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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1021 of 2009

Gilbs Computer Limited
(Formerly Gold Fish Computers P. Ltd)
a company incorporated under the
Companies Act, 1956 and having its
registered office at 121, Radha Bhuvan,
1st floor, Nagindas Master Road,
Fort, Mumbai 400 023. .. Petitioner

versus

1. Income-tax Appellate Tribunal,
Mumbai Bench having its office at
Old C.G.O. Building, 4th floor,
101 Maharshi Karve Road,
Mumbai 400 020

2. Assistant Commissioner of Income-tax
Central Circle-40, Mumbai having its
office at Aayakar Bhavan, 6th floor,
Maharshi Karve Road,
Mumbai 400 020.

3. Union of India, through the Secretary
Ministry of Finance, North Block,
New Delhi – 110 001. .. Respondents.

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Mr. P.J. Pardiwala, Sr.Counsel with Mr.Atul K. Jasani and Ms.Vandana Rawale for the petitioner.
Mr.P. S. Sahadevan for the respondents.

CORAM : FERDINO. I. REBELLO AND
J.H. BHATIA, JJ
DATED : 29 th July 2009.

ORAL JUDGEMENT (FERDINO I. REBELLO, J)

1. Rule. Heard forthwith.

2. The principal question that arises for determination in this petition is what are the court fees payable by the assessee in preferring an appeal to Appellate Tribunal under section 253(6) of the Income Tax Act which hereinafter shall be referred to as "the Act". On behalf of the petitioner, learned counsel has submitted as under:-

3. The petitioner had filed its return of income for assessment year 2003-04 on 1st December 2003 in which return it claimed that it was entitled to carry forward a loss of Rs.19,24,93,890/-. The Petitioner's assessment was completed under section 143(3) by Respondent no.2

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by his order dated 17th February 2006 by which order Respondent no.2 determined the business loss incurred by the Petitioner at Rs. 7,18,78,768/- and the long-term capital loss at Rs.1,82,19,212/- aggregating Rs.9,00,97,980. In making the assessment Respondent No.2 disallowed the Petitioner's claim for interest to the extent of Rs. 11,98,97,222/-. A copy of the said order is annexed to the petition as Exhibit"A" and is to be found at pages 21 to 24.

4. As the CIT (Appeals) had dismissed the Petitioner's appeal the Petitioner preferred an appeal to Respondent no.1 in accordance with section 253 and consistent with its stand that the requisite fee payable was Rs.500/- the form 36 that was filed in the registry was accompanied by a challan evidencing payment of a fee of Rs.500/-.

5. The registry of Respondent no.1, by its letter dated 25th August 2009, communicated the defect in the Memo of Appeal in as much as the appeal fee paid was less by Rs.9500/- and invited the Petitioner's attention to a decision of the Tribunal reported in 49 ITD 552. The Petitioner was called upon to rectify the defect within ten days from the date of receipt of the letter. According to the Petitioner as there was no shortfall in payment of the fee it did not pay the additional

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amount demanded and, hence, the matter was fixed for hearing by Respondent no.1. By the impugned order dated 21st January 2009 Respondent no.1 has dismissed the Petitioner's appeal as unadmitted as according to Respondent no.1 the Petitioner had not paid the requisite fee and the deficiency was not met despite an opportunity being given. In coming to its conclusion Respondent no.1 relied upon its earlier decision in the case of Andhra Pradesh State Electricity Board Vs. ITO 49 ITD 552 where the Tribunal had taken the view that if the loss determined by the Assessing Officer was more than Rs.1 lakh the total income would be more than Rs.1 lakh (although negative and the fee payable would be Rs.1,500/- and not Rs.250/- (as the law then stood). According to Respondent no.1 the object behind section 253(6) appeared to be that big cases involving income of more than a particular figure, positive or negative, required more time and effort of the Tribunal to deal with. The nature of fees being compensatory a higher fee for a bigger case would be in consonance with the object.

6. It is therefore submitted that considering the section, the court fees is payable on the total income as computed by the Assessing

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Officer, and in the instant case, there being a loss, the court fees payable will be Rs.500/- in terms of section 253(A). The Tribunal therefore, on its administrative side was wrong in rejecting the appeal for failure to pay proper court fees.

7. On the other hand, on behalf of the respondent, revenue, it is submitted that this court should not exercise its writ jurisdiction, as an appeal shall lie to the High Court from every order passed by the Appellate Tribunal. As an appeal is an effective and efficacious legal remedy, this court ought not to exercise its extra ordinary jurisdiction and consequently petition on this ground alone must be dismissed.

. It is then contended that total income means “the total amount of income referred to section 5 computed in the manner laid down in the Act. The computation process may result in positive income or loss as happened in the case of the petitioner. The total income was computed at Rs.7,18,78,768/- (loss). That will be the basis of payment of fees in appeal proceedings. There is therefore no infirmity in the finding by the Tribunal but as the income goes up the fees accordingly are higher. Similarly, when the loss goes up, the fees will also go on increasing.

