IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : I-2 : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No.3618/Del/2017
Assessment Year: 2003-04

Xerox India Ltd., 5th Floor, Block 1, Vatika Business Park, Sector-49, Sohna Road, Gurgaon.	Vs	ACIT, Central Circle-20, New Delhi.

PAN: AAACM8634R

(Appellant)		(Respondent)
Assessee by	:	Shri Ajay Wadhwa, Advocate
Revenue by	:	Shri Shashi Bhusan Shukla, CIT, DR
Date of Hearing	:	15.07.2021
Date of Pronouncement	:	28.07.2021

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 21st February, 2017 of the CIT(A)-38, New Delhi relating to assessment year 2003-04.

2. Grounds raised by the assessee are as under:-

> ñOn the facts and circumstances of the case and in law, the learned Assessing Officer (ñAO") has erred in passing the assessment order under section 143(3) of the Income- tax Act, 1961 (ñthe Actò) after considering the adjustments proposed by the learned Transfer Pricing Officer (ñTPOò) in his order passed under section 92CA(3) of the Act and subsequently confirmed by the learned

Commissioner of Income-tax (Appeals) - 38 [ñCIT(A)ò] under section 250(6) of the Act.

Each of the ground is referred to separately, which may kindly be considered independent of each other.

That on the facts and circumstances of the case and in law -

1. The order dated 21.02.2017 passed by the learned CIT(A) is bad in law and on facts.

2. The learned CIT(A) has erred in upholding the adjustment made to the total income of the appellant by the learned AO under section 143(3) of the Act on account of transfer pricing matters.

3. The learned TPO/ AO/ CIT(A) have erred in making an adjustment under section 92CA(3) of the Act without returning a finding about existence of any of the circumstances specified in clauses (a) to (d) of sub-section (3) of section 92C of the Act.

4. the learned TPO/ AO/ CIT(A) have erred in computing the operating margin of the appellant.

4.1 The learned TPO/ AO/ CIT(A) have erred in concluding that extra-ordinary expense items like bad debts and advances written off; provision for doubtful debts and provision for doubtful advances as operating in nature.

4.2 The learned TPO/ AO/ CIT(A) have erred in not making appropriate adjustments to the ónet operating marginô of the appellant on account of significantly higher amount of provisioning and write off accounted for in the books of the appellant during the financial year 2002-03 primarily on account of change in accounting policy;

4.3 The learned TPO/ AO,/ CIT(A) have erred in not taking cognizance of the fact that bad debts and advance written off; provision for doubtful debts; and provision for doubtful advances, was already disallowed by the appellant in its return of income and also not appreciating that adding them back while computing the transfer pricing adjustment has led to double jeopardy and consequent double taxation.

4.4 The learned CIT(A) has erred in not accepting without prejudice analysis submitted by the appellant during the course of CIT(A) proceedings demonstrating portion of extraordinary items as operating income/ expense based on average percentage of such items in the case of comparable companies or average percentage of such items in appellantôs case for preceding years.

5. The Ld. CIT(A) has erred in law and on facts in denying additional claims [which were claimed first time before the Ld. CIT(A)] on the ground that claims were not made by way of filing the revised return u/s 139(5)of the Income-tax Act, 1961. Those claims were ï

(i) Inadvertent disallowance taken in the return of income under the mistaken belief that freight expenses of Rs. 73,42,630/- were debited to the Profit & Loss A/c, whereas said freight expenses were not at all debited to the Profit & Loss A/c of that year;

(ii) Allowance of deduction not taken in the return of income u/s 43B amounting to Rs. 80,19,029/- in respect of employee contribution to gratuity fund of AY 2002-03 paid during AY 2003-04;

(iii) Allowance of deduction not taken u/s 43B amounting to Rs. 51,20,457 in respect of bonus and commission of AY 2002-03 paid during AY 2003-04;

(iv) Excess disallowance taken of Rs. 21,00,000 u/s 43B towards bonus and commission incurred and remaining unpaid for AY 2003-04.

