[2018] 409 ITR 358 (Ker)

[IN THE KERALA HIGH COURT]

COMMISSIONER OF INCOME-TAX

v.

MALAYALA MANORAMA CO. LTD.

K. VINOD CHANDRAN and ASHOK MENON JJ.

May 30, 2018.

SS ▶ ITA 1961, s 80G
HF ▶ Assessee/Department

ASSESSMENT—CLAIM FOR DEDUCTION—ALTERNATE CLAIM NOT RAISED IN RETURN CAN BE CLAIMED IF NECESSARY FACTS ARE ON RECORD—INCOME-TAX ACT, 1961.

CHARITABLE PURPOSES—DONATION FOR CHARITABLE PURPOSES—SPECIAL DEDUCTION UNDER SECTION 80G—DONATION MUST BE FOR CHARITABLE PURPOSE IN INDIA—EXPENDITURE INCURRED ON AIR-CONDITIONING HALL BELONGING TO LOCAL AUTHORITY—NOT DONATION FOR CHARITABLE PURPOSE—AMOUNT NOT ENTITLED TO DEDUCTION UNDER SECTION 80G—INCOME-TAX ACT, 1961, S. 80G.

Where at the time of assessment, a claim for deduction made in the return is disallowed, the assessee is entitled to make an alternate plea by way of submission before the Assessing Officer if the necessary facts for claiming a deduction are available in the return.

Sub-section (5) of section 80G of the Income-tax Act, 1961, makes it clear that deduction for a donation to an institution or fund referred to in sub-clause (iv) of clause (a) of sub-section (2) of section 80G would be available only if the institution or fund is established in India for a charitable purpose and fulfils the conditions enumerated therein. What is essentially required is that the donation should be to an institution or fund which is eventually applied for charitable purposes.

The assessee had through a trust expended an amount of Rs. 1 crore for the purpose of air-conditioning of a hall which was owned by the Kottayam Municipality. The hall was in the name of the founder of the assessee and the assessee had taken upon itself the task of maintaining, refurnishing and modernising the hall in memory and in honour of the founder. The assessee claimed deduction of the expenses in its return under section 37 of the Act, as an expense incurred wholly and exclusively for business purposes. The Assessing Officer rejected the claim. The assessee then raised an alternate

contention that, it was entitled to deduction under section 80G as a donation granted to a charitable trust. The claim was rejected on the merits and also on the ground that the returns did not indicate it having been given as a donation to the charitable trust. The appellate authority allowed the claim. The Tribunal affirmed the order of the appellate authority. On appeal :

Held, *(i) that there could be a deduction considered under section 80G, by the Assessing Officer without a revised return being filed since the claim for deduction was made though under a wrong provision. The necessary facts for a claim to be set up were available in the return.*

(ii) that the fund was applied for air-conditioning of a town hall which was owned by the local authority and bore the name of the founder of the assessee. There was no charitable purpose in the application of the funds. The trust had no control over the funds and acted merely as an agent of the assessee in carrying out the air-conditioning of the hall, if at all it was so carried out. There was no donation made by the assessee which applied to the charitable purposes for which it was established. The expenditure was not deductible under section 80G.

Cases referred to :

CIT (Addl.) *v.* Gurjargravures P. Ltd. [1978] 111 ITR 1 (SC) (para 8)

CIT *v.* Mahalaxmi Sugar Mills Co. Ltd. [1986] 160 ITR 920 (SC) (para 4)

CIT *v.* Pruthvi Brokers and Shareholders P. Ltd. [2012] 349 ITR 336 (Bom) (para 4)

CIT *v.* V. MR. P. Firm, Muar [1965] 56 ITR 67 (SC) (paras 4, 11)

Goetze (India) Ltd. *v.* CIT [2006] 284 ITR 323 (SC) (para 4)

Malayala Manorama Co. Ltd. *v.* CIT [2006] 284 ITR 69 (Ker) (paras 3, 10)

NTPC Ltd. *v.* CIT [1998] 229 ITR 383 (SC) (para 4)

Income Tax Appeal No. 96 of 2010.

