IN THE INCOME TAX APPELLATE TRIBUNAL,
BANGALORE BENCH 'B'

BEFORE SHRI GEORGE GEORGE K, JUDICIAL MEMBER AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER

ITA No.1027/Bang/2011
(Asst. year 2007-08)

Sri Rakesh Singh, #2, R R Chambers, IV Floor, IInd Main, Vasanthanagar, Bangalore. **PA No.AFAPS4404D**	vs	The Asst. Commissioner of Income Tax, Central Circle-1(2). Bangalore.
(Appellant)		(Respondent)

Date of Hearing	:	16.07.2012
Date of Pronouncement	:	24.08.2012

Assessee by	:	Shri Raghavendra Chakravarthy, C.A.
Revenue by	:	Smt. Susan Thomas Jose, JCIT

ORDER

PER GEORGE GEORGE K :

This appeal instituted by the assessee is directed against the order of the CIT (A), Mysore dated 26/8/2011. The relevant assessment year is 2007-08.

2. The assessee has raised seven grounds in his Memorandum of appeal. Ground No.1 and 7 are general in nature and no specific adjudication is called for and, hence, the same are dismissed. Ground No.6 is not maintainable as charging of interest u/s 234A, 234B and 234C of the Act is mandatory and consequential in nature and, therefore, this ground is dismissed.

3. Ground No.2, 3, 4 and 5 reads as follows:-

2) The learned CIT(A) is not justified in holding that the claim made by the appellant in the return of income filed in course of assessment proceedings cannot be allowed as the revised return of income cannot be acted upon by the learned AO under the facts and in the circumstances of the appellant's case;

3) The authorities below are not justified in not considering the income from house property at Rs.6,65,710/- ad declared by the appellant in his revised return of income under the facts and in the circumstances of the appellant's case;

4) the authorities below are not justified in not allowing the claim of Rs.15,567/- and Rs.6,167/- towards interest on car loan on Zen and Ford Fiesta Car and Rs.95,665/- towards depreciation on cars under the facts and in the circumstances of the appellant's case; &

5) The authorities below are not justified in assessing the appellant on the short term capital gain of Rs.22,66,195/- as against the loss of Rs.8,47,805/- claimed by the appellant under the facts and in the circumstances of the appellant's case.

4. Briefly stated the facts are as follows:-

The assessee is an individual. He is deriving income from house property and from the business of real estate. For the year under consideration, the assessee filed the e-return on 29/2/2008 declaring an income of Rs.29,49,560/-, which consisted of the following:-

i) Income from house property	Rs. 6,82,330/-
ii) Short-term Capital gain	Rs.22,66,195/-
iii) Income from Other Sources	Rs. 1,031/-

The assessment was taken up for scrutiny by issuance of notice under section 143(2) of the Act. During the course of assessment proceedings, the assessee filed a revised return of income on 28/7/2009 declaring a total income of Rs.27,75,550/- after claiming some variations in the deductions, computation of short term capital gains and making fresh claim of depreciation on car. The scrutiny assessment was completed vide order dated 31/12/2009 accepting the income declared in the original return filed on 29/2/2008. The assessee's plea to consider the revised return and the revised balance sheet was not accepted by the Assessing Officer for the reasons mentioned at para 3 of the assessment order.

4. The assessee being aggrieved carried the matter in appeal before the first appellate authority.

5. It was submitted before the first appellate authority that in the course of assessment proceedings, it was discovered that the assessee had omitted to claim certain legitimate deduction and therefore, the revised return was filed on 28/7/2009. It was submitted that if from the facts investigated at the time of assessment it emerges that the assessee is entitled to a particular relief provided in law, it is obligatory on the part of the Assessing Officer to draw the attention of the assessee to give the lawful relief or deduction, although the assessee did not claim it. For this proposition, the assessee relied on the Departmental Circular No.14 (XI-35) of 1955 dated April 11, 1955.