6. The learned AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act.

7. The learned AO has erred in law in charging interest u/s 234B of the Act.

The appellant craves leave to add, amend, alter, delete, rescind, forgo or withdraw any of the above grounds of appeal either before or during the course of the proceedings before the Hon'ble Income Tax Appellate Tribunal in the interest of the natural justice.ò

3. At the time of hearing, the ld. Counsel for the assessee did not press grounds No.2 to 4.4 for which the ld. DR has no objection. Accordingly, these grounds are dismissed as not pressed. Ground No.1 being general in nature is dismissed. Ground No.6 being premature at this juncture is dismissed. Ground No.7 challenging charging of interest u/s 234B being mandatory and consequential in nature is dismissed. Ground No.5 relates to the order of the CIT(A) in rejecting the

additional claims made for the first before the CIT(A) on the ground that the same were not made by way of filing revised return u/s 139(5) of the IT Act.

4. Facts of the case, in brief, are that the assessee is a company engaged in the export of software, manufacture of photocopiers, trading of faxes, paper and toner. It filed its return of income on 2nd December, 2003 declaring the net loss of Rs.4,21,57,710/- which was processed u/s 143(1) of the Act vide intimation dated 16th June, 2004. Subsequently, the assessee revised its return on 31st March, 2005 declaring taxable income at Rs.53,24,250/-. The AO completed the assessment u/s 143(3) of the Act on 23rd March, 2006 determining the total income of the assessee at Rs.20,62,26,270/- by making various additions. In the said order, apart from other additions, the AO had made addition of Rs.73,42,630/- on account of freight expenses, Rs.80,19,029/- u/s 43B in respect of employeeôs contribution to gratuity fund, Rs.51,20,457/- in respect of bonus and commission for A.Y. 2002-03 paid during A.Y. 2003-04 and Rs.21 lakh u/s 43B towards bonus and commission remained unpaid for A.Y. 2003-04.

5. Before the CIT(A), it was argued that while preparing the return of income for the impugned assessment year, the assessee offered for add back/disallowance of a sum of Rs.73,42,630/- towards freight expenses under the mistaken belief that these expenses which have been charged to the Profit & Loss Account of this year will not be borne by the assessee and will be eventually reversed in the books of account in subsequent years. While preparing the revised income-tax return for

A.Y. 2004-05, it was noticed that this amount along with some other accounts of similar nature were actually booked in expenses of that year and subsequently, revised in that year itself meaning that the expenses were never booked in this year for the first place. To support the above contention, the assessee company also filed an affidavit of Shri Sudhir Singhal, Dy. General Manager (Accounts) dated 23rd October, 2007. It was submitted that out of the above a sum of Rs.73,42,630/- has been charged to the Profit & Loss Account for the year ended 31st March, 2003 as there was a disagreement with the supplier over who is to bear the freight. Ultimately, in the next F.Y. i.e., 2003-04, these expenses were debited and were reversed in the books of account of Xerox India Ltd., with the result that the company has not booked any expense ever with respect the above invoice of the debit notes. The assessee relied upon the CBDT Circular No.14 dated 11th April, 1995 and various decisions to support the contention that additional claim raised at appellate stage should be allowed if the same is on account of error/omission and is patently allowable by law and on import.

6. Based on the arguments advanced by the assessee, the ld.CIT(A) called for a remand report from the AO who opposed the admission of the additional ground on the plea that the assessee did not raise the issue during assessment proceedings and the assessee did not make the claim either in the original return of income for A.Y. 2003-04 filed on 02.12.2003 which was a belated return or never revised the return filed on 31.03.2005. The AO further contended that the AO calculates

income as per the return of income filed by the assessee. These details were provided by the assessee in the return of income and details regarding this issue were provided during assessment proceedings which concluded on 23rd March, 2006. The AO further reiterated that since the turnover of the assessee was very high being Rs.478.86 crores, their claim that the expenses were debited in the P&L Account because of non-availability of qualified person seems to be invalid.

6.1 The ld. CIT(A) confronted the remand report of the AO to the assessee who submitted that evidences in support of the additional claim were submitted to and verified by the AO. It was further submitted that the appellate authority have been entrusted with appropriate powers to admit or reject such additional claims.