Jose Joseph, Standing Counsel for Income-tax Department, for the appellant.

P. Benny Thomas, P. Gopinath, K. John Mathai and *E. K. Nandakumar*, Advocates, for the respondent.

JUDGMENT

The judgment of the court was delivered by

K. Vinod Chandran J.—We are faced with an interesting situation 1
wherein the assessee claims a deduction as allowable, under a different provision from that claimed in the return ; denied however, for reason of

the proper procedure of revision of return having not been resorted to. The question of law framed by the Revenue who is in appeal is reframed as follows :

> "When at the time of assessment, the claim for deduction made in the return is disallowed, whether the assessee is entitled to make an alternate plea by way of mere submission before the Assessing Officer, especially when the statute interdicts even a revision, as per sub-section (5) of section 139, after one year from the relevant assessment year or completion of assessment, whichever is earlier ?"

We are also inclined to frame an alternate question of law as arising from the order of the Tribunal :

> "Has not the Tribunal erred in so far as allowing the claim under section 80G of the Income-tax Act since even if the assessee carried out the air-conditioning of the town hall through a charitable institution certified under the provision, the same would not be a donation as provided under section 80G eligible for deduction as one made to a charitable institution ?"

2 Limited facts required to be stated are as follows :

The assessment for the assessment year 2004-05 was completed by annexure A. The assessee had through the Mammen Mappilai Charitable Trust expended an amount of Rs. 1 crore for the purpose of air-conditioning of Mammen Mappilai Hall which is owned by the Kottayam Municipality. The hall is in the name of the founder of the assessee and the assessee had taken up on itself the task of maintaining refurnishing and modernising the said hall in memory and in honour of the founder. The assessee claimed in its return, deduction under section 37 of the Income-tax Act, 1961 as an expense incurred wholly and exclusively for business purposes.

3 The Assessing Officer rejected the claim in view of the binding precedent in *Malayala Manorama Co. Ltd.* v. *CIT* [2006] 284 ITR 69 (Ker). The assessee then raised an alternate contention that, it is entitled to deduction under section 80G as a donation granted to a charitable trust. The said claim was rejected on merits as also for reason that the returns did not indicate it having been given as a donation to the charitable trust. The appellate authority allowed the claim and remanded the matter for the limited purpose of verification of the receipt of donation and the certificate under section 80G issued to the trust. The Tribunal affirmed the same.

The learned counsel for the Revenue placed before us an order of the hon'ble Supreme Court reported in *Goetze (India) Ltd.* v. *CIT* [2006] 284 ITR 323 (SC) wherein a claim made other than by way of a revised return was held to be not permissible. The assessee in opposition relied on a Division Bench decision of the High Court of Bombay in which a decision of the hon'ble Supreme Court, reported in *NTPC Ltd.* v. *CIT* [1998] 229 ITR 383 (SC) was relied on to allow an identical claim. The decision of the High Court of Bombay is reported in *CIT* v. *Pruthvi Brokers and Shareholders P. Ltd.* [2012] 349 ITR 336 (Bom) wherein *Goetze (India) Ltd.* was noticed but distinguished. The learned counsel appearing for the assessee also contended that when the claim is allowable under section 80G and not includable in the taxable income as per the Income-tax Act, there can be no deduction merely for the reason of the claim having not been made before the Assessing Officer. That would lead to the assessee being pinned down to the claim of deduction made under the return ; applying the principles of estoppel ; which has been deprecated by the hon'ble Supreme Court in *CIT* v. *V. MR. P. Firm, Muar* [1965] 56 ITR 67 (SC), *CIT* v. *Mahalaxmi Sugar Mills Co. Ltd.* [1986] 160 ITR 920 (SC) ; AIR 1986 SC 2111 was also placed before us to urge that a claim of benefit of set off has to be applied in appropriate cases in computation of total income ; even if it is not claimed by the assessee. 4

