

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

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA Nos.3560 & 4571/M/2016
Assessment Years 2010-11 & 2011-12**

ITO -12(1)(1), Room No.226, 2 nd Floor, Aayakar Bhavan, M.K. Rd., Mumbai - 20	Vs.	M/s. Adept Agencies Pvt. Ltd., Office No.36, Shrinaman Plaza, Behind Shopper's Stop, Kandivali (W), Mumbai – 400 067 PAN: AADCA5179Q
(Appellant)		(Respondent)

**CO No.25/M/2018
(ITA No.4571/M/2016)
Assessment Year 2011-12**

**CO No.319/M/2017
(ITA No.3560/M/2016)
Assessment Year 2010-11**

M/s. Adept Agencies Pvt. Ltd., Office No.36, Shrinaman Plaza, Behind Shopper's Stop, Kandivali (W), Mumbai – 400 067 PAN: AADCA5179Q	Vs.	ITO -12(1)(1), Room No.226, 2 nd Floor, Aayakar Bhavan, M.K. Rd., Mumbai - 20
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Ajay Singh, A.R.
Revenue by : Shri Sachchidanand Dube, D.R.

Date of Hearing : 03.12.2018

Date of Pronouncement : 15.01.2019

ORDER

Per Rajesh Kumar, Accountant Member:

The above titled two appeals by the Revenue and the two cross objections by the assessee have been preferred against the orders dated 29.02.2016 & 11.04.2016 of the Commissioner of

Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2010-11 & 2011-12 respectively.

2. The Revenue has challenged the order of Ld. CIT(A) raising common grounds in both the years. The grounds raised by the Revenue in the appeal for A.Y. 2010-11 are as under:

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not considering the allowance of the loss incurred by the assessee on high sea transaction w.r.t. the provisions of the section 43(5) of the Act in view of judicial rulings holding that the powers of the first appellate authority are conterminous with those of the AO. The appellant prays that the order of the CIT(A) on the grounds be set aside and that of the Assessing Officer be restored.

2 The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.

3 The appellant craves leave to add, amend or alter all or any of the grounds of appeal.”

3. Whereas the issue raised by the assessee in the cross objections is common in both the years and is reproduced as under:

“1. Appellant submits that the ground raised by the AO is neither arising from the assessment order nor arising from the CIT-(A)’s order and such the Appeal filed by the department shall be dismissed

2. The Appellant craves leave to add, amend or alter all or any of the grounds of appeal.”

4. We shall first take up the issue raised by the assessee in the cross objections. The common issue challenged by the Ld. A.R. in the cross objection is that ground raised by the Revenue in its appeal in both the years is not arising from the assessment order nor arising from the Ld. CIT(A)’s order and as such appeal filed by the Department should be dismissed. The Ld. A.R. submitted before the Bench that the perusal of the grounds of appeal reveal that the issue sought to be raised by

the Revenue is against the order of Ld. CIT(A) not considering the allowance of losses incurred by the assessee on high sea transactions with respect to provisions of section 43(5) of the Act in view of the fact that powers of the Ld. CIT(A) are co-terminus with that of the AO. According to the Ld. A.R. the AO has challenged in the appeal filed before the Tribunal that Ld. CIT(A) should have looked into the aspect of contingent loss made by the assessee on the high sea transactions which are covered under provisions of section 43(5) of the Act whereas the Ld. A.R. while taking us through the assessment order submitted that AO nowhere stated the said transactions to be of contingent nature and covered by the section 43(5) of the Act. The AO has only suspected the said transactions on the ground that assessee has received service charges from M/s. Ruchi Soya Industries Ltd. for supply of manpower and on the other hand the assessee has done the transactions of purchase and sale with the same entity and thus came to the conclusion that the transactions are collusive in nature and intended to transfer the profits/money from parent/assessee company by M/s. Ruchi Soya Industries Ltd. with a view to avoid the tax liability in the hands of transferee company and ultimately added the same to the income of the assessee to the tune of Rs.2,99,77,817/-. The Ld. A.R. also took us through the Ld. CIT(A)'s order and submitted that Ld. CIT(A) has not gone into the issue of contingent loss made from high sea transactions under section 43(5) of the Act which is sought to be raised by the Revenue in the appeal before this Hon'ble Tribunal. Thus the issue of loss under section 43(5) of the Act was neither before the AO nor the Ld. CIT(A). Now at this stage the AO can not by way of filing

appeal before the Tribunal rake up the issue which was not gone into by Ld. CIT(A) nor was arising out of the records before the authorities below. The Ld. A.R. vehemently submitted that the Revenue is raising a new ground and thus trying to give a new colour to the assessment order which is not permissible under the Act as the Revenue can not make out a new case which is quite different from the issue in the assessment order as well as in the appellate order. The Ld. A.R. relied on a series of decisions as under:

1. ACIT vs. Ms. Aishwarya K. Rai (2010) 127 ITD 204 (Mum)
2. DCIT vs. M/s. Envision Investment & Finance Pvt. Ltd. (ITA No.2138/M/2010 A.Y. 2006-07 & Others)
3. ITO vs. Anant Y. Chavan (2009) 126 TTJ (Pune) 984