6. The CIT (A) however rejected the appeal of the assessee. The CIT (A) held that the original return was filed belatedly; hence, no revised

return could be filed under section 139(5) of the Act. For this proposition, the CIT(A) placed reliance on the judgment of the Hon'ble Apex Court in the case of Kumar Jagadish Chandra Sinha v CIT 220 ITR 67. Further, the CIT(A), relying on the judgment of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. v CIT reported in 284 ITR 323, held that the assessee could not make a claim for deduction other than by filing revised return. The CIT(A) concluded that in view of the above said judgments of Supreme Court, the assessee could only claim additional expenditure by way of revised return under section 139(5) and when the original return is not filed within the time prescribed under section 139(1) or 139(2), the assessee cannot file a revised return under section 139(5) of the Act.

7. The assessee being aggrieved is in appeal before us.

8. The submission of the learned AR on various points are summarized as under:

(i) that the assessee is a co-owner, having 50% share and interest in the properties at (i) RR Plaza, 8th Main, 3rd cross, Vasanthnagar; and (ii) RR Chambers, 11th Main of Vasanthnagar and in his original return a sum of Rs.2,90,500/- being his share of Corporation taxes was claimed as deduction as against Rs.2,71,423/- and with a view to rectify this anomaly, a revised return of income was filed;

- Likewise, a deduction of Rs.11,24,300/- was claimed in the original return as against the correct figure of Rs.11,54,274/- being his share of interest on capital borrowed for construction. A certificate to this effect from the Karnataka Bank was furnished before the AO.

- that due to the above variations, the income from house property shown in the revised return came to Rs.6,65,710/- as against Rs.6,82,330/- shown in the original return of income.

(ii) that the assessee had not claimed deductions of Rs.15,567/- and Rs.6,167/- towards interest on car loan on Zen and Ford Fiesta respectively and depreciation of Rs.95,665/- in the original return of income on a wrong notion that no deduction was allowable in the absence of any income from this head.

- that the cars were used only for the purpose of business. It was contended that the depreciation is a specific relief and allowance be given to the assessee under section 32 of the Act for the use of the asset in the business. Drawing reference to Explanation 5 to section 32(1), it was contended that whether the assessee claimed depreciation or not, the Assessing Officer is duty bound to grant depreciation. The learned AR also strongly relied on the Board's Circular No.14 (XI-35) of 1955 dated April 11, 1955, which is reproduced at para 3.2 of the impugned order of the CIT (A).

(iii) that there was variation in short-term capital gains too. The assessee was the owner of a property at Mahadevapura which was acquired by the assessee and one Sri Ramakrishna Gupta and that the assessee had made the investment in the purchase of the property and Shri Gupta had agreed to reimburse a part of the investment to the extent of 50% and thereafter take the deed of conveyance in his name. it was submitted that in the meanwhile the said property came to be sold by the assessee during the FY 2006-07 to one Sri D Krishnareddy for Rs.85.76 lakhs, out of which Rs.40 lakhs was paid by the assessee to Shri Gupta as his share of profit on the sale of the subject property;

- that while filing the original and revised returns of income, the assessee had reported 50% of the consideration received on the sale of the property and had also deducted only 50% of the cost of acquisition, presuming that the balance of 50% of

the capital gains has to be assessed in the hands of Shri Gupta. However, the assessee, it was contended, came to know that the Shri Gupta had declared the entire sum of Rs.40 lakhs received by him as other income in as much as he had never become the owner of the property to offer the same under the head 'capital gains. It was, further, contended that the legal effect of the transaction was that of the assessee alone as he was the owner of the property and, thus, he had to offer the entire capital gain in respect of sale after claiming deduction of the amount paid to Shri Gupta towards his share of sale proceeds. According, the assessee had revised the computation of short term capital which had resulted in a short term capital loss of Rs.8,47,805/-; &

(iv) that the AO ought not to have rejected the aforesaid bona-fide claims made by the assessee; and that the AO as well as the CIT (A)ought to have considered the revised computation of income and the rejection of the same on the ground that the assessee was not competent to revise the return of income was unjustified.