We have to first notice that the issue of section 80G was examined by the Assessing Officer and disallowed on merits as also on the ground that there was no claim made in the return, as to the amounts being allowable as a donation nor any evidence produced to prove such donation. The first appellate authority looked at the photocopy of the receipts issued by the trust and its order of approval under section 80G and directed verification of the originals on satisfaction of which the claim was directed to be allowed. The Tribunal affirmed the limited remand made in first appeal. The Revenue is in appeal on the compelling ground that without a revision of return as permitted by the statute there can be no such consideration. We notice that *Goetze (India) Ltd.* and *Pruthvi Brokers* are distinguishable on facts and on law. *Goetze* was a case in which the return was filed and later a specific claim of deduction, not raised in the return, was sought to be urged before the Assessing Officer by way of a letter. The claim was disallowed on the ground that there was no provision under the Income-tax Act, to amend the return other than by revision of return. In *Pruthvi Brokers* the claim of deduction was made in the return but the figures were relatable to another year ; which was sought to be altered to the amounts relevant for the subject year. 5

6 The High Court of Bombay was concerned with a case where the assessee had made a claim of deduction not only before the Assessing Officer but also independently before the appellate authorities. The assessee therein, claimed deduction of an amount as fees paid to SEBI, which at the time of assessment was found to be paid in the year relevant to the next assessment year. Before the Assessing Officer, the assessee submitted that the amount shown in the return was by inadvertence and proffered a still larger amount paid as SEBI fees in the relevant assessment year. The Assessing Officer rejected the claim on the ground that there is no authority to allow the relief not specifically claimed in the return. The distinguishing factor is that in *Goetze (India) Ltd.* the deduction claimed by a letter was not claimed in the return. In *Pruthvi Brokers* the deduction was claimed, but by an inadvertent omission the amount shown could have been claimed only in the next assessment year. However there was considerable amounts entitled to be deducted in the relevant assessment year, under the same provision for deduction, which were paid in the year relevant to the subject assessment year. The Division Bench also found that even if the Assessing Officer was not entitled to grant deduction on the basis of a mere submission made or letter communicated, the appellate authorities would be entitled to consider the claim and adjudicate it. An extract from para 7 is relevant (page 340 of 349 ITR) :

> "We find well founded, Mr. Mistri's submission that even assuming that the Assessing Officer is not entitled to grant a deduction on the basis of a letter requesting an amendment to the return filed, the appellate authorities are entitled to consider the claim and to adjudicate the same."

7 In *Pruthvi Brokers* the deduction was one claimed in the return but the quantum claimed was a mistake and it was relevant to another year. The claim raised on assessment was only to correct the quantum claimed. Likewise herein too, the claim of deduction was raised but however the provision under which the claim was allowable, as claimed in the return was not proper. Therefore a claim for deduction under a different provision under the Income-tax Act itself. The assessee also had raised the claim independently before the first appellate authority which was allowed and remand order to verify the genuineness of the documents produced in support of the claim.

8 *Addl. CIT* v. *Gurjargravures P. Ltd.* [1978] 111 ITR 1 (SC) also was relied on to find that :

> "The above observations do not rule out a case for raising an additional ground before the Appellate Assistant Commissioner if the

> ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made, or that the ground became available on account of change of circumstances or law. There may be several factors justifying raising of such new plea in appeal, and each case has to be considered on its own facts. If the Appellate Assistant Commissioner is satisfied, he would be acting within his jurisdiction in considering the question so raised in all its aspects. Of course, while permitting the assessee to raise an additional ground, the Appellate Assistant Commissioner should exercise his discretion in accordance with law and reason. He must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The satisfaction of the Appellate Assistant Commissioner depends upon the facts and circumstances of each case and no rigid principles or any hard and fast rule can be laid down for this purpose."

NTPC was a case in which the assessee had deposited certain funds in 9
short-term deposits on which there was an interest income amounting to Rs. 22,84,994. This was offered for assessment and there obviously was no ground raised against the assessment of those amounts in first appeal. When the second appeal was filed before the Tribunal also, there was no challenge to the inclusion in income. Subsequently when the second appeal was pending, an additional ground was raised that on account of the erroneous admission with regard to the sum of Rs. 22,84,994, there could be no inclusion in the taxable income, especially when it had to be excluded. The hon'ble Supreme Court answered the question of law framed in affirmative that the Tribunal has jurisdiction to examine the question of law which arise from the facts as found by the authorities below and having a baring on the tax liability of the assessee.

The learned standing counsel appearing for the Revenue would contend 10
that only a question of law could be so raised as an additional ground and a deduction not claimed by the assessee cannot be raised before any of the authorities unless a claim is made in the return of income or a revised return filed. The learned counsel appearing for the assessee specifically refers to sub-section (5) of section 139, which mandates a revised return to be filed within the expiry of one year or before the completion of the assessment whichever is earlier as the provision stood at the time of assessment. Hence there could have been no revised return filed at the time of assessment since it was after a period of one year from the date of expiry of the end of the relevant assessment year.

The learned standing counsel appearing for the Revenue per contra would alertly point out that in the assessee's own case, *Malayala Manorama Co. Ltd.* v. *CIT* [2006] 284 ITR 69 (Ker), this court had held that an identical claim raised under section 37 was not permissible. The judgment was delivered on December 13, 2005. The relevant assessment year in the instant case is 2004-05. The time within which a revised return had to be filed was March 31, 2006. There was no appeal filed from the decision in *Malayala Manorama Co. Ltd.* v. *CIT* [2006] 284 ITR 69 (Ker). The assessee having accepted the decision delivered on December 13, 2005 ; necessarily a revised return could have been filed before March 31, 2006. We agree with the learned standing counsel that the assessee had ample time to file a revised return especially when the claim as raised in the return for an earlier assessment year was found to be not allowable by the jurisdictional High Court. However, we are not convinced that the said fact alone would disentitle the assessee from making the claim at the appellate stage.

11 We are fortified in taking such a view by the decision of the hon'ble Supreme Court in *CIT* v. *V. MR. P. Firm, Muar* [1965] 56 ITR 67 (SC). Therein the question was with respect to the assessee having acted in accordance with the instructions of the Central Board of Revenue which took into account the devaluation of currency in Malaya due to occupation of Japan. A scheme was framed for the benefit of Indian nationals doing business in Malaya ; who were hit by the reintroduction of Malayan Currency after the British re-occupied Malaya, resulting in drastic devaluation of the Japanese currency, which together with the Malayan currency was in vogue at the time of Japanese occupation. The losses suffered by such assessees during the assessment year 1942-43 and 1946-47 were allowed to be set off against the profit of the assessment years 1942-43 and 1941-42. The debts discharged in Japanese currency were excluded in the asset side in the balance-sheet, but the authority reserved for itself the right to treat any recoveries subsequently made as income. The subsequent recoveries were only on account of the Malaya Government reviving the loans due ; which were already paid off in undervalued Japanese currency, on the Malayan currency being reintroduced after occupation of Japan. Certain assessees, who suffered losses applied under the scheme and got their losses set off under the scheme. Since the debts due to them were revived they made some recoveries in the subsequent years ; which they claimed to be not includable in income, since it was realization of the original amounts lent. Certain others had to pay more on their debts getting revived ; which they claimed as business expenditure for deduction. The Income-tax Officer rejected both claims, the Commissioner-Appeals

allowed the former but declined the latter claim. The Tribunal interfered with the order in appeal in so far as the claim of recovery being realization of the money lent. The Tribunal found that the assessee having had the benefit of the scheme, for setting off losses, the debts are deemed to be written off and the further recovery is assessable as income. The High Court held in the case of recoveries ; whatever received as principal will be allowable and the interest component alone will be treated as income. As to the subsequent payments on revival of debts it was held that the interest component alone will be treated as business expenditure and the principal cannot be allowed as deduction. Agreeing with the High Court, the hon'ble Supreme Court held so (page 74 of 56 ITR) :