7. However, the ld. CIT(A) was not satisfied with the arguments advanced by the assessee and rejected the claim of freight expenses of Rs.73,42,630/- by observing as under:-

> ñ4.8.8 I have carefully gone through the submissions and case laws of various High Courts and Tribunals relied upon by the Appellant. I am of the opinion that assessing officer is justified in rejecting the appellantôs claim regarding freight expenses of Rs. 73,42,630/- . Notwithstanding the fact that the appellant has filed evidence before the assessing officer in remand proceedings to show that the claims were otherwise factually correct, the same cannot be allowed because they were not claimed even in the revised return of income for A,Y, 2003-04 filed on 31.03.2005. There is no provision in the Act which permits additional claims being raised otherwise than under section 132 (5) of the Act i.e. by way of revised return. This is exactly what the Honôble Supreme Court in the case of Goetze India Ltd supra have held. Respectfully following the judgement of the Honôble Supreme Court the additional claim made by the appellant as discussed is dismissed and the additional ground of the appellant in this regard is rejected.ò

8. Similarly, he also rejected the claim of deduction u/s 43B of Rs.80,19,029/- pertaining to employeeôs contribution to gratuity fund for A.Y. 2002-03, claim of deduction u/s 43B of Rs.51,20,457/- pertaining to bonus and commission for A.Y. 2002-03 paid during this year and claim of excess disallowance of Rs.21 lakhs u/s 43B towards bonus and commission incurred and remained unpaid for A.Y. 2003-04 by holding that there is no provision in the Act which permits additional claims being raised otherwise than u/s 139(5) i.e., by way of filing of a revised return.

9. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal.

10. The ld. counsel for the assessee, at the time of hearing, drew the attention of the Bench to para 4.8.8 of the order of the CIT(A) and submitted that although the ld.CIT(A) has given a finding that the assessee has filed evidences before the AO in remand proceedings to show that the claims were otherwise factually correct, she rejected the same on the ground that the assessee has not filed any revised return as per the provisions of section 139(5) of the IT Act. He submitted that the ld.CIT(A) while deciding the issue against the assessee has relied upon the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. vs. CIT reported in 157 Taxman 1. Referring to the said decision, he submitted that the Hon'ble Supreme Court in the said decision has categorically held that this decision does not, in any way, relate to the power of the AO to entertain a claim for deduction otherwise than the filing of a revised return. They have made 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 u/s 254 of the Income-tax Act, 1961.

10.1 Referring to the decision of the Hon'ble Supreme Court in the case of NTPC vs. CIT, 229 ITR 383, he submitted that the Hon'ble Supreme Court has held that the Tribunal has jurisdiction to examine a question of law which arises from facts as found by authorities below and having bearing on tax liability of an assessee even though such question was not raised before authorities below nor in grounds of appeal, but, raised by way of additional issue in a forwarding letter.

10.2 Referring to the decision of the Hon'ble Bombay High Court (Panaji Bench) in the case of Sesa Goa Ltd. vs. Addl.CIT, reported in 430 ITR 114, he submitted that the Hon'ble High Court in the said decision has held that appellate authorities under the Income-tax Act, 1961 have very wide powers while considering an appeal which may be filed by the assessee. The appellate authorities 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 the assessee in accordance with law. The Commissioner (Appeals) has undoubted power to consider a claim for deduction not raised in the return or revised return.

11. Referring to the decision of the Hon'ble Bombay High Court in the case of CIT vs. Pruthvi Brokers & Shareholders reported in 23 taxmann.com 23, he submitted that the Hon'ble Bombay High Court in the said decision has held that an assessee is entitled to raise before appellate authorities additional grounds in terms of additional claims not made in return filed by it.

12. Referring to the decision of Hon'ble Madras High Court in the case of CIT vs. Abhinitha Foundation (P) Ltd., reported in 396 ITR 251, he submitted that the Hon'ble High Court in the said decision has held that even if a claim made by assessee company does not form part of original return or even revised return, it can still be considered by Assessing Officer as well as appellate authorities in case relevant material is available on record.

