

Fresh claim not made in original return can be raised before Tribunal for first time: HC

Summary – The High Court of Bombay in a recent case of B. G. Shirke Construction Technology (P.) Ltd., (the Assessee) held that An assessee is entitled to make a claim before Tribunal which was not raised before Assessing Officer at time of filing return of income or by filing a revised return of income

Return filed under section 153A(1) is a return furnished under section 139 and, therefore, provisions of Act which apply in case of return filed in regular course under section 139(1), would also continue to apply in case of return filed under section 153A

Facts

- The assessee was engaged in the execution of construction contracts. There was a search and seizure action under section 132 upon the assessee. Consequent thereto, a notice under section 153A was issued to the assessee for the assessment years 2003-04, 2006-07, 2007-08 and 2008-09.
- However, as the assessments for the subject assessment years 2007-08 and 2008-09 were pending before the Assessing Officer they stood abated in view of the second proviso to section 153A(1).
- Consequent to the above, the assessee filed its return of income for the subject assessment years under section 153A read with section 139(1). In its return of income filed consequent to notice under section 153A, in both the assessment years, assessee had while offering its income on account of execution of the contracts had not excluded the amounts retained by its customers till the completion of the defect liability period after completion of the contract. This amount could not be quantified in the short time available to file its return of income. Therefore, the assessee filed a note along with its returns of income pointing out the aforesaid facts and its seeking appropriate deduction when completing the assessments.
- During the assessment proceeding, the assessee quantified its claim year wise placing reliance upon relevant clause of the contract with its customers so as to claim deduction of the taxable income to the extent the customers had retained *i.e.* contract amount till the completion of the defect liability period.
- The Assessing Officer did not entertain the aforesaid claim when quantified during the assessment proceedings holding that he had no power to allow deduction which was not claimed either in the return of income as originally filed or claimed by way of filing a revised return of income.
- The Commissioner (Appeals) upheld the order of Assessing Officer.
- The Tribunal held that although it was undisputed that the computation of income did not reflect the actual quantification of the amount of retention money held by the customers which could not be subjected to tax, yet the note filed along with the return of income indicated the claim in principle (absent quantification). This quantification was explained during the assessment proceeding along with relevant clauses of each contract with its customers.

- Thus the Tribunal held that on merits that the claim made for deduction of retention money as quantified during assessment proceedings was to be allowed. The Tribunal further proceeded to hold that even if the quantification made during the course of the assessment proceeding was considered to be a fresh claim and could not have been entertained by the Assessing Officer, there was no bar/impediment in raising the claim before the Appellate Authorities under the Act for consideration. Thus as the facts were already on record the same could have been considered by the Appellate Authorities. The Tribunal thus allowed assessee's claim.
- On revenue's appeal:

Held

- For the purpose of the instant appeal, the issue whether or not the claim of quantification made by the assessee before the Assessing Officer for the subject assessment years would be a fresh claim or not is academic. This, in view of the fact that the impugned order has held that even if one accepts that the quantification of the amount of deduction made during the course of assessment proceedings is a fresh claim, it is a settled position so far as this Court is concerned that it can be made before and could be considered by the Appellate Authorities. The right of an assessee to raise a fresh claim before the Appellate Authorities is no longer *res integra* in view of the decision of this Court in *CIT v. Pruthvi Brokers & Shareholders* [\[2012\] 349 ITR 336/208 Taxman 498/23 taxmann.com 23 \(Bom.\)](#) wherein it has been held that there is no prohibition in the Tribunal to entertaining additional ground/claims which was not placed before the lower authorities.
- In the instant case, it is an undisputed position that the pending assessment before the Assessing Officer consequent to return filed under section 139(1) for the subject assessment years had abated. This was on account of the search and as provided in second proviso to section 153A(1). The consequence of notice under section 153A(1) is that assessee is required to furnish fresh return of income for each of the six assessment years in regard to which a notice has been issued. It is this return which is filed consequent to the notice which would be subject of assessment by the revenue for the first time in the case of abated assessment proceedings.
- Consequent to notice under section 153A the earlier return filed for the purpose of assessment which is pending, would be treated as *non est* in law. Further, section 153A(1) itself provides on filing of the return consequent to notice, the provision of the Act will apply to the return of income so filed. Consequently, the return filed under section 153A(1) is a return furnished under section 139 of the Act. The assessee is being assessed in respect of abated assessment for the first time under the Act. Therefore, the provisions of the Act which would be otherwise applicable in case of return filed in the regular course under section 139(1) would also continue to apply in case of return filed under section 153A.
- The Court in *Pruthvi Brokers and Share holders (P.) Ltd. (supra)* while dealing with a return of income filed under section 139(1) has held that an assessee is entitled to raise a fresh claim before the Appellate Authorities, even if the same was not raised before the Assessing Officer at the time of filing return of income or by filing a revised return of income.

- In view of the fact that the issue stands concluded by the decision of the Court in *Pruthvi Brokers & Shareholders (supra)*, no substantial question of law arises from the Tribunal's order.
- Accordingly, the revenue's appeal is dismissed.