Fresh Claim Outside the Return of Income or in an Appeal

Admission of claim not made by filing the revised return of income before the assessing officer (AO) or appellate authority has always been an issue in which the tax authorities and courts have taken different views. Courts have pronounced decisions that support the contention that fresh claim can be made before the appellate authorities even if it is not made before the AO nor claimed in the return of income. In this article, the authors have discussed in detail the view that fresh claim outside the return of income or in appeal can be made and is allowable even if the claim is made before the AO or appellate authorities, provided the relevant facts pertaining to the claim are before the AO. Read on…

Overview

The return of income is filed under Section 139(1) of the Income-tax Act, 1961 (Act) before the due date specified in Explanation 2 of the Section. In case any omission or incorrect statement is made in the return of income, revised return can be filed before the expiry of one year from the end of the relevant assessment year (AY), or before the completion of assessment, whichever is earlier, in accordance with Section 139(5) of the Act.

Omission or mistake or incorrect statement is often discovered during the assessment proceedings. In other words, after the time permitted to revise the return of income under Section 139(5) of the Act. The issue arises whether in such cases the assessee can claim a deduction that was not claimed in the return of income without revising the return of income before the AO or before the appellate authorities.

The Income Tax Department relying upon the decision in *Goetze (India) Ltd. vs. CIT, 284 ITR 323(SC)* invariably upholds that fresh claim can be made only by revising the return of income that too within the time permitted under Section 139(5) of the Act.

In this article, it is discussed whether a legitimate claim or deduction not claimed in the return can be claimed before the AO or before CIT(A), in the light



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of the Constitution of India, the Income-tax Act, 1961 and the decisions of the Supreme Court, High Courts and Income Tax Appellate Tribunal.

***Goetze (India) Ltd. vs. CIT (284 ITR 323)* – Facts and Decision**

It is important to note that the case of *Goetze (India) Ltd., (supra)* relates to AY 1995 – 96. The facts of the case were as follows:

The assessee filed its return of income but omitted to claim a deduction that was legitimately available to it. The mistake was discovered during the assessment proceedings after the time for revising return of income under Section 139(5) had elapsed. A claim was made by filing a letter during the assessment proceedings. The AO rejected the claim stating that no provision existed in the Act to entertain a claim made otherwise than by revising the return.

In the appeal before CIT(A), the matter was decided in assessee's favour. The Tribunal reversed the decision of CIT(A). The assessee preferred an appeal before the High Court, which upheld the decision of the Tribunal. The Hon'ble Apex Court also confirmed the order of the High Court.

Before the Apex Court, the assessee company based on the decision in *National Thermal Power Co. Ltd. vs. CIT (229 ITR 383) (SC)* contended that – it was open to the assessee to raise points of law even before the Tribunal, if the same arises from the facts as found by the authorities and having a bearing on the tax liability of the assessee.

The Apex Court observed that – *the decision does not in any way relate to the power of the AO to entertain a claim for deduction otherwise than by filing a revised return. The Apex Court while dismissing the appeal clarified that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the ITAT under Section 254 of the Act.*

Return of Income and its Revision - Provisions of the Income-tax Act, 1961

Section 139(1) of the Act prescribes the time within which return of income should be filed. Section 139(5) prescribes the time for revising the return of income. A reading of the Section suggests that if the time limit of revising the return of income had elapsed, *the assessee cannot claim the legitimate deduction or relief available to him.*

It is also relevant to examine the provisions of the Act regarding assessment under Section 143(3) as prevailed in the assessment year 1995-96 (year of *Goetze* decision) and that which is currently in force.

Section 143(3)(ii) of the Act during AY 1995-96

On the day specified in the notice –

(ii) issued under clause (ii) of sub-Section (2), ...and determine the sum payable by him on the basis of such assessment.

Section 143(3)(ii) of the Act currently in force

On the day specified in the notice –

(ii) issued under clause (ii) of sub – Section (2), ...and determine the sum payable by him or refund of any amount due to him on the basis of such assessment.

It may be noted that the assessing authorities have been specifically empowered by the Act currently to grant refund of tax post assessment, whereas in the AY 1995-96, they were empowered only to determine the amount payable by the assessee post assessment only. This position in law as existing during 1995-96 may have influenced the decision of the Apex Court in *Goetze (India) Ltd.* (*supra*), since the case related to AY 1995-96.