13. Referring to the decision of the Hon'ble Delhi High Court in the case of CIT vs. Sam Global Securities Ltd., reported in 38 taxmann.com 129, he submitted that the Hon'ble High Court in the said decision has held that the Tribunal has comprehensive jurisdiction which gives discretion to allow a new ground to be raised. It has been held that the IT Department is not expected to raise revenue from an ignorant assessee and the AO is obliged to extend relief to such an assessee. Referring to the decision of the Hon'ble Madras High Court in the case of Ramco Cements Ltd. vs. DCIT reported in 373 ITR 146, he submitted that the Hon'ble High Court in the said decision has held that additional grounds claiming market development/advertisement expenses raised by the assessee before

appellate fora being bona fide required to be considered on merit. Referring to the decision of the Hon'ble Delhi High Court in the case of CIT vs. Jai Parabolic Springs Ltd., 306 ITR 42, he submitted that the Hon'ble High Court in the said decision has held that there is no prohibition on the powers of the Tribunal to entertain an additional ground which, according to the Tribunal, arises in the matter for the just decision of the case. Relying on various other decisions placed in the paper book, he submitted that the additional ground raised by the assessee before the CIT(A) should not have been rejected by the CIT(A) especially when she has given a finding that the claims made by the assessee were otherwise factually correct.

14. The ld. DR, on the other hand, heavily relied on the order of the CIT(A). He submitted that since the assessee has not claimed such expenses by filing a revised return, the ld.CIT(A) was fully justified in rejecting such claim made by the assessee otherwise than by filing a revised return as per the provisions of section 139(5) of the IT Act, 1961.

15. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. The only question to be decided in the grounds of appeal No.5 by the assessee raised before the Tribunal is regarding the admissibility of fresh claims made by the assessee during the appeal proceedings which were not made before the AO by

filing a revised return. The issue now stands settled in favour of the assessee by various decisions that an assessee is entitled to raise before the appellate authorities additional grounds in terms of additional claims not made in the return filed by it.

15.1 We find, the Hon'ble Bombay High Court in the case of Pruthvi Brokers & Shareholders (supra) has held that the assessee is entitled to raise before the appellate authorities additional ground in terms of additional claims not made in the return filed by it by observing as under:-

> ñ23. It is clear to us that the 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 Tribunal under section 254.
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> 24. A Division Bench of the Delhi High Court dealt with a similar submission in Commissioner of Income-tax v. Jai Parabolic Springs Limited, (2008) 306 ITR 42. The Division Bench, 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 Division Bench 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.ò

16. We find, the Hon'ble Madras High Court in the case of Abhinitha Foundation (P) Ltd. (supra) has held that even if a claim made by assessee company does not form part of original return or even revised return, it can still be considered by the Assessing Officer as well as appellate authorities in case relevant

material is available on record. The relevant observations of the Hon'ble High Court at para 18 of the order reads as under:-

> ñ18.In sum, what emerges from a perusal of the ratio of the judgments cited above, in particular, the judgments rendered by the Supreme Court in GOETZE's case and National Thermal Power Co. Ltd.'s case, and those, rendered by the Division Bench of this Court in Ramco Cements Ltd. and CIT vs Malind Laboratories P. Ltd., as also the judgments of the Delhi High Court in Sam Global Securities Ltd.'s case and Jai Parabolic Springs Ltd.'s case, that, even if, the claim made by the assessee company does not form part of the original return or even the revised return, it could still be considered, if, the relevant material was available on record, either by the appellate authorities, (which includes both the CIT (A) and the Tribunal) by themselves, or on remand, by the Assessing Officer. In the instant case, the Tribunal, on perusal of the record, found that the relevant material qua the claim made by the assessee company under Section 80 IB (10) of the Act was placed on record by the assessee company during the assessment proceedings and therefore, it deemed it fit to direct its reexamination by the Assessing Officer.ò

17. Various other decisions relied on by the ld. Counsel in the paper book also support the case to the proposition that the assessee can always make a new claim before the appellate authorities which was not claimed before the AO by filing a revised return of income. Since, in the instant case, the assessee has made this additional claim by filing additional grounds, the ld.CIT(A) should not have rejected the same merely on the ground that the assessee has not made such claims before the AO by filing a revised return as per the provisions of section 139(5) of the Act. We, therefore, deem it proper to restore the issue to the file of the CIT(A) with a direction to admit the additional ground and decide the issue as per fact and law after giving due opportunity of being heard to the assessee. We hold and

direct accordingly. Ground of appeal No.5 by the assessee is accordingly allowed for statistical purposes.

18. In the result, the appeal filed by the assessees is partly allowed.

Pronounced in the open court on 28.07.2021.

Sd/-	Sd/-
(KUL BHARAT) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMBER

Dated: 28th July, 2021

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Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi