

IN THE INCOME TAX APPELLATE TRIBUNAL

BENCH "D" CHENNAI

(Before Shri U.B.S. Bedi, Judicial Member and
Shri Abraham P. George, Accountant Member)

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I.T.A. No. 1058/Mds/2010

Assessment Year : 2007-08

Shri R. Natarajan,
New No.15, Old No.8,
3rd Cross Street, R.K. Nagar,
Mandaveli,
Chennai – 600 028.

v.

The Assistant Commissioner
of Income Tax,
Salary Circle V,
Chennai – 600 034.

PAN : AABPN8427H
(Appellant)

(Respondent)

Appellant by : Shri R. Kumar
Respondent by : Shri K.E.B. Rengarajan
Junior Standing Counsel

O R D E R

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :

This appeal is filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-VI, Chennai, for the impugned assessment year. The grounds raised by the assessee are reproduced as under:-

The appellant at the time of filing the return for the assessment year 2007-08, in addition to the regular income also admitted a sum of ₹ 4,28,750/- as performance incentive from his employer. A sum of ₹ 1,28,625/- was claimed as tax deducted at source by the employer for the said performance incentive. The case was selected for scrutiny for the assessment year 2007-08 and the income admitted by the appellant was accepted by the assessing officer ended up in the demand of ₹ 2,51,720/-. The reason for the demand is non availability for TDS credit claim of ₹ 1,28,625/-.

On going through the assessment order the appellant realized that the performance incentive which was admitted by him for the assessment year 2007-08 actually belong to the assessment order 2008-09. On seeing the Form 16 given by the company for the assessment year 2008-09 the performance incentive of ₹ 4,28,750/- was included there and the appellant without knowing that it was admitted in the assessment year 2007-08 also admitted in the assessment year 2008-09. In effect the same performance incentive of ₹ 4,28,750/- was admitted both in the assessment year 2007-08 and 2008-09, whereas TDS credit of ₹ 1,28,625/- is available only for the assessment year 2008-09.

The appellant being aggrieved by the order for the assessment year 2007-08 filed on appeal before the Commissioner of Income Tax (Appeals VI) The Commissioner dismissed the appeal inviting reference to 246 of the Income-tax Act, 1961.

The fact remains that the amount ₹ 4,28,750/- has been taxed twice by the Income Tax Department. Hence the appeal.

2. Assessee has also filed an additional ground wherein it assails the action of the CIT(Appeals) in dismissing the appeal in limine.

3. Short facts apropos are that the assessee had filed his return of income for the impugned assessment year declaring a total income of ₹ 14,86,210/-. The said return was accepted in an assessment done under Section 143(3) of Income-tax Act, 1961 (hereinafter called "the Act") and assessment was completed. Appeal was filed by the assessee against the order of the A.O. wherein its main submission was as under:-

The assessee at the time of filing the return for the assessment year 2007-08 has admitted an income of ₹ 4,28,750/- being performance incentive received from SSL TT Ltd., Credit for tax deducted at source was

also claimed for a sum of ₹ 1,28,625/- for the same assessment year. Now, it has been noticed that the assessee's employer M/s SSL TTK Ltd., has considered the said performance incentive in the subsequent year namely assessment year 2008-09 and has given TDS certificate for the assessment year 2008-09. The assessee in addition to admitting the income of ₹ 4,28,750/- in the assessment year 2007-08 also admitted the same in the assessment year 2008-09. Therefore, the income cannot be taxed in the assessment year 2007-08 and if it is done, the same amount will get taxed twice.

4. However, the CIT(Appeals) was of the opinion that an appeal would lie only when the assessee denied his liability to be assessed. Here, the Assessing Officer had accepted the returned income. According to him, the case had become infructuous and he dismissed the appeal.

5. Now before us, the learned A.R. submitted that assessee had filed his return of income for the impugned assessment year wherein he had shown salary received from M/s SSL TTK Ltd. According to him, Form 16 issued by the said company, placed at page No.7 in paper-book, clearly shows that the income chargeable under the head "Salary" was ₹ 11,67,780/-. However, the assessee had aggregated with this amount, performance incentive of ₹ 4,28,750/- which was given by the said company to him in financial year 2007-08 relevant to the assessment year 2008-09, by mistake. According to him, the said company vide its letter dated 5th July, 2007, placed at page No.10 of paper-book, had informed him regarding performance incentive of ₹ 4,28,750/-. Such letter having been received before filing of the return for the

impugned assessment year, assessee by mistake included the performance incentive also in the salary. The corresponding tax was also claimed for credit along with tax deductions on salary of ₹ 11,67,780/-. Learned A.R. submitted that the A.O. while completing assessment, accepted the return but did not give credit for the tax deduction made on performance incentive of ₹ 4,28,750/-. For assessment year 2008-09 the assessee in his return of income once again included the same amount of ₹ 4,28,750/- and for this learned A.R. placed reliance on page No.17 of paper-book which is an annexure to Form 16 issued by M/s SSL TTK Ltd. for assessment year 2008-09. According to him, though the assessee had returned the same amount as a part of his income for the impugned assessment year, the Assessing Officer in the assessment for assessment year 2008-09 also considered it as a part of assessee's income, whereas as he ought have excluded it, considering the mistake committed by the assessee. Therefore, according to him, the said amount of performance incentive was included twice by the assessee for assessment year 2007-08 as well as assessment year 2008-09 and credit for TDS also claimed both the years. The Assessing Officer had accepted the returns in so far as it related to the salary income for both the years but for assessment year 2007-08, he denied the tax credit on performance incentive. Relying on the decision of co-ordinate Bench of this Tribunal in the case of Ark Investments Ltd. v. ITO (1985) 13 ITD 65 (Mad), learned A.R. submitted that an appeal