But, the larger question is – *whether the assessing authorities should or can allow legitimate deductions or rebates even though omitted to be claimed/not claimed by the assessee in the return of income and the time limit prescribed under Section 139(5) of the Act for revision of such return has elapsed?*

The analysis of the *Constitution of India, the Income Tax Act, 1961, the Circulars issued by CBDT* and a number of Court decisions would provide an insight into the reasons for allowing claims made by the assessee outside the return of income.

The Constitution of India

Article 265 empowers the Government to levy and collect taxes. Any act outside the powers of the Government is *ultra vires*, being not legally sustainable. Article 265 of the Constitution is reproduced below –

"Thus, under the constitution, the Government can levy and collect only those taxes and only that much taxes that are provided in the law. The assessing authority should collect the due taxes and in determining the tax, it is duty bound to allow legitimate deductions and reliefs as provided in the Act, even though they are not claimed by the assessee. Collection of any tax not provided under law would be in violation of the provisions of the Constitution of India."

"No tax shall be levied or collected except by authority of law".

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Duties and Responsibilities of Assessing Authorities under the Income-tax Act, 1961

The Board of Revenue (now CBDT) issued Circular (No. 14 (XL – 35) dated 11th April 1955 detailing duty on the assessing authorities to make correct assessments and collect correct taxes. Let us examine the legal validity and legal status of the Circular issued by the Board.

Circular No. 14 (XL – 35) dated 11th April 1955

The text of the Circular is 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 proceedings or other particulars before him 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 the assessee may be sure of getting a square deal from the department. Although, therefore, the responsibility of claiming refunds and reliefs rests with the 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 the 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 the refunds and reliefs.

CBDT through this Circular has prescribed the duties of AOs directing them to assist the assessee in every reasonable way, particularly in the matter of claiming and securing reliefs. It further directs them to take initiative in guiding the taxpayer where proceedings or other particulars before him indicate that some refund or relief is due to him. The effect of the Circular is that the assessing authorities are duty-bound:

1. to bring to the notice of the assessee reliefs and deductions that are due to it and not claimed; and
2. to allow the reliefs and deductions upon being claimed during the assessment proceedings where the particulars indicating that the reliefs or deductions are due to the assessee.

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In *S. R. Koshti vs. CIT; 146 Taxman 335*, the Gujarat High Court observed:

The authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or not being properly instructed, is over-assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. This Court, in an unreported decision in case of Vinay Chandulal Satia vs. N. O. Parekh, CIT (Spl. Civil Application No. 622 of 1981 dated 20.8.1981) has laid down the approach that the authorities must adopt in such matters in the following terms:

"The Apex Court has observed in numerous decisions, including Ramlal vs. Rewa Coalfields Ltd. AIR 1962 SC 361, State of West Bengal vs. Administrator, Howrah Municipality AIR 1972 SC 749 and Babutmal Raichand Oswal vs. Laxmibai R. Tarte AIR 1975 SC 1297, that the State authorities should not raise technical pleas if the citizens have a lawful right and the lawful right is being denied to them merely on technical grounds. The State authorities cannot adopt the attitude which private litigants might adopt."

The Hon'ble Allahabad High Court in *CIT vs. Lucknow Public Education Society 183 Taxman 62* held that assessing authorities should follow Circular No. 14.

Legal Validity of the Circular No. 14 (XL - 35) of 1955, dated 11th April 1955

Hon'ble Apex Court examined this Circular in *CIT vs. Mahendra Mills (243 ITR 56)* and held that the Circular was in force even though issued prior to the 1961 Act as the Circular has not been withdrawn till date.

Legal Validity of Circulars

Section 119(1) of the Income-tax Act, 1961 requires every officer to follow orders, instructions and directions of CBDT. Circular No. 14 is issued by CBDT and thus, is binding.