5. The Ld. A.R. argued that in all these decisions it has been held that AO can not file an appeal to rake up/raise the issues which were never discussed in the order nor were part of the appellate order. Finally, the Ld. A.R. prayed before the Bench that the appeal filed by the Revenue should be dismissed and the CO of the assessee should be allowed. The Ld. A.R. also brought to the notice of the Bench that the similar addition was made by the AO in A.Y. 2009-10 which was allowed by the Ld. CIT(A) and the Department has not gone into appeal against the order of Ld. CIT(A). Therefore, the issue is settled in favour of the assessee and there is no change in facts and circumstances in the current year and therefore on this count also the appeals of the Revenue are not maintainable.

6. The Ld. D.R., on the other hand, relied heavily on the order of AO though candidly admitting that no appeal was filed in A.Y.

2009-10 wherein a similar issue was involved, however, the Ld. D.R. argued that the principle of res-judicata is not applicable to the income tax proceedings. The Ld. D.R. argued that the transactions of sale and purchase in high sea were discussed at length in the AO as well as Ld. CIT(A)'s order and these are undoubtedly speculative in nature. Therefore, it was the duty of the Ld. CIT(A) to look into the matter as the transactions were speculative in nature. The Ld. D.R. further contended that this Hon'ble Bench has the power to look into the matter as this being a legal issue and can be raised at any stage in the appellate proceedings. In defence of his arguments, the Ld. D.R. relied on the decisions of the Hon'ble Supreme Court in the case of Jute Corporation India Ltd. vs. CIT & others 187 ITR 688 SC.

7. After hearing both the parties and perusing the material on record, we find that in this case the Revenue has sought to raise a issue in the grounds of appeal that the transactions of purchase and sales in high sea are covered under section 43(5) of the Act and are of speculative in nature and therefore the Ld. CIT(A) should have considered this issue which was not considered at all. After perusal of assessment order and also the appellate order passed by Ld. CIT(A), we observe that the said issue was never a part of the orders passed by the authorities below and now by way of filing the appeals for both these years i.e. 2010-11 and 2011-12 the Revenue seeks to raise an altogether different issue of loss being speculative in nature under the provisions of section 43(5) of the Act. After considering the rival submissions and perusing the case laws relied by both the parties carefully, we are of the view that this is

altogether new issue which the Revenue has raised before the Tribunal. In our opinion, the AO can not file an appeal before the Tribunal to raise an issue which was not at all part of the assessment order. Moreover, we find merit in the contentions of the Ld. A.R. that by way of filing these appeals the Revenue seeks to raise an altogether new issue which is not part of the orders by the authorities below and thus not arising out of the appellate order or assessment order. In the case of the ACIT vs. Ms. Aishwarya K. Rai (2010) 127 ITD 204 (Mum) co-ordinate bench of the Tribunal has held as under:

“4. The Id. DR contended that the Id. CIT(A) was not justified in law on adjudicating the issue on merits for the reason that the matter was debatable and, hence, beyond the scope of section 154. Shorn off unnecessary details we find that on the moving of the application by the assessee under section 154, the Assessing Officer has dealt with the issue on merits and had not held the issue as debatable in his order. It is further observed from the Assessing Officer's response to the notice of hearing issued by the learned CIT(A), which has been reproduced in para 5 of the impugned order that no such issue was taken up and it was never the case of the Assessing Officer that the issue is debatable and hence, outside the purview of section 154. It is no doubt true that the learned D.R. can make any arguments in support of the stand taken by the Assessing Officer but there are certain inherent limits of his arguments inasmuch as he cannot transgress the boundaries made by the Assessing Officer. In other words, the learned D.R. can support the action of the Assessing Officer with any arguments, he can rely on any case law in support of the Assessing Officer's case, but he cannot make out altogether a new case which was not the subject-matter of consideration by the Assessing Officer or the learned first appellate authority. To find fault in the assessment order is outside the domains of the arguments of the learned D.R. as such power vests with the learned CIT under section 263 for revising any order which is erroneous and prejudicial to the interest of the revenue. We are therefore not inclined to accept these grounds as they do not emanate from the orders of the authorities below. Be that as we will notice infra that the issue was not at all debatable or capable of having two views.”

8. We have also perused the decision relied by the Revenue in the case of Jute Corporation of India Ltd. vs. CIT & Ors. However, the said decision was rendered in the context of filing additional grounds before the appellate authority which was not raised earlier for good reasons and not on the issue which is

before us i.e. altogether new issue which is not at all in the assessment order. The facts of the decision relied upon by the revenue are distinguishable and the ratio laid is not applicable to the present case. We are therefore respectfully following the decision of the co-ordinate bench of the Tribunal as discussed hereinabove allow the cross objections raised by the assessee by dismissing the appeals of the Revenue.

9. In the result, both the appeals of the Revenue are dismissed and both the cross objections of assessee are allowed.

Order pronounced in the open court on 15.01.2019.

**Sd/-
(Mahavir Singh)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 15.01.2019.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.