was maintainable even where income returned was accepted but there was a subsequent claim that income was not taxable. Relying on para 5 of this order, learned A.R. submitted that even if the assessee by mistake had shown certain receipts as taxable, it would not per se make him liable for tax thereon. As per the learned A.R., an assessee could be taxed only on income which can be included as a part of the total income. Relying on Circular No.14 (XL-35) dated 11.4.1995 issued by CBDT, learned A.R. submitted that Revenue had wrongly taken advantage of assessee's ignorance, to collect more tax out of his income than was legitimately payable by him. At this juncture, the Bench asked the learned A.R. as to why in the certificate issued by M/s SSL TTK Ltd., placed at page 10 of paper-book, it was mentioned that the performance incentive was being awarded, as done in the past. Or in other words, query posed by the Bench was whether in preceding assessment year there was any performance incentive received and shown by the assessee in his return of income. There upon, the learned A.R. filed a copy of return filed by the assessee for assessment year 2006-07 and submitted that assessee had joined M/s SSL TTK Ltd. only in March, 2006 as an employee and was not in receipt of any performance incentive for financial year 2005-06 from the said company. Learned A.R. submitted that prior to March, 2006 assessee was working with T.V. Sundaram Iyengar & Sons Ltd. and the salary received therefrom along with one month salary received from SSL TTK

Ltd. was duly shown in the return of income for assessment year 2006-07. Copy of SARAL tax return for assessment year 2006-07 was placed on record at page No.22 of paper-book. In so far as the statement in the letter of SSL TTK Ltd., regarding past performance incentive, learned A.R. submitted that the said company was using a standardized template for all employees while giving performance incentive, and hence this aberrance.

6. Per contra, learned D.R. submitted that a same amount was admittedly taxed twice both for the assessment year 2007-08 and 2008-09. He further stated that tax credit could be given to the assessee only in the year in which corresponding income was admitted.

7. We have perused the orders and heard the rival contentions. There is no dispute that assessee had filed return for the impugned assessment year which was accepted in a scrutiny assessment done under Section 143(3) of the Act. Assessee by mistake included in the said assessment year, a sum of ₹ 4,28,750/- received as performance incentive in the subsequent year. As per the assessee, such amount was again included by him in the return for the subsequent year and A.O. while completing assessment for the impugned assessment year did not give credit for the TDS relatable to performance incentive. Records placed by the assessee would show that he was in the employment of SSI TTK Ltd. only from March, 2006 (paper-book

page No.28) and prior to that he was with T.V. Sundaram Iyengar & Sons Ltd. (paper-book page Nos.23 to 27). In assessment year 2006-07 relevant to previous year ending 31.3.2006, assessee had shown in his return of income salary received from both these concerns. Performance incentive of ₹ 4,28,750/- was received by the assessee on 5th July, 2007 vide letter of SSL TTK Ltd. placed at page 10 in paper-book. Return for the impugned assessment year was filed by the assessee after 5th July, 2007. Therefore, there is every chance that the assessee had by mistake included the said amount in his income for the impugned assessment year on a mistaken impression that the amount had to be considered for assessment in the impugned assessment year. The A.O. while accepting the return as filed by the assessee, obviously did not give credit for tax on performance incentive. Whatever be the situation, it is clear that same amount was included twice as income of the assessee, once for assessment year 2007-08 and again for assessment year 2008-09. Co-ordinate Bench in the case of Ark Investments Ltd. (supra) has clearly held that an assessee can file an appeal if he considers himself to be aggrieved by the total income assessed or tax determined, on account of some amount of income having been taxed which he believed to be not taxable, even though he had returned it as his income under an erroneous or mistaken view of the law. Here, the assessee was clearly under a mistake when he included performance incentive in his return of income for the impugned

assessment year while the said amount was received in the subsequent year. As rightly relied on by the learned A.R., Circular No.14 of CBDT clearly emphasizes that the Revenue should not take advantage of an assessee's ignorance. One of the canons of taxation is that tax is to be collected from a subject as per law, and not a pie more or not a pie less. The A.O. ought have excluded the sum of performance incentive while completing assessment under Section 143(3) of the Act, since the said amount was received by the assessee in the subsequent year. He was aware that the said amount was received by the assessee in the next year, as is clear from the fact that TDS credit was not given by him for the impugned assessment year on the performance incentive. Though the CIT(Appeals) dismissed the appeal of the assessee in limine, we are not inclined to remit the issue back to him, all the facts being on record and not being disputed by the D.R. In any case, the primary duty of any Tribunal established under a statute is to ease the rigours of procedure and render substantial justice without taking refuge under cumbersome technicalities, which would defeat the very purpose of its formation. We are, therefore, of the opinion that to meet the ends of justice, the amount of ₹ 4,28,750/- shown by the assessee as performance incentive has to be excluded from the assessee's total income for impugned assessment year. Directed accordingly.