The Supreme Court has also on numerous occasions examined the issue and has held that the Circulars issued by CBDT are binding in nature on the tax authorities, even if the directions given by CBDT are at variance with the provisions of law. *The circulars in effect, are as good as law.* To quote: *Ellerman Lines Ltd. vs. CIT (82 ITR 913), K. P. Varghese vs. ITO (131 ITR 597), UCO Bank vs. CIT (237 ITR 889), CIT vs. Anjum M. H. Ghaswala (252 ITR 1) and Spentex Industries Ltd. vs. CCE (Civil app. No. – 1978 of 2007).*

In the light of above discussion, let us revisit the decision in *Goetze (India) Ltd.:*

- ***Article 265 of the Constitution*** empowers the Government to levy and collect tax that it can through the authority of law.
- ***Circular No. 14 (XI – 35) of 1955*** prescribes the duties of the assessing authorities with respect to granting legitimate reliefs and deductions available to the assessee.
- ***Section 143(3)(ii) of the Act*** empowers the assessing authorities to grant refund of amount to the assessee post assessment. It leaves little doubt in the mind that the assessing authorities can assess the income at an amount lower than that returned by the assessee. The decision of the Supreme Court in *Goetze (India) Ltd.* relates to the AY 1995-96 and the Act did not allow the assessing authorities to grant refund post assessment. In *Universal Subscription Agency (P) Ltd. vs. JCIT 159 Taxman 64 (All.),* it was held that the decision of the Apex Court in *Goetze (India) Ltd. (supra)* has not laid down as a matter of law that there is a bar for the assessing authority to entertain the claim for deduction otherwise than by filing a revised return.

The purpose and intention of law is to make correct assessments and to collect correct and legitimate tax from the assessee. If the rightful deduction or relief is not allowed to the assessee, the purpose and intention of the law is defeated.

This view finds support from the following decisions of the Hon'ble High Courts and also the Income Tax Appellate Tribunal:

1. ***CIT vs. Bharat Aluminium Ltd. 303 ITR 256 (Del)***

   In this case, the assessee had submitted two revised computations of income during the assessment proceedings. It had in its return of income claimed a part of deferred revenue expenditure as revenue expenditure while the remaining was carried to the balance sheet. In the revised computation, the assessee claimed total deferred revenue expenditure as revenue expenditure. The AO rejected the claim made by the assessee in the revised computation holding the expense to be capital in nature. The matter was decided by the CIT (A) and also by the Tribunal in favour of the assessee holding that the Act does not have a concept of deferred revenue expenditure. The Department filed an appeal before the High Court.

   It was held that the assessee had only corrected the claim allowable by virtue of Section 37(1) of the Act on account of the expenditure which was incurred wholly and exclusively for the purpose of business hence, is allowable.

   In effect, the court upheld that the legitimate claim of the assesse is to be allowed even if claimed subsequently without revising the return of income.

2. ***CIT vs. Jai Parabolic Springs Ltd. 172 Taxman 258 (Delhi)***

   The assessee claimed 1/5th of deferred revenue expenditure as was debited to profit and loss account. Also, it did not claim the expense as revenue before the AO. The assessee sought relief through additional ground before the CIT (A). CIT (A) and ITAT allowed the claim of the assessee. On appeal, the High Court

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held that revenue expenditure incurred wholly and exclusively for the purpose of the business must be allowed in entirety in the year in which it is incurred. It further held that there was no infirmity in the order of the Tribunal.

In effect, the court upheld that the legitimate claim of the assesse is to be allowed even if claimed subsequently without revising the return of income.

3. ***CIT vs. Dhampur Sugar Ltd. 90 ITR 236 (All.)***

The Court distinguished between the original return and revised return. It held:

"There is a distinction between a revised return and a correction of return. If the assessee files some application for correcting a return already filed or making amends therein, it would not mean that he has filed a revised return. It will still retain the character of an original return, but once the revised return is filed, the original return must be taken to have been withdrawn and to have been substituted by a fresh return for the purpose of the assessment."

4. ***Chicago Pneumatics India Ltd. vs. DCIT (15 SOT 252) (Mumbai)***

The Hon'ble Tribunal observed as follows:

"The situation has compelled us to look into the duties of the assessing authorities rather than powers of assessing authorities because the Government is entitled to collect only the tax legitimately due to it otherwise the tax not so collected would be in violation of Article 265 of the Constitution of India. We have found that the CBDT as back as in 1955 issued Circular No. 14 as to what should be the department's attitude towards refund and reliefs to the assessees".