> "The contention is that the assessees having opted to accept the scheme, derived benefit thereunder, and agreed to have their discharged debts excluded from the asset side in the balance-sheet subject to the condition that subsequent recoveries by them would be taxable income, they are now precluded, on the principle of 'approbate and reprobate' from pleading that the income they derived subsequently by realization of the revived debts is not taxable income. The doctrine of 'approbate and reprobate' is only a species of estoppel ; it applies only to the conduct of parties. As in the case of estoppel, it cannot operate against the provisions of a statute. If a particular income is not taxable under the Income-tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. Equity is out of place in tax law ; a particular income is either exigible to tax under the taxing statute or it is not. If it is not, the Income-tax Officer has no power to impose tax on the said income."

Hence for the mere reason that the assessee had not claimed the provision under which the deduction was allowable in the return cannot preclude the assessee from claiming it either before the first appellate authority or the Tribunal. Merely for the reason that the assessee had made a wrong claim in the return under section 37 and as an alternate plea, relied on another provision, for deduction, it would not disable an alternate claim under section 80G. In any event the assessee would not have been disabled from making such a claim before the appellate authority as held by a three Judge Bench of the hon'ble Supreme Court in the case of *NTPC*. We agree with the decision of the Bombay High Court, which followed *NTPC*. 12

Mahalaxmi Sugar Mills according to us, on the quite distinct facts as also the law applied, has no application and has been quoted out of context. Therein an Indian company which had shares in a Pakistani company, 13

suffered losses in India but however obtained dividend income from the Pakistani company. The assessee-Indian company claimed that under the agreement for the avoidance of double taxation entered into between the two countries, the dividend income having suffered tax in Pakistan was not liable to be set-off against the losses suffered in India. The assessee claimed that the losses suffered in India has to be carried over for being adjusted in the profits of the Indian company, if any, for the subsequent years. The assessee won before the High Court, however the Supreme Court held otherwise. It was found that the dividend income obtained by the company whether accruing or arising abroad would have been taxable under the Indian Income-tax Act. It was only by virtue of the agreement for avoidance of double taxation that the dividend income accruing in a company existing in Pakistan was entirely taxable in Pakistan. The assessments, however, even as per the agreement, was to be made in the ordinary course in accordance with the laws existing in each of the countries. Hence, set-off as provided in the income-tax laws of India has to be applied even if the assessee fails to claim the same. It is to be noticed that the set-off applied went against the assessee and not in its favour in so far as the losses of the Indian company to the said extent was set off by the dividend income which was received from the Pakistani company. The aforesaid decision has absolutely no application on facts or law to the present case.

14 On the questions of law, we are of the opinion that the Assessing Officer cannot allow a claim for deduction, afresh raised ; unless there is a revised return made in accordance with the Act as has been held in *Goetze (India) Ltd.*. Merely for reason that the Assessing Officer had disallowed the claim for the technical reason of the assessee having not filed a revised return, the assessee cannot be disabled from raising the very same claim before the appellate authorities as has been held in *NTPC*. Following *NTPC* it has also to be found that the necessary facts for claiming a deduction if available in the return filed ; an erroneous claim on figures or even a wrong claim under a provision could be entertained even by the Assessing Officer, as in the present case. Here the assessee claimed business expenditure under section 37 ; which, as held by this court in a similar matter, was not allowable. The assessee then claimed before the Assessing Officer that there was yet another provision under the Act, under which the deduction could be allowed. This was submitted before the assessing authority, who declined it on the merits for reason of no evidence produced. Before the first appellate authority also the claim was made, which stood allowed ; which decision was affirmed by the Tribunal.