9. Per contra, the learned DR submitted that the assessee is not authorized to make claim of deduction without filing a revised return. For this proposition, the learned DR relied on the judgment of the Apex Court in the case of Goetze (India) Ltd. v CIT reported in 284 ITR 323. It was submitted that the original return was filed belatedly on 29/2/2008, hence, the revised return was filed on 28/7/2009 under section 139(5) of the Act cannot be taken cognizance of.

10. We have heard the rival submissions and perused the materials on record. It is not in dispute that in the instant case, return under section 139(1) was filed belatedly. Hence, the assessee is not entitled to file a revised return under section 139(5) of the Act going by the ratio laid down

by the Hon'ble Apex Court in the case of Kumar Jagadish Chandra Sinha cited supra. However, the depreciation allowance under Explanation 5 of section 32 of the Act is mandatory allowable if the said asset is used for the purpose of business of the assessee. In other words, whether the assessee makes a claim of depreciation or not in his return of income, the Assessing Officer is duty bound to grant depreciation allowance by virtue of Explanation 5 to section 32(1) of the Act (Inserted by Finance Act, 2001 w.e.f. 1/4/2002).

10.1. Circular No.14 (XI-35) of 1955, dated April 11, 1955 provides that the officers of the department must not take advantage of the ignorance of an assessee as to his rights and that although the responsibility for claiming refunds and reliefs rests with the assessee on whom it is imposed by law, yet (a) the officers should draw the attention of the assessees to any refund or relief to which they are entitled to but which they have omitted to claim for some reason or other, and (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. The relevant portion of the Circular reads as follows:-

> *"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 the 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 the assessee on whom it is imposed by the 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".

10.2 In view of Explanation 5 to section 32(1), the Assessing Officer was duty bound to grant depreciation allowance, whether the same is claimed by the assessee or not, provided the conditions mentioned under section 32 are satisfied. The controversy could be examined from another angle. No doubt, the revised return cannot be taken cognizance of since the original return was filed belatedly. However, an additional claim could be made before the appellate authority and the appellate authority is duty bound to consider the same. There are number of judgments which clearly establish that the assessee is entitled to raise additional grounds, not merely in terms of legal submissions but in respect of new claim not made in the return filed.

10.3 The Hon'ble Supreme Court in the case of Jute Corporation of India Limited v CIT reported in 187 ITR 688 was considering the following facts:-

For the assessment year 1974-75, the appellant did not claim any deduction of its liability towards purchase tax under the provisions of the Bengal Raw Jute Taxation Act, 1941, as it entertained a belief that it

was not liable to pay purchase tax under that Act. Subsequently, the appellant was assessed to purchase tax and the order of assessment was received by it on 23rd November, 1973. The appellant challenged the same and obtained a stay order. The appellant also filed an appeal from the assessment order under the Income Tax Act. It was only during the hearing of the appeal that the assessee claimed an additional deduction in respect of its liability to purchase tax. The Appellate Assistant Commissioner (AAC) permitted it to raise the claim and allowed the deduction. The Tribunal held that the AAC had no jurisdiction to entertain the additional ground or to grant relief on a ground which had not been raised before the Income Tax Officer. The Tribunal also refused the appellant's application for making a reference to the High Court. The High Court upheld the decision of the Tribunal and refused to call for a statement of case. It is in these circumstances that the appellant filed the appeal before the Supreme Court.

The Supreme Court held as under:-

"5. In CIT v Kanpur Coal Syndicate, a three Judge bench of this Court discussed the scope of section 31(3)(a) of the Income Tax Act, 1922 which is almost identical to section 251(1)(a). The court held as under: (ITR p.229)

> *"If an appeal lies, section 31 of the Act describes the powers of the Appellate Assistant Commissioner in such an appeal. Under Section 31(3)(a) in disposing of such an appeal the AAC may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment; under clause (b) thereof he may set aside the assessment and direct the Income Tax Officer to make a fresh assessment, The AAC has, therefore, plenary powers in disposing of an appeal.*

The scope of his power is co-terminus with that of the ITO. He can do what the ITO can do and also direct him to do what he has failed to do".