It further observed that – *it is a settled position that the Circulars issued by the Board are binding on the subordinate income tax authorities and if CBDT issues directions which are beneficial to the assessee although the same may not be directly in consonance with the provisions of law, even then these instructions have to be given effect and adhered to by the concerned authorities.*

The Hon'ble Apex Court, on numerous occasions has laid down the proposition that the assessing authorities are bound to compute the correct income only and collect only legitimate tax, hence, by merely procedural lapse or technicalities, in our opinion, the assessee should not be compelled to pay more tax than what is due from him. Therefore, this situation has to be looked upon from the angle of duties of assessing authorities as stated earlier, CBDT is the apex body for tax administration and it can also issue directions which are for the benefit of the assessees though such directions may not be in consonance with the provisions of law, hence, if a circular is issued directing the assessing authorities to grant reliefs / refunds while completing the assessment proceedings, even though such circular may be at variance with the law, as pronounced by the Hon'ble Apex Court, but the same would be binding on the subordinate IT authorities.

In our opinion, therefore, circulars of the same nature which have been already issued would not become irrelevant or can be ignored. Admittedly, the circular issued in 1955 has not been withdrawn hence it has got binding force on the subordinate IT authorities even as on date. Accordingly, we hold that the AO is bound to assess the correct income and for this purpose, the AO may grant reliefs / refunds suo moto or can do so on being pointed out by the assessee in the course of assessment proceedings for which the assessee has not filed revised return, although, as per law, the assessee is required to file the revised return. Having stated so, in our view, the learned CIT (A) having co-terminus powers with the powers of AO and the fact that the appellate proceedings are the continuation of original proceedings, should have entertained the claim of the assessee and allowed if other provisions of law are satisfied.

5. ***Bharat Starch Industries Ltd. vs. JCIT (URO) (ITA No. 1611/K/2003)***

The assessee had not claimed deduction for interest paid allowable under Section 36(1)(iii) of the Act in its return of income. The complete facts relating to interest were disclosed in the tax audit report and notes to accounts. The AO had not allowed the deduction. The assessee in its appeal before the CIT (A) sought relief as an additional ground. The additional ground was admitted and adjudicated in favour of the assessee.

In the appeal before the Hon'ble ITAT, it was held that the decision in the case of *Goetze India Ltd. (supra)* is not applicable to the case and directed the AO to allow the claim as per law.

6. ***Thomas Kurian vs. ACIT; 108 TTJ 439 (Cochin)***

The assessee had not claimed deduction under

Section 80HHC. It was allowed by the Tribunal, it being the deduction available as it was provided in the Act.

7. ***Xerox India Ltd. vs. DCIT New Delhi (ITA No. 1580/Del/2010) (URO)***
   Expenses disallowed in the earlier year under Section 43B were not claimed on payment in the assessment year by oversight was allowed by the Tribunal as the matter was before the assessing authority in the earlier years.

However, the Chennai Bench in ***Chiranjeevi Wind Energy Ltd. vs. ACIT 29 (Trib.) 534*** held that a claim not made in the return of income cannot be claimed before the CIT (A). A reading of ITAT order suggests that in the established legal position, Article 265 of the Constitution and Circular 14 was not considered.

First Time Claim Before the CIT (A)

Another related issue that arises is whether the assessee can claim the relief before the CIT (A) even though it has not been claimed before the assessing authority.

Section 251 of the Act empowers CIT (A) to confirm, reduce, enhance or annul the assessment. The powers of the CIT (A) being co-terminus with that of the assessing authority, the assessee can claim a relief that is due to him for the first time before the CIT (A).

The view finds support from the decisions in the cases of *JCIT vs. Hero Honda Finlease Ltd.; 115 TTJ (Del) (TM) 752, CIT vs. Rajasthan Fastners (P) Ltd. 100 DTR (Raj) 152, Ramco Cements Ltd. vs. Dy. CIT 112 DTR (Mad) 393, CIT vs. Jai Parabolic Springs Ltd. 172 Taxman 258 (Delhi), Chicago Pneumatics India Ltd. vs. DCIT 15 SOT 252 and ACIT vs. Bharat Starch Industries Ltd. (URO).*

Conclusion

Based on the foregoing discussions, a legitimate relief available to the assessee and not claimed in the return of income and the time permitted to revise the return of income under Section 139(5) having elapsed can be claimed by the assessee either before the assessing authorities or before the CIT (A) provided the relevant facts and data with respect to the claim was before the assessing authorities. ■

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