In the facts and circumstances of this case we hence answer the first question of law framed in favour of the assessee and against the Revenue that there could have been a deduction considered under section 80G, by the Assessing Officer without a revised return being filed since the claim for deduction was made ; but under a wrong provision. The necessary facts for a claim to be set up were available in the return. 15

We then notice that the first appellate authority has considered the claim under section 80G prima facie, and found it to be tenable. The appellate authority had directed consideration of the claim by the Assessing Officer which is permissible, as has been laid down by the hon'ble Supreme Court in *NTPC*. But the consideration directed was confined to verification of the certificate issued to the trust under section 80G and the receipts. We cannot accede to that especially since the claim of the assessee itself is that through the trust it carried out air-conditioning of the hall which did not belong to the assessee or the trust. It would have to be considered whether the mere disbursement of funds through a trust which is an institution approved under section 80G could enable the deduction ; especially when the money allegedly handed over to the trust is for the specific purpose of air-conditioning a hall and the trust has no control or option to apply the funds in its charitable activities. 16

On the above reasoning we would have normally remanded the matter to the Assessing Officer for fresh consideration of the claim on merits. However we see that the Assessing Officer had considered the claim on merits and in appeal, the first appellate authority reversed the findings and held the claim allowable on merits subject only to the verification of the receipt of donation and certificate issued to the trust under section 80G. The Tribunal also upheld the same. The alternate question framed by us hence assumes relevance. The Assessing Officer having declined the claim under section 37 also considered the claim raised as a donation under section 80G. The Assessing Officer found that it was the initial claim of the assessee that the amount incurred by the company was for a specific purpose ; of air-conditioning of Mamman Mappilai Hall. The assessee had been regularly debiting and claiming such expenses in the preceding years as business expenditure which stood disallowed by a decision of this court. There was found to be no evidence filed to prove the expenses incurred by the company for air-conditioning the Mamman Mappilai Hall ; to be a donation to the charitable trust. It is before the appellate authority copies of the receipts were produced. 17

Even if there is a payment made to a trust, certified under section 80G and the trust has issued a receipt, in the totality of the facts pleaded by the 18

assessee, we are of the opinion that it is not a donation to a charitable trust. The nominal heading of section 80G reads as "Capital deduction in respect of donations to certain funds, charitable institutions etc." The donation is said to be one under section 80G(2)(a)(iv) : "any other fund or any other institutions to which this section applies". Hence what was intended is a donation to an institution or fund as enumerated in the provision which essentially has to be applied for charitable purposes. Sub-section (5) of section 80G makes it clear that the donation to an institution or fund referred to in sub-clause (iv) of clause (a) of sub-section (2) of section 80G would apply only if established in India for a charitable purpose and fulfil the conditions enumerated therein. What is essentially required is that the donation should be to an institution or fund which is eventually applied for charitable purposes. In the present case, there were never a case set up of a donation made to the trust. The claim was made of business expenditure which was later altered to one of a donations to the trust. The purpose of the activity for which the fund is applied does not change with the change of the provision under which the claim for deduction is raised. The fund was applied for the air-conditioning of a town hall which is owned by the local authority and bears the name of the founder of the assessee. We do not see any charitable purpose in the application of the funds and we also notice that the trust had no control over the funds and acted merely as an agent of the assessee in carrying out the air-conditioning of the hall, if at all it was so carried out. We find that there is no donation made by the assessee to the charitable institution ; which it could have applied to the charitable purposes for which it was established. Hence we reject the claim and affirm the order of the Assessing Officer, setting aside those of the first appellate authority and the Tribunal to that extent. We answer the alternate question raised by us in favour of the Revenue and against the assessee.

In that context, the income-tax appeal would stand allowed setting aside the orders of the appellate authorities to the extent it allowed the claim of the assessee under section 80G.