6. The above observations are squarely applicable to the interpretation of section 251(1)(a) of the Act. The declaration of law is clear that the power of the Appellate Assistant Commissioner is co-terminus with that of the ITO, if that be so, there appears to be no reason as to why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the ITO. No exception could be taken to this view as the Act does not place any restriction or limitation on the exercise of appellate power. Even otherwise an Appellate Authority while hearing appeal against the order of a subordinate 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 appears to be no good reason and none was placed before us 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 ITO". (Emphasis supplied).

It is clear, therefore, that an assessee is entitled to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before them. The appellate authorities have the discretion whether or not to permit such additional claims to be raised. It cannot, however, be said that they have no

jurisdiction to consider the same. They have the jurisdiction to entertain the new claim. That they may choose not to exercise their jurisdiction in a given case is another matter. The exercise of discretion is entirely different from the existence of jurisdiction.

10.4 The Full Bench of the Hon'ble Mumbai High Court in the case of Ahmedabad Electricity Limited v CIT (1993) 199 ITR 351 considered a similar situation. In that case, the appellant/assessee did not claim a deduction in respect of the amounts it was required to transfer to contingencies reserve and dividend and tariff reserve either before the Income Tax Officer or before the Appellate Assistant Commissioner in appeal. Subsequently, the Hon'ble Mumbai High Court in the case of Amalgamated Electricity Company Limited v CIT (1974) 97 ITR 334, held that such amounts represented allowable deductions on revenue account. The appellant, therefore, raised a new claim and additional grounds before the Tribunal in that connection. The Tribunal rejected the same. The second question which was raised in the reference before the Hon'ble Division Bench of Mumbai High Court was as under:

> *"(2) Whether, on the facts and in the circumstances of the case, the Tribunal erred in not allowing the assessee leave to raise in its own appeals additional grounds and in the departmental appeals cross objections regarding the deductibility of the sums transferred to contingency reserve and tariff and dividend control reserve?*

The Division Bench which heard the reference, finding that there was a conflict of decisions, placed the papers before the Hon'ble Chief Justice

for constituting a larger Bench to resolve the controversy. The Full Bench answered the reference in the affirmative and in favour of the assessee. The Full Bench held:-

> *"Thus, the Appellate Assistant Commissioner has very wide powers while considering an appeal which may be filed by the assessee. He may confirm, reduce, enhance or annul the assessment or remand the case to the Assessing Officer. This is because, unlike an ordinary appeal, the basic purpose of a tax appeal is to ascertain the correct tax liability of an assessee in accordance with law. Hence an Appellate Assistant Commissioner also has the power to enhance the tax liability of the assessee although the Department does not have a right of appeal before the Appellate Assistant Commissioner. The Explanation to sub-section (2), however, makes it clear that for the purpose of enhancement, the Appellate Assistant Commissioner cannot travel beyond the proceedings which were originally before the Income Tax Officer or refer to new sources of income which were not before the Income Tax Officer at all. For this purpose, there are other separate remedies provided under the Income-tax Act".*

10.5 The Hon'ble Supreme Court in the case of National Thermal Power Company Limited v CIT (1998) 229 ITR 383 was considering a case where the assessee had deposited its funds not immediately required by it on short term deposits with banks. The interest received on such deposits was offered by the assessee itself for tax and the assessment was completed on that basis. Even before the Commissioner of Income-tax (Appeals), the inclusion of this amount was neither challenged by the assessee nor considered by the Commissioner of Income-tax (Appeals). The

assessee filed an appeal before the Tribunal. The inclusion of the amount was not objected to even in the grounds of appeal as originally filed before the Tribunal. Subsequently, the assessee by a letter raised additional grounds to the effect that the said sum could not be included in the total income. The assessee contended that on an erroneous admission, no income can be included in the total income. It was further contended that the ITO and the Commissioner of Income-tax (Appeals) had erred and failed in their duty in adjudicating the matter correctly and by mechanically including the amount in the total income. It is pertinent to note that the assessee contended that it was entitled to the deduction in view of two orders of the Special Benches of the Tribunal and the assessee further stated that it had raised these additional grounds on learning about the legal position subsequently. The Tribunal declined to entertain these additional grounds. The Supreme Court did not answer the question on merits, but framed the following question and held as under:-

> *"4. The Tribunal has framed as many as five questions while making a reference to us. Since the Tribunal has not examined the additional grounds raised by the assessee on merit, we do not propose to answer the questions relating to the merit of those contentions. We reframe the question which arises for our consideration in order to bring out the point which requires determination more clearly. It is as follows:*
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> > *"Where on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of the assessee, whether the Tribunal has jurisdiction to examine the same."*

Under Section 254 of the Income Tax Act the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with the 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. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. 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 assessee as well as the Department has a right to file an appea1/crossobjections 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."

10.6 The Hon'ble Supreme Court in the case of Goetze (India) Limited v. Commissioner of Income-tax (supra) relied on by the CIT is distinguishable on the facts. The question before the Court was whether the appellant-assessee could make a claim for deduction, other than by filing a revised return. After the return was filed, the appellant sought to claim a deduction by way of a letter before the Assessing Officer. The claim, therefore, was not before the appellate authorities. The deduction was disallowed by the Assessing Officer on the ground that there was no provision under the Act to make an amendment in the return of income by modifying an application at the assessment stage without revising the

return. The Commissioner of Income-tax (Appeals) allowed the assessee's appeal. The Tribunal, however, allowed the department's appeal. In the Supreme Court, the assessee relied upon the judgment in National Thermal Power Company Limited contending that it was open to the assessee to raise the points of law even before the Tribunal. The Supreme Court held :-

> *"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. There shall be no order as to costs." [Emphasis supplied]*

10.7 The Hon'ble Supreme Court did not hold anything contrary to what was held in the previous judgments to the effect that even if a claim is not made before the assessing officer, it can be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim has not been negated by the Supreme Court in this judgment. In fact, the Supreme Court made it clear that the issue in the case was limited to the power of the assessing authority and that the judgment does not impinge on the power of the appellate authorities.

10.8 A Division Bench of the Hon'ble Delhi High Court in the case of Commissioner of Income-tax v. Jai Parabolic Springs Limited (2008) reported in 306 ITR 42 had distinguished the Hon'ble Apex Court judgement in the case of Goetze (India) Ltd. (Supra). The Hon'ble Delhi High Court, in paragraph 17 of the judgment held that the Supreme Court dismissed the appeal making it clear that the decision was limited to the power of the assessing authority to entertain a claim for deduction otherwise than by a revised return and did not impinge on the powers of the Tribunal. In paragraph 19, the Hon'ble High Court held that there was no prohibition on the powers of the Tribunal to entertain an additional ground which, according to the Tribunal, arises in the matter and for the just decision of the case.

10.9 In the instant case, the CIT (A) has not examined the issue in correct perspective taking into consideration the Explanation 5 to section 32(1) of the Act and the Board's Circular mentioned supra. The CIT (A) is empowered to consider additional claim made before him, though not made in the return filed. Therefore, in the interest of justice and equity, the case is restored to the file of the CIT (A) to consider the issues afresh and to take appropriate action in accordance with the provisions of the Act. If so desired, the CIT (A) shall call for a comprehensive remand report as to whether the assessee was entitled to deductions as claimed under various heads and to decide the issues as deem fit. The assessee shall, however, be afforded an opportunity of being heard. It is ordered accordingly.

11. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 24th day of August, 2012

Sd/-	Sd/-
(JASON P BOAZ)	(GEORGE GEORGE K)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Copy to :

1. The Revenue 2. The Assessee 3. The CIT concerned.
4. The CIT(A) concerned. 5. DR 6. GF

MSP/ By order

Senior Private Secretary, ITAT, Bangalore.