8. In the result, the appeal filed by the assessee stands allowed.

The order was pronounced in the Court on

(U.B.S. Bedi)
George)
Judicial Member

sd/
(Abraham P.
Accountant Member

Chennai,
Dated the May, 2011.

As per separate order
dated 06.09.2011
sd/- 6.9.2011
(U.B.S. Bedi)
Judicial Member

Kri.

Copy to: (1) Appellant
(2) Respondent
(3) CIT(A)-VI, Chennai-34
(4) CIT, Chennai-V, Chennai
(5) D.R.
(6) Guard file

Per U.B.S. Bedi, J.M.

09. Despite best persuasion of myself, I am not able to agree with the finding and conclusion as drawn by the Id. Accountant Member and I write my order as under:

10. Facts indicate that the assessee declared income of Rs.14,86,210/- in his return filed on 09.07.2007 relevant to the assessment year 2007-08. The said return was processed under section 143(1) and the case was selected for scrutiny and the notice under section 143(2) was issued. The Id. AR of the assessee appeared before the Assessing Officer on the dates of hearing on 07.12.2009, 11.12.2009 and 15.12.2009, details were furnished as called for in respect of mutual fund investment, which was claimed to be out of salary earning and accumulation of saving bank account about which necessary documentary evidences were produced. The assessment was completed accepting the returned income vide order dated 31.12.2009 giving credit of taxes to the extent of Rs.2,29,841/- as TDS and RS.71 ,690/- as self-assessment tax, thereby demand of Rs.2,51,720/- was raised as per calculation sheet attached in the assessment order.

11. The assessee filed appeal against this order, through which the assessee challenged the order of the Assessing Officer by raising a ground that the Assessing

Officer should tax the incentive amount in the assessment year 2008-09 and not for the assessment year 2007-08 and following reasons were given:

"The assessee at the time of filing the return for the assessment year 2007-08 has admitted an income of Rs.4,28,750/- being performance incentive received from SSL TTK Ltd., Credit for tax deducted at source was also claimed for a sum of Rs.1,28,625/- for the same assessment year. Now, it has been noticed that the assessee's employer M/s. SSL TTK Ltd., has considered the said performance incentive in the subsequent year namely assessment year 2008-09 and has given TDS certificate for the assessment year 2008-09. The assessee in addition to admitting the income of Rs . .4,28,750/- in the assessment year 2007-08 also admitted the same in the assessment year 2008-09. Therefore, the income

cannot be taxed in the assessment year 2007-08 and if it is done, the same amount will get taxed twice."

11.1 During the hearing of the appeal, the Id. Counsel for the assessee submitted that the assessee has wrongly paid tax and shown income with respect to incentive amount in the return. The assessee also claimed that although the Assessing Officer has accepted the return on the same income, but amount is added twice as the assessee has offered such income for the assessment year 2008-09 also.

12. The Id. CIT(A), while considering, but not accepting the appeal of the assessee has concluded to dismiss the appeal as per para 4.1 of his order, which is

reproduced below:

"4.1 Reference is invited to section 246A of the I.T. Act and it is noticed that CIT(A) can only alter, reduce, annul and enhance the order of the Assessing Officer. The appeal lies only when the assessee denies his liability to be assessed and in the instant case the AO has accepted the returned income and there is no denial of liability. When there is no liability, the case becomes infructuous and the appeal is dismissed."

13. Still aggrieved, the assessee filed further appeal and contested in the memorandum of appeal that the assessee, at the time of filing of the return for 2007-08, in addition to regular income also admitted a sum of ₹ 4,28,750/- as performance incentive from his employer. A sum of Rs.1,28,625/- was claimed as tax deducted at source by the employer for the said performance incentive. The case was selected for scrutiny for the assessment year 2007-08 and the income admitted by the assessee was accepted by the Assessing Officer, which ended up in the demand of Rs.2,51,720/-. The reason for the demand is non-availability for TDS credit claim of Rs.1,28,625/-. On going through the assessment order, the assessee is stated to have realized that the performance incentive which was admitted by him for the assessment year 2007-08 actually belongs to the assessment order 2008-09. On seeing the Form 16 given by the company for the assessment year 2008-09, the

performance incentive of Rs.4,28,750/- was included there and the assessee without

knowing that it was admitted in the assessment year 2008-09 also admitted in the assessment year 2007-08. In effect the same performance incentive of Rs.4,28,750/-

was admitted both in the assessment year 2007-08 and 2008-09, whereas TDS credit of Rs.1,28,625/- is available only for the assessment year 2008-09. The assessee being aggrieved by the order for the assessment year 2007-08 filed an appeal before the Id. CIT(A) and the Id. CIT(A) dismissed the appeal inviting reference to section 246A of the Income-tax Act, 1961. The fact remains that the amount Rs.4,28,750/- has been taxed twice by the Income Tax Department, therefore the assessee preferred the appeal.

14. At the time of hearing of the appeal, the assessee also filed additional ground. Based on the Tribunal's decision, the same was found to contain same issue as raised in the memo of appeal except relying upon our Tribunal decision which the assessee could otherwise raise, so the same is not considered.

15. At the time of hearing of the appeal, the assessee's counsel has relied upon the written submission as well as authorities cited therein to plead that the same amount, which has been taxed during the assessment year 2007-08 has again been offered for taxation in 2008-09 and assessed, therefore, the same is being taxed twice, which is not permissible under law, otherwise also, though intimation about incentive amount pertaining to the financial year 2006-07 was communicated to the assessee by his employer vide letter dated 05.07.2007, the amount of incentive was determined in the next year relevant to the assessment year 2008-09, the assessment with respect to the said amount could only be made in the assessment year 2008-09 and not in 2007-08. The assessee, mistakenly offered the said amount in the assessment year under consideration and claimed TDS with respect to the

said amount and the Assessing Officer has accepted the returned income, but did not give credit to the TOS pertaining to the incentive amount and it is a settled law that credit of TOS could be given in the year in which the income has been assessed. So, on this score also, the order of the Assessing Officer is not proper and justified. As far as first appellate authority is concerned, the assessee is denying its liability to tax with respect to the incentive amount, so the appeal was maintainable and even if the claim is made before the first appellate authority the same could be allowed. At this juncture, the assessee's counsel was asked to clarify if he was of the opinion that this amount is not taxable in 2007-08, then why a revised return was not filed to exclude such amount when the assessee himself offered the same amount for the assessment year 2008-09 in the return for that year filed on 15.07.2008 with TDS certificate etc. The assessee simply insisted that since incentive amount, though pertaining to the year under consideration, it is taxable in the subsequent year, because the same was determined and communicated to the assessee in the subsequent year. Since legitimate and proper tax has to be collected from the assessee, therefore, even if revised return was not filed and such amount was not excluded from the total income before the Assessing Officer, the Id. CIT(A) could very well decide the issue without going into the ground of non-maintainability of the appeal and the assessee's appeal should not have been dismissed. It was prayed for exclusion of income, taxed twice.

16. The Id. DR submitted that the best course for the assessee was to file revised return if he wanted to exclude such income, when he came to know about TDS on such amount in next year on filing of his return for the subsequent year, which event took place on 15.07.2008, so he could revise his income by filing revised return, but he opted not to do so, despite having attended on number of occasion

during hearing before the Assessing Officer during the proceedings for the assessment year 2007-08 when the assessment order under section 143(3) was passed on 31.12.2009. The assessee also could not be able to establish that there is no tax liability in his case. Therefore, the action of the Id. CIT(A) in dismissing the appeal of the assessee is proper and justified, which should be further confirmed. The Id. DR has relied upon the decision in the case of Goetze (India) Ltd. v. CIT [284 ITR 323 (SC)] to plead that in the absence of having filed revised return of income, the assessee could not claim any deduction exclusion by way of letter addressed to the Assessing Officer or letter addressed to the AR. So, the action of authorities below should be confirmed.

16.1 To counter the submission of the Id. DR, the Id. Counsel for the assessee submitted that this decision pertains to the proceedings before the Assessing Officer and not before the Id. CIT(A) or any higher forum. So, it cannot be held to be applicable in this case.

17. After having considered the arguments of both the sides, material on record and precedents as relied upon by rival sides, it is found that the assessee declared income of Rs.14,86,210/- in his return filed on 09.07.2007 relevant to the assessment year 2007 -08. The said return as processed under section 143(1) and the case selected for scrutiny and after due notice and considering the reply and material on record, the Assessing Officer accepted the returned income. It is not in dispute that the assessee himself declared the incentive income of Rs.4,28,750/- as performance incentive for the financial year 2006-07 relevant to the assessment year 2007-08 making a claim of TDS in respect to the said income at Rs.1,28,625/- on the basis of communication received by the assessee from SSL TTK Ltd. dated

05.07.2007, which letter has been placed by the assessee in his paper book at page 10 and the same reads as under:

SSL - TTK Limited

July 5, 2007

*Mr. R Natarajan
Chennai*

Dear Mr. Natarajan,

As in the past, we are pleased to award Performance Incentive for your performance during 2006-07 as follows:

<i>30% on Basic Salary as performance Bonus (Apr '06 - Aug '06</i>	<i>Rs. 1,05,000/-</i>
<i>30% on Basic Salary as performance Bonus (Sep '06 - Mar '07</i>	<i>Rs. 1,52,250/-</i>
<i>In recognition and appreciation of the exceptional Overall performance of the Company during 2006-07 The Management is pleased to grant a one time Ex-gratia amounting to</i>	<i>Rs. 1,71,500/-</i>
<i>TOTAL</i>	<i>Rs. 4,28,750/-</i>
<i>Less: Tax Deducted at Source @ 30%</i>	<i>Rs. 1,28,625/-</i>
<i>Net after tax</i>	<i><u>Rs. 3,00,125/-</u></i>

(Rupees three lakhs one hundred and twenty five only)

We have no doubt you will endeavour to make even more significant contribution to the growth and betterment of the company

With best wishes

Yours Sincerely

*Sd/-
T R Venkatesh*

NB: The amount is credited to your SB ale with ICICI Bank. "

The assessee is stated to have offered same amount of Rs.4,28,750/- in the return filed by him for the assessment year 2008-09 on 15.07.2008 and also claimed TDS of RS.1,28,625/- there.

17.1 The assessment proceedings for the assessment year 2007-08, as per assessment order Col.11 started on 07.12.2009 and the assessment order was

passed on 31.12.2009, whereas the assessee has filed the return for the assessment year 2008-09 on 15.07.2008 and TDS certificate enclosed with that return, as stated to have filed with the return of income, clearly indicates that the payment of incentive as well as TDS with respect to the said incentive income. So, if assessee was of the opinion, that the income on account of incentive bonus does not pertain to A.Y 2007-08 which he has already offered otherwise pertains to the accounting period 2007-08 relevant to assessment year 2008-09, he could very well exclude such income from the return of income by filing a revised return for 2007-08, for which he had time upto 31.03.2009 but he did not do so and that apart the assessment proceedings started from 07.12.2009, which were concluded on 31.12.2009, when the order of the assessment was passed, the assessee did not opt for excluding such income, when his returned income was accepted. The Hon'ble Supreme Court in the case of Goetze (India) Ltd. v. CIT [2006] 284 ITR 323 (SC) has held as under:

"The question raised in this appeal relates to whether the appellant assessee could make a claim for deduction other than by filing a revised return. The assessment year in question was 1995-96. The return was filed on November 30, 1995, by the appellant for the assessment year in question. On January 12, 1998, the appellant sought to claim a deduction by way of a letter before the Assessing Officer. The deduction was disallowed by the Assessing Officer on the ground that there was no provision under the Income-tax Act to make amendment in the return of income by modifying an application at the assessment stage without revising the return.

This appellant's appeal before the Commissioner of Income-tax (Appeals) was allowed. However, the order of the further appeal of the Department before the Income-Tax Appellate Tribunal was allowed. The appellant has approached this court and has submitted that the Tribunal was wrong in upholding the Assessing Officer's order. He has relied upon the decision of this court in National Thermal Power Company Ltd. v. CIT [1998] 229 ITR 383, to contend that it was open to the assessee to raise the points of law even before the Appellate Tribunal.

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. There shall be no order as to costs. "

Since the assessee has not filed any revised return and did not make any such claim before the A.O. during assessment proceedings, despite having filed a return of Income for the subsequent year i.e. for A Y 2008-09, on 15.07.2008, when time limit was available upto 31.03.2009 to revise the return for the assessment year 2007-08 filed on 09.07.2007, therefore, in my considered view, the claim of the assessee for exclusion of the incentive income offered by the assessee pertaining to the financial year 2006-07 relevant to the assessment year 2007-08, even if received in F Y 2007-08 relevant to the assessment year 2008-09, in the absence having excluded such income under the process envisaged under law (there was no change in income as declared and assessed), could not be allowed (to be excluded) in 2nd appeal. As such, it is held that the action of the authorities below is justified and calls for no interference at this level. This view is further fortified by the Hon'ble Madras High Court's decision dated 12.06.2011 in Tax Case (Appeal) No. 223 of 2005, in which the conclusion has been drawn as per para 8 and 9 of the said order, which reads as under:

"8. As far as the second question is concerned, learned Standing counsel for the Revenue placed before us the decision in the case of Goetze (India) Ltd v. Commissioner of Income Tax reported in 284 ITR 323 (SC), wherein, under similar circumstances, the Apex Court rejected the appeal preferred by the assessee therein. It shows that in the case referred to, the assessee made a claim for deduction not by filing a revised return but by merely by filing a letter before the Assessing Officer. The Assessing officer rejected the claim on the ground that there is no power

for the Assessing Officer to entertain a claim for deduction otherwise than by filing a revised return. The Tribunal rejected the claim of the assessee, which, on further appeal before the High Court, was once again confirmed, and on further appeal before the Apex Court, where the decision of the High Court was confirmed that the claim for deduction not made on the revised return could not be entertained by the Assessing Officer otherwise than by filing a revised return.

9. Following the said decision, we have no hesitation in confirming the order of the Tribunal by answering the substantial questions in favour of the Revenue. Consequently, the Tax Case (Appeal) stands partly allowed. No costs. "

Therefore, the appeal of the assessee, being devoid of any merit, is rejected.

Sd/-

(U.B.S.B
edi)
Judicial Member

Dated: 06.09.2011

Vm/-

IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

BEFORE
Dr. O.K.NARAYANAN, VICE-PRESIDENT
THIRD MEMBER

ITA No.1058(Mds)/2010
Assessment Year : 2007-08

Shri R.Natarajan,
New No.15, Old No.8,
3rd Cross Street, R.K.Nagar,
Mandaveli, Chennai-600028.
PAN AABPN8427H.
(Appellant)

The Assistant Commissioner
of Income-tax,
Salary Circle V,
Chennai.
(Respondent)

Appellant by : Shri R.Kumar, Advocate
Respondent by: Shri KEB Rengarajan, Jr.Standing Counsel.

Date of Hearing : 18th January, 2012
Date of Order : 23rd January, 2012

ORDER

PER Dr.O.K.NARAYANAN, VICE-PRESIDENT:

This appeal is filed by the assessee. The relevant assessment year is 2007-08. The appeal is directed against the

order of the Commissioner of Income-tax(Appeals)-VI at Chennai dated 21-4-2010 and arises out of the assessment completed under section 143(3) of the Income-tax Act, 1961.

2. The assessee in this case is a salaried employee working for SSL-TTK Limited. He filed his return of income for the impugned assessment year 2007-08 on a total income of ₹ 14,86,210/-. The assessment was completed under section 143(3), accepting the return filed by the assessee.

3. In his return of income filed for the impugned assessment year 2007-08, the assessee had admitted an income of ₹ 4,28,750/-, being the performance incentive received from SSL-TTK Limited. This amount was in fact received by the assessee on 5-7-2007, after the close of the relevant previous year, but before the due date of filing of the return. As the incentive was given to the assessee for his efforts made in the previous year relevant to the assessment year 2007-08, the assessee offered the said amount of ₹ 4,28,750/- as his income for the impugned assessment year 2007-08. But the twist of the situation came when his employer company M/s.SSL-TTK

Limited considered the said amount of performance incentive only for the subsequent assessment year 2008-09. The result is that the assessee's employer issued the TDS certificate for the assessment year 2008-09. It was imperative upon the assessee to co-relate the income generated and the TDS made thereon, for the purpose of claiming credit of the TDS against the tax liability. Therefore, the assessee had to return the performance incentive of ₹ 4,28,750/- as his income, again for the assessment year 2008-09. Once he included this incentive income of ₹ 4,28,750/- in his total income for the assessment year 2008-09, the matching of the TDS certificate was satisfied and he was given credit of the TDS made by his employer. In that way the assessment for the subsequent assessment year 2008-09 was completed and now rests on record. The assessment for the assessment year 2008-09 has come to finality.

4. Now the ordeal of the assessee begins. The amount of performance incentive of ₹ 4,28,750/- was offered for taxation by the assessee two times, that is, for the assessment years 2007-08 and 2008-09. Therefore, to come out of above

situation, the assessee filed an appeal before the Commissioner of Income-tax(Appeals) for the assessment year 2007-08. The assessee argued before the Commissioner of Income-tax(Appeals) that the incentive income of ₹ 4,28,750/- has already been offered by the assessee as part of his taxable income for the assessment year 2008-09 and the said assessment has been completed and become final and the assessee has also received the benefit of credit of the TDS made by his employer for that assessment year. The fact being so, there is no need for the assessee to offer the very same amount for the assessment year 2007-08 and, therefore, that much of income may be excluded from the assessment of the impugned assessment year 2007-08.

5. The first appeal filed by the assessee was dismissed with the following observations by the Commissioner of Income-tax(Appeals):-

“Reference is invited to section 246A of the I.T.Act, and it is noticed that CIT(A) can only alter, reduce, annul and

enhance the order of the Assessing Officer. The appeal lie only when the assessee denies his liability to be assessed and in the instant case the Assessing Officer has accepted the returned income and there is no denial of liability. When there is no liability, the case becomes infructuous and the appeal is dismissed.”

6. Aggrieved by the order of the Commissioner of Income-tax(Appeals), second appeal was filed before the Tribunal.

7. The learned Accountant Member authored the order for the Tribunal. After examining the facts of the case in a detailed manner, the learned Accountant Member found that the assessee was under a mistake when he did include the performance incentive in his return of income for the impugned assessment year 2007-08, where in fact the same amount was received by the assessee only in the subsequent previous year. He observed that one of the canons of taxation is that tax is to be collected from a subject as per law and not a pie more or not

a pie less. He found that the assessing authority ought to have excluded the performance incentive while completing the assessment under section 143(3) for the impugned assessment year, as he was aware that the incentive amount was received by the assessee only in the subsequent previous year and more particularly when the assessing authority has not given the TDS credit for that amount for the impugned assessment year even though the incentive amount was offered for taxation. He held that the primary duty of the Tribunal is to ease the rigours of procedure and render substantial justice without taking refuge under the cumbersome technicalities. He accordingly held that the amount of ₹ 4,28,750/- offered for taxation by the assessee for the impugned assessment year is to be excluded from the assessee's total income. Accordingly, the appeal was proposed to be allowed by the learned Accountant Member.

8. But the learned Judicial Member could not agree with the order proposed by the learned Accountant Member. The learned Judicial Member relied on the decision of the Hon'ble Supreme Court in the case of Goetze(India) Ltd. vs. CIT,

284 ITR 323, wherein the Hon'ble Apex Court has held that additional claims of relief cannot be made by an assessee in the course of assessment proceedings unless he has filed a revised return of income. The learned Judicial Member also relied on the judgment of the Hon'ble Madras High Court dated 12-6-2011 in Tax Case (Appeal) No.223 of 2005 (as mentioned by the learned Judicial Member), in support of his conclusion. He, accordingly, rejected the grounds raised by the assessee and proposed to dismiss the appeal.

9. In view of the above difference of opinion between the Hon'ble Members who heard the case, a reference was made to the Hon'ble President of the Income-tax Appellate Tribunal under section 255(4) of the Income-tax Act, 1961 to nominate a Third Member to answer the following questions framed by the Hon'ble Members:-

"In view of the facts and circumstances of the case,

Whether income on account of incentive pertaining to assessment year 2007-08 received in the assessment

year 2008-09 and offered by the assessee himself in the return for the year under consideration, when returned income came to be accepted could be directed to be deleted as held by the Accountant Member,

OR

Could the assessment framed by accepting the returned income, in the absence of filing of revised return excluding such incentive, in view of the decision of the Hon'ble Supreme Court in the case of Goetze(India) Ltd. v CIT (2006) 284 ITR 323 (SC), be upheld as held by Judicial Member?"

10. The Hon'ble President nominated me as the Third Member and it is how these questions have been placed before me for adjudication.

11. I heard Shri R.Kumar, the learned counsel appearing for the assessee and Shri KEB Rengarajan, the learned Standing Counsel appearing for the Revenue.

12. The facts and circumstances of the case have been elaborately discussed by the Hon'ble Accountant Member in his order and other particulars are very much available in the orders of the assessing authority, the Commissioner of Income-tax(Appeals) and in the statement of facts and the grounds of appeal filed before the different authorities.

13. The issue is as to whether the assessee should be subjected to tax on a sum of ₹ 4,28,750/- for two assessment years 2007-08 and 2008-09, even though the assessee himself has offered the said amount as his income for both the above assessment years.

14. The case of the assessee is that the above stated amount of ₹ 4,28,750/- was offered by him as income for the impugned assessment year 2007-08 by mistake, whereas the said amount was rightly offered as income for the subsequent assessment year 2008-09 and the same was assessed after getting the TDS credit and assessment has become final. In order to rectify his mistake of offering the income of ₹ 4,28,750/- for taxation for the assessment year 2007-08, the

assessee has not filed any revised return. In these circumstances, the question is whether the assessee is entitled for relief so that the amount of ₹ 4,28,750/- may be excluded from the taxable income of the assessee for the impugned assessment year 2007-08. For the sake of clarity, it is to be made clear that there is no dispute whatsoever as far as the assessment year 2008-09 is concerned. The dispute is only with reference to the impugned assessment year 2007-08 as to whether the said amount of ₹ 4,28,750/- should be again taxed for the impugned assessment year or it should be excluded from taxation for the impugned assessment year.

15. Article 265 of the Constitution of India reads as below:-

*“Taxes not to be imposed save by authority of law.-
No tax shall be levied or collected except by
authority of law.”*

16. In the light of the above stated constitutional mandate on collection of tax, it is incumbent upon public authorities vested with the duty of collecting tax to see that what is demanded is only the legitimate tax due from an assessee. The above constitutional mandate is profoundly reflected in the Circular issued by the Central Board of Direct Taxes to give administrative instructions for guidance of Income-tax Officers on matters pertaining to assessment. That particular Circular is numbered as Circular No.14(XL-35), dated 11-4-1955. Although the Circular was issued even before the present Income-tax Act of 1961, the principles survive for all the time. The most relevant extracts from the above Circular are reproduced below:-

“1. The Board have issued instructions from time to time in regard to the attitude which the Officers of the Department should adopt in dealing with assesseees in matters affecting their interests and convenience. It appears that these instructions are not being uniformly followed.

2. Complaints are still being received that while Income-tax Officers are prompt in making assessments likely to result into demands and in effecting their recovery, they are lethargic and indifferent in granting refunds and giving reliefs due to the assessees under the Act. Dilatoriness or indifference in dealing with refund claims (either under section 48 or due to appellate, revisional, etc. orders) must be completely avoided so that the public may feel that the Government are actually prompt and careful in the matter of collecting taxes and granting refunds and giving reliefs.

3. Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the

department for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessee on whom it is imposed by law, officers should—

(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;

(b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs.

4.

5. *While officers should, when requested, freely advise assessees the way in which entries should be made in various forms, they should not themselves make any in them on their behalf. Where such advice is given, it should be clearly explained to them that they are responsible for the entries made in any form and that they cannot be allowed to plead that they were made under*

official instructions. This equally applies to the Public Relation Officers.

6. The intention of this circular is not that tax due should not be charged or that any favour should be shown to anybody in the matter of assessment, or that where investigations are called for, they should not be made. Whatever the legitimate tax it must be assessed and must be collected. The purpose of this circular is merely to emphasis that we should not take advantage of an assessee's ignorance to collect more tax out of him than is legitimately due from him."

17. The Board has given clear instruction to assessing authorities that they should not take advantage of ignorance of an assessee as to his rights. In the present case, the assessee voluntarily offered the incentive income of ₹ 4,28,750/- for taxation in the assessment year 2007-08 on a bona fide belief that the incentive related to the said assessment year and he would also get the benefit of TDS made by his employer on that

amount of incentive in the very same assessment year 2007-08. But it happened that the assessee's employer accounted for the TDS for the assessment year 2008-09 and the department granted credit of such TDS only for the assessment year 2008-09. Therefore, the assessee had to offer the incentive again for taxation for the assessment year 2008-09, for otherwise the assessee would lose his legitimate right of availing credit of TDS made out of the income earned by him. All these facts were very much available before the assessing authority while completing the assessment for the impugned assessment year 2007-08. The assessing authority was all the more aware that though he has assessed the sum of ₹ 4,28,750/- as the income of the impugned assessment year, he has not given the assessee the benefit of the credit of the corresponding TDS. In spite of such a situation, where the assessee was denied credit of the TDS, it is very evident for the assessing authority to understand that the amount of ₹ 4,28,750/- was offered for the impugned assessment year by mistake and it was offered for the assessment year 2008-09, for which assessment year the

assessment has been completed and it has become final. In spite of this factual knowledge, the assessing authority thought to assess the amount of ₹ 4,28,750/- as the income of the assessee for the impugned assessment year 2007-08 only on the technical ground that the said amount was offered for assessment by the assessee himself voluntarily.

18. The Commissioner of Income-tax(Appeals) after understanding the facts of the case without any confusion, dismissed the plea of the assessee on the ground that when there is no liability as a result of the assessment, there is no scope for appeal. It is the case of the Commissioner of Income-tax(Appeals) that an appeal lies only when the assessee denies his liability to be assessed and in the present case as the assessing authority has accepted the returned income, there is no denial of liability from the side of the assessee. These are all reasonings for self consumption. The Income-tax Act does not authorize levy of tax on the same amount of income more than once. A particular amount of income can be assessed only for once for a particular assessment year. This is very certain. In

the present case the subject income has already been assessed for the assessment year 2008-09 and that assessment has become final. Therefore, it is clear that it is not at all possible to assess the same income again for the assessment year 2007-08. There is no such enabling provision anywhere in the Income-tax Act; for that matter not under any other taxing statute.

19. The Income-tax Department is collecting tax not for itself. It is collecting tax for the Sovereign State, that is, Union of India. Union of India as the sovereign authority does not require to levy tax on an amount returned by mistake. The sovereign authority does not want to take advantage of a mistake committed by an innocuous assessee. It is not the policy of the Sovereign State to crave for undue enrichment.

20. When, under these circumstances, levy of tax on the sum of ₹ 4,28,750/- is altogether impermissible for the assessment year 2007-08, how the prayer of the assessee could be brushed aside? If the Income-tax Act authorizes a designated authority to collect tax for State, the same Act always

permits the said authority to rectify any proceedings, which has resulted in double taxation. When the income of ₹ 4,28,750/- has been assessed for the assessment year 2008-09, the assessment of the same amount for the impugned assessment year 2007-08 is a mistake apparent from the records. The assessing authority could have corrected it and if not, the Commissioner of Income-tax(Appeals) could have given a direction to rectify such a mistake apparent from the records. There is no great question of law involved in this.

21. The decision of the Hon'ble Supreme Court in the case of Goetze(India) Ltd. vs. CIT, 284 ITR 323, has no application in this context. The assessee is not asking for any exemption or any other concession. The assessee has not asked for any concession at all. The entire sum of ₹ 4,28,750/- has already been assessed for the assessment year 2008-09. Then, where is the question of concession or exemption? The prayer of the assessee is that his returning of the said amount as taxable income for the assessment year 2007-08 was a bona fide mistake and he be not subjected for taxation twice on the

same amount. Is it not a legitimate claim made by the assessee?

22. In the facts and circumstances of the case, I find that the assessment of ₹ 4,28,750/- to income-tax for the assessment year 2007-08 is against law. Therefore, I agree with the order of the learned Accountant Member in giving direction to the assessing authority to delete the said amount of ₹ 4,28,750/- from the assessment relating to the assessment year 2007-08. I agree with the learned Accountant Member that the appeal of the assessee is to be allowed.

23. It is a settled principle of jurisprudence that delivery of justice should not be fettered by technicalities. Where there is a glaring instance of injustice writ large on the face of the records, it is the bounden duty of the Tribunal to stand by the side of justice to redress the grievance of a hapless assessee.

24. Now this file will be placed before the regular Bench for passing orders to finally dispose of the case on a majority view.

Sd/-
(Dr.O.K.Narayanan)
Vice-President
THIRD MEMBER

Chennai,
Dated the 23rd January, 2012.
V.A.P.

IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

**BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER
AND SHRI GEORGE MATHAN, JUDICIAL MEMBER**

I.T.A. No. 1058/Mds/2010
(Assessment Year : 2007-08)

Shri R. Natarajan,
New No.15, Old No.8,
3rd Cross Street, R.K. Nagar,
Mandaveli, Chennai - 600 028.

v. The Assistant Commissioner
of Income Tax,
Salary Circle V,
Chennai.

PAN : AABPN8427H
(Appellant)

(Respondent)

Appellant by : Shri R. Kumar, Advocate
Respondent by : Shri K. Gopalakrishna, JCIT

Date of Hearing : 17.02.2012
Date of Pronouncement : 17.02.2012

ORDER GIVING EFFECT

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :

There being a difference of opinion among the Members constituting the original Bench, on the issues raised in this appeal, a reference was made by Hon'ble President under Section 255(4) of Income-tax Act, 1961.

2. Hon'ble Vice President sitting as Third Member has agreed with the view taken by the Accountant Member. Accordingly, in view of the majority opinion, appeal of the assessee is allowed.

Order pronounced in the open court after conclusion of hearing on 17th February, 2012.

sd/-
(George Mathan)
Judicial Member

sd/-
(Abraham P. George)
Accountant Member

Chennai,
Dated the 17th February, 2012.

Kri.

Copy to: (1) Appellant
(2) Respondent
(3) CIT(A)
(4) CIT,
(5) D.R.
(6) Guard file