



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"E" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI N.K. PRADHAN, ACCOUNTANT MEMBER**

ITA no.3521/Mum./2019  
(Assessment Year : 2015-16)

Tristar Fashions  
C/o Shankarlal Jain & Associates  
12, Engineering Building  
265, Princess Street  
Mumbai 400 013  
PAN – AAAFT0077E

..... Appellant

v/s

Asstt. Commissioner of Income Tax  
Circle-17(3), Mumbai

..... Respondent

Assessee by : None  
Revenue by : Shri Amit Pratap Singh

Date of Hearing – 30.09.2020

Date of Order – 07.10.2020

**ORDER**

**PER SAKTIJIT DEY. J.M.**

The captioned appeal by the assessee is against the order dated 8<sup>th</sup> April 2019, passed by the learned Commissioner of Income Tax (Appeals)-28, Mumbai, for the assessment year 2015-16.

2. When the appeal was called for hearing, no one was present on behalf of the assessee to represent the case. There is no application seeking adjournment either. Considering the nature of dispute, we proceed to dispose off the appeals ex-parte qua the assessee after

hearing the learned Departmental Representative and on the basis of material available on record.

3. As could be seen from the grounds raised in this appeal, the grievance of the assessee is against non-consideration of its claim of taxability of long term capital gain arising on sale of depreciable asset at 20% instead of 30%.

4. Brief facts are, the assessee, a partnership firm, filed its return of income for the impugned assessment year on 21<sup>st</sup> August 2015, declaring total income of ₹ 98,88,420. In the return of income filed, the assessee has offered short term capital gain of ₹ 99,44,569, in respect of sale of industrial gala by treating it as depreciable asset under section 50 of the Act. During the assessment proceedings, the assessee made a fresh claim through submissions that since the asset was held for more than three years, the rate of tax applicable would be that of long term capital gain as per section 112 of the Act. The Assessing Officer, however, did not accept the aforesaid claim of the assessee by observing that such claim having not been made in the original return of income or through a revised return of income cannot be entertained as per the decision of the Hon'ble Supreme Court in *Goetz India Ltd. v/s CIT*, [2006] 284 ITR 323 (SC). While considering assessee's appeal on the issue, learned Commissioner (Appeals) also

agreed with the aforesaid reasoning of the Assessing Officer and did not examine assessee's claim on merits.

5. We have considered the submissions of learned Departmental Representative and perused the material on record. Undisputedly, in the course of assessment proceedings, the assessee did make a claim through submissions that since the asset sold was held for more than three years, the rate of tax as applicable in case of long term capital gain would apply in terms of section 112 of the Act. Both, the Assessing Officer and learned Commissioner (Appeals) have rejected the aforesaid claim of the assessee on the ground that the assessee has not made such claim either in the original return of income or through a revised return of income as provided under section 139(5) of the Act. In our view, learned Commissioner (Appeals) was not justified in agreeing with the decision of the Assessing Officer, thereby, not deciding assessee's claim on merits. The settled legal position as emerges from the decision of the Hon'ble Supreme Court in *Goetz India Ltd. (supra)* and the decision of the Hon'ble Jurisdictional High Court in *CIT v/s Pruthvi Brokers and Shareholders Pvt. Ltd., [2012] 349 ITR 336 (Bom.)*, the appellate authority certainly has power and jurisdiction to entertain a fresh claim of the assessee if the relevant fact for deciding such issue are available on record. Therefore, in our considered opinion, learned Commissioner (Appeals) was not justified

in rejecting the claim of the assessee without deciding it on merit. In view of the aforesaid, we set aside the impugned order of the learned Commissioner (Appeals) and restore the issue back to the file of the Assessing Officer for deciding the assessee's claim on merits keeping in view the judicial precedents to be cited before him. Needless to mention, the Assessing Officer shall provide reasonable opportunity of being heard to the assessee before deciding the issue. Grounds raised by the assessee are allowed for statistical purposes.

6. In the result, appeal is allowed for statistical purposes.

Order pronounced through notice board under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1963, on 07.10.2020

**Sd/-**  
**N.K. PRADHAN**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 07.10.2020**

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The CIT(A);
- (4) The CIT, Mumbai City concerned;
- (5) The DR, ITAT, Mumbai;
- (6) Guard file.

Pradeep J. Chowdhury  
Sr. Private Secretary

True Copy  
By Order

Assistant Registrar  
ITAT, Mumbai