till further orders, the impugned demand notices as well as penalty notices are stayed. It is clarified that the final assessment order dated 30th November, 2021 shall be subject to the final outcome of the accompanying writ petitions."

4. For the purposes of disposal of the present writ petitions, we take note of the following essential facts. The petitioner is an

incorporated company and is a tax resident of Japan. For **Assessment Year**[3] 2005-06, it filed its Return of Income on 31 October 2005, declaring an income of INR 4,18,98,800/- A revised return thereafter came to be submitted enhancing the declared income to INR 61,05,41,430/-. The aforesaid revision, according to the petitioner, was on the basis of a sum of INR 53.82 crores being attributable to activities of its Liaison office in India and INR 3.06 crores in respect of actual sales made to the Delhi Metro Rail Corporation. These revisions, according to the writ petitioners, were necessitated in light of the settlement which had been arrived at with the respondents in earlier years. However, the AO while framing an order of assessment on 31 December 2008 refused to accept the aforesaid declarations and thus chose not to proceed in accordance with the settlement which had been alluded to.

5. Aggrieved by the aforesaid action, and which, according to the writ petitioner, constituted a departure from the stand as taken for AYs' 1998-99 to 2004-05, the petitioner, in its appeal preferred before the **Commissioner of Income Tax (Appeals)**[4] added additional grounds assailing the aforesaid view as taken by the AO. The CIT(A), however, in terms of its order of 02 August 2011 dismissed those additional grounds. For purposes of clarity, we extract the additional grounds which were sought to be introduced hereinbelow:-

> **"**1. That on the facts of the case and in law, the Assessing Officer has erred in taxing purchases while taxing sales and not excluding the turnover from export of goods from India while computing the total income attributable to the activities of the Liaison Office

[3] AY

[4] CIT(A)

('LO') in complete disregard of the provisions of Income tax Act, 1961 ("Act") which clearly states that income shall not be deemed to accrue or arise in India on account of purchase operations for the purpose of export from India;

2. That on the facts of the case and in law, the Assessing Officer has erred in taxing purchases while taxing sales and not excluding the turnover from export of goods from India while computing the total income attributable to the activities of the LO in complete disregard of the provisions of tax treaty between India and Japan which clearly states that no profits can be attributable to the purchase function;

3. Without prejudice to the appellant's mere intention to buy peace and avoid litigation in not challenging the assessment order, the Assessing Officer erred in not appreciating that the LO of the appellant handled only the Machinery Division and since LO was held to be a PE, the sales made by other divisions of Me Japan (without any involvement of LO) should not be included in the turnover for the purpose of computing the total income;

4. That on the facts of the case and in Law, the Assessing Officer erred in not appreciating that the Indian Subsidiary is not a Permanent Establishment (,PE,) of the appellant

4.1 In any case the sales made to Indian subsidiary on principal to principal basis should be excluded from the total turnover for the purpose of computing the total income as the Indian subsidiary was selling goods on its own account and not on behalf of the appellant.

4.2 That on the facts of the case and in law, the Assessing Officer ought to have appreciated that the Indian subsidiary does not constitute a PE for the assessee in India and the observation/passing reference made by the AO in earlier years order was without examining any facts in relating to the Indian Subsidiary;

4.3 Without prejudice to the Ground Nos. 4, 4.1 and 4.2 above, the Assessing Officer ought to have appreciated that since the Indian subsidiary is remunerated on arm's length, any PE which is constituted of the appellant on account of the activities of the Indian subsidiary, gets extinguished.

5. That on the facts of the case and in law, the Assessing Officer erred in allowing the deduction for the expenses incurred in relation to the operations of the La only to the extent of 50% inspite of the facts that as per the provisions of the law such expenses should be allowed to the extent of 100%.

6. That on the facts of the case and in law, the Assessing Officer erred in applying the rate of 50% for the purpose of attributing income to the operations of La without considering the fact that the

major revenue generating activities were performed outside India and not by the LO."

6. Aggrieved by the aforesaid, the petitioner approached the **Income Tax Appellate Tribunal**[5] and which while dealing with the aforenoted deviations held as follows:-

> **"12.** We are of the considered view that when the ld. CIT (A) has admitted the additional grounds raised by the assessee to decide the issue on merit, the issue was not to be decided by the ld. CIT (A) on the basis of agreed settlement formula by applying the rule of consistency. The ld. CIT (A) has merely decided the issue pertaining to applicability of correct gross profit rate by applying the rule of consistency. The Ld. CIT (A) has also decided the applicability of gross profit rate· of 10% pertaining to DMRC project but has not decided the issue of exclusion from turnover. Ld. CIT (A) in order to test the applicability of gross profit rate of 10% has merely relied upon the order of AY 2006-07. All other grounds remained unadjudicated.
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> **13.** In view of what has been discussed above, we are of the considered view that since the assessee has set up a new case by raising additional grounds by departing from the rule of consistency, all the grounds were required to be decided by the ld. CIT (A) on merits. However, at the same time, we are of the considered view that since the assessee has raised many of the new grounds first time before the ld. CIT (A) qua which no material was there before the AO at the time of framing assessment, it would be in the interest of justice to remand the case back to AO to decide afresh after giving an opportunity of being heard to the assessee. Consequently, the appeal being ITA No. 4659/Del/2011 for AY 2006-06 is allowed for statistical purposes."

7. Pursuant to the order of remit, the petitioner appears to have reagitated that issue before the AO. According to the view expressed by the AO in the order impugned before us, the grant of relief as claimed by the petitioner would clearly result in the income chargeable to tax falling below the threshold as declared in its Return of Income. It is in the aforesaid context that the AO had sought to rest its decision on

[5] Tribunal

CBDT Circular of 31 October 1989 and the validity of which too is questioned before us.

8. It becomes pertinent to note that the CBDT vide Para 5.12 of that Circular had taken note of the amendments introduced in Section 143 and opined as under:-

> **"5.12** Since, under the provisions of sub-section (i) of the new section 143, an assessment is not to be made now, the provisions of sub-sections (2) and (5) have also been recast and are entirely different from the old provisions. A notice under sub-section (£) which will be issued only in cases picked up for scrutiny, is now issued only to ensure that the assessee has not understated his income or has not computed excessive loss or has not underpaid the tax in any manner while furnishing his return of income. This means that, under the new provisions, in an assessment order passed under section 143(3) in a scrutiny case, neither the income can be assessed at a figure lower than the returned income, nor loss can be assessed at a figure higher than the returned loss, nor a further refund can be given except what was due on the basis of the returned income, and which would have already been. allowed under the provisions of section 143(1)(a)(ii)."

9. It is in the aforesaid backdrop that learned counsel drew our attention to some of the significant amendments introduced in Section 143(3) of the **Income Tax Act, 1961**[6] as was applicable for AY 2005-06 and constituting the year under consideration. The amendments so introduced in Section 143(3) of the Act as contrasted with how that provision stood when CBDT Circular 549/1989 had come to be issued was sought to be highlighted by way of the following table:-

"Section 143(3) as applicable for AY 1989-90	**Section 143(3) as applicable for AY 2005-06 to AY 2008-09 (post amendment)**
(3) On the day specified in the notice issued under sub-section (2), or as	(3) On the day specified in the notice- issued under clause (1) of sub-section

[6] Act

soon afterwards as may be, after hearing such **evidence** as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him on the basis of such assessment.	(2), or as soon afterwards as may be, after hearing such evidence and after taking into account such particulars as the assessee may produce, the Assessing Officer shall, by an order in writing, allow or reject the claim or claims specified in such notice and make an assessment determining the total income or loss accordingly, and determine the sum payable by the assessee on the basis of such assessment; issued under clause (it) of sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, **the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment."**

10. It was in the aforesaid light that learned counsel contended that since Section 143(3) of the Act as it stood in AY 2005-06 clearly contemplated a refund being granted upon culmination of an assessment undertaken in terms of Section 143(3) of the Act, the CBDT Circular 549/1989 would neither be applicable nor determinative of the question which stood raised. The submission essentially was that in light of the change in the statutory position, the Circular had been rendered redundant and would have no impact on the prayer that was addressed.

11. Notwithstanding the above, learned counsel for the petitioner

submitted that since the additional grounds had come to be accepted by the Tribunal and peremptory directions framed for the issue being re-examined, the AO was clearly unjustified in taking the view that those aspects could not be considered. Learned counsel for the petitioner further submitted that while ordinarily an assessee may be bound by a return as submitted and stand restrained from advocating any deviations therefrom, except by way of filing of a revised return, that restriction would have no application when an assessment is liable to be undertaken pursuant to a direction framed by a Court or a Tribunal.

12. It was contended by Mr. Nagi, learned counsel for the petitioner, that the decision of the Supreme Court in **Goetze (India) Ltd. Vs. Commissioner of Income Tax**[7] itself recognizes this position as would be evident from the following passage: -

> **"4.** The decision in question is that the power of the Tribunal under section 254 of the Income-tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the Assessing Officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income-tax Act, 1961."

13. It was further urged that the position in law as enunciated in *Goetze* and which recognizes an exception in case of an order of the Tribunal also finds resonance in two decisions handed down by this Court. Learned counsel firstly drew our attention to the judgment in **CIT vs. Jai Parabolic Springs Ltd**[8]. As would be evident from the

[7] 2006 SCC OnLine SC 1446
[8] 2008 SCC OnLine Del 1486

question which arose for determination in that case, the Court was principally called upon to consider whether the Tribunal was justified in according relief to the assessee notwithstanding a claim in that respect not being made in the Return of Income. The Court in *Jai Parabolic* firstly explained the nature and extent of the power which could be exercised by the Tribunal under Section 254 of the Act and observed as follows:-

> **"14.** Reference may be made to National Thermal Power Co. Ltd. v. CIT [1998] 229 ITR 383, where the Supreme Court observed that (page 386):
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> "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 assessees 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."
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> **15.** Reference may also be made to Gedore Tools P. Ltd. v. CIT [1999] 238ITR 268 (Delhi), wherein the apex court decision in National Thermal Power Co. Ltd. [1998] 229 ITR 383 has been followed.
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> **16.** In the case of Jute Corporation of India Ltd. v. CIT [1991] 187 ITR 688, while dealing with the powers of the Appellate Assistant Commissioner, the Supreme Court observed that (page 386 of 229 ITR) :
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> "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 assessee 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 assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also."

14. It then went on to significantly observe in Para 17 that the decision of the Supreme Court in *Goetze* cannot be read as either impinging upon the power of a Tribunal to frame an appropriate direction or for that matter such a direction being rendered incapable of execution merely because a revised return had not been submitted. Para 17 is reproduced hereinbelow:-

> **17.** In Goetze (India) Ltd. v. 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."

15. A similar issue arose for consideration in **Rites Limited v. Commissioner of Income Tax**[9]. Here too, the Court was faced with a situation where the CIT(A) had rejected an application made by the assessee under Section 264 of the Act holding that since no deduction had been claimed in the return by way of amendment, the assessee would not be entitled to relief. The Court in *Rites* proceeded to hold as follows:-

[9] 2017 SCC OnLine Del 8940

"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.
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> 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."
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> **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.
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> **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."

16. Any doubt which could have possibly been harboured in this respect in any case stands laid to rest bearing in mind the recent judgment rendered by the Supreme Court in **Wipro Finance Ltd. v.**

CIT[10]. As would be evident from a reading of paragraph 10 of the report, an identical objection appears to have been raised on behalf of the Revenue with it being contended that since the assessee had taken a particular position with respect to an item of expenditure in the return, not only was the Tribunal disentitled in law to entertain a fresh claim, the same in any case could not have been taken into consideration for the purposes of according relief to the assessee.

17. The aforesaid contention came to be negated by the Supreme Court in the following terms:-

> **"10.** The learned Additional Solicitor General appearing for the Department had faintly argued that since the appellant in its return had taken a conscious explicit plea with regard to the part of the claim being ascribable to capital expenditure and partly to revenue expenditure, it was not open for the appellant to plead for the first time before the Income-tax Appellate Tribunal that the entire claim must be treated as revenue expenditure. Further, it was not open to the Income-tax Appellate Tribunal to entertain such fresh claim for the first time. This submission needs to be stated to be rejected. In the first place, the Income-tax Appellate Tribunal was conscious about the fact that this claim was set up by the appellant for the first time before it, and was clearly inconsistent and contrary to the stand taken in the return filed by the appellant for the concerned assessment year including the notings made by the officials of the appellant. Yet, the Income-tax Appellate Tribunal entertained the claim as permissible, even though for the first time before the Income-tax Appellate Tribunal, in appeal under section 254 of the 1961 Act, by relying on the dictum of this court in National Thermal Power Co. Ltd.*. Further, the Income-tax Appellate Tribunal has also expressly recorded the no objection given by the representative of the Department, allowing the appellant to set up the fresh claim to treat the amount declared as capital expenditure in the returns (as originally filed), as revenue expenditure. As a result, the objection now taken by the Department cannot be countenanced.
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> **11.** Learned Additional Solicitor General had placed reliance on the decision of this court in Goetze (India) Ltd. v. 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,

[10] (2022) 443 ITR 250

> 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."

18. As is evident from the enunciation of the legal position in the decisions aforenoted, while ordinarily an assessee may be bound by the Return of Income as furnished, in case the Tribunal were to admit a question and proceed to accord relief, the same cannot be denied or be made subject to a Return of Income being revised. The insistence of the respondents on a revision of the return being a precondition clearly fails to take into consideration the plenary powers which stand conferred upon the Tribunal by virtue of Section 254 of the Act.

19. In light of our conclusions on the principal question which stood posited, we observe that the challenge to the Circular of the CBDT does not really merit further consideration. All that need be observed is that once the Tribunal had called upon the AO to examine the issue afresh, the said direction could not have been disregarded by reference to a Circular issue by the CBDT.

20. We accordingly allow the writ petitions and quash the final assessment orders dated 30 November 2021 insofar as they negate consideration of the additional grounds which had been urged by the writ petitioners. The AO shall consequently consider the same and pass fresh orders in accordance with law. We, in light of the above, also quash the consequential demand and penalty notices also dated 30 November 2021.

21. All rights and contentions of respective parties in respect of the additional grounds are kept open to be addressed before the AO.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JULY 30, 2024/neha