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8. For the purpose of deciding the controversy, we may gainfully refer to the provisions of section 253(6) which reads as under:-

253. Appeals to the Appellate Tribunal.

(6) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, in the case of an appeal made, on or after the 1st day of October, 1998, irrespective of the date of initiation of the assessment proceedings relating thereto, be accompanied by a fee of,

(a) where the total income of the assessee as computed by the Assessing Officer, in the case to which the appeal relates, is one hundred thousand rupees or less, five hundred rupees,

(b) where the total income of the assessee, computed as aforesaid, in the case to which the appeal relates is more than one hundred thousand rupees but not more than two hundred thousand rupees, one thousand five hundred rupees,

(c) where the total income of the assessee, computed as aforesaid, in the case to which the appeal relates is more than two hundred thousand rupees, one per cent of the assessed income, subject to a maximum of ten thousand rupees,

(d) where the subject matter of an appeal relates to any matter, other than those specified in clauses (a), (b) and (c), five hundred rupees:]

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Provided that no such fee shall be payable in the case of an appeal referred to in sub-section (2) or a memorandum of cross-objections referred to in sub-section (4).

9. The history of the provision may now be considered. Section 33 of the Indian Income-tax, 1922 empowered an assessee aggrieved by an order passed by the Appellate Assistant Commissioner to appeal to the Tribunal. Sub-section of section 33 provided that an appeal to the Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, in the case of an appeal preferred by the assessee, be accompanied by a fee of Rs.100/-. When the Income-tax Act, 1961 was enacted, the requirement to pay a fee for preferring an appeal to the Tribunal was found in sub-section (6) of section 253. As initially inserted it required the Memo of Appeal to be accompanied by a fee of Rs.100/- which fee was increased to Rs.125/- by the Taxation Laws (Amendment) Act, 1970 with effect from 1st April 1971. Section 253(6) was thereafter amended once again and the quantum of the fee was increased to Rs.200/- by the Finance Act, 1981.

10. The Finance Act, 1992 changed the manner of computing the fee and it was provided that if the total income of the assessee as

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computed by the Assessing Officer in the case to which the appeal relates is Rs. One lakh or less the fee payable would be Rs.1,500/-. The circular explaining the provisions of the Finance Act, 1992 (see 198 ITR(St.) @ 50) being Circular No.636 dated 31st August 1992 states thus:-

> "52 – The Finance Act has amended section 253 enhancing the fee to be paid for filing appeals before the Income-tax Appellate Tribunal. Under the pre amended provisions of sub-section (6), an appeal to the Appellate Tribunal shall be in the prescribed format and shall be accompanied by a fee of Rs.200/-. After the amendment, the fee will be Rs.250/-, where the total income computed by the Assessing Officer is upto Rs.1 lakh and Rs. 1,500/- in cases where the total income as so computed is more than Rs.1 lakh. The former type of cases would include cases where the total income computed by the Assessing Officer is a negative figure".

11. The Finance (No.2) act, 1998 once again amended section

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253(6) and it was provided that if the total income was less than Rs.One lakh, the fee payable would be Rs.500/-. However, if the assessed total income was more than Rs.One lakh but no more than Rs.Two lakhs, the fees payable would be Rs.1,500/- and if the assessed total income was more than Rs.Two lakhs the fee payable would be one percent of the assessed income subject to a maximum of Rs. 10,000/-. There was no provision similar to clause (d), as it now stands, in the amended provision. The object behind the insertion of the said provision was that the existing scale of fees was not a deterrent for filing of a large number of unnecessary appeals thus slowing down the disposal of the appeals and, hence, it was decided to enhance the limit.

Section 253(6) was once again amended by the Finance Act, 1999 and clause (d) was inserted in sub-section (6). The object behind the amendment was explained in Circular No.779 dated 14th September 1999 as under:-

> "The Finance (No.2) Act, 1998 introduced a scale of fees for filing appeals before the CIT (Appeals) and also enhanced the existing scale of fees payable before the Appellate Tribunal under

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> various direct tax acts. The fee payable under the Income-tax Act both before the CIT (Appeals) and the Appellate Tribunal is relatable to the assessed income. However, appeals are also filed on issues such as TDS defaults, non-filing of returns, etc. which might not have any nexus with the assessed income. The Act, therefore, has amended section 249 of the Income-tax Act to provide a fee of Rs. 250/- for appeals before the CIT (Appeals) and Rs.500/- for appeals before the Appellate Tribunal for a residuary group of appeals which cannot be linked with the assessed income."

12. The legislative history, therefore, indicates that initially a fee at a fixed rate was payable. Thereafter a graded system of payment of fees was introduced on the concept of "ability to pay" and, therefore, an assessee to a higher income was obliged to pay a higher fee irrespective of the quantum involved in the issue raised in the appeal. This is borne out by the language used in section 253(6) and also by the fact that when the law was amended and a graded scale of fees was introduced having regard to the assessed income the Legislature was aware that when the fee that was payable was to be calculated based on the amount involved in dispute in appeal a suitable provision to that effect

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was made. For example under Schedule 1 of the Bombay Court Fees Act 1959 article 16 prescribed the fee payable on a reference application under section 256(2). The fee was one half of the ad valorem fee leviable on the amount in dispute. Likewise a fee payable when an appeal is preferred under section 260A is in term of Article 16A is to be computed having regard to the amount disputed in appeal.

13. If we therefore trace the legislative history, it is clear that court fees is based on total income of the assessee. Higher the total income more the court fees payable. The only question is when the income is negative whether the expression "total income" should also be considered to be the loss. Learned counsel for the revenue has placed before us the judgment of the Supreme Court. The Supreme Court by judicial interpretative process has held that income would include both profit and loss. The question however for consideration is the language of the provision. As an illustration in section 253(6)(a), the words used as "one hundred thousand rupees or less. In (b), the language used is "more than one hundred thousand rupees but not more than two hundred thousand rupees and in (c) it is more than two

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thousand rupees. In so far as (a) is concerned, therefore, the expression used "one hundred thousand rupees or less; in (b) more than and in (c) more than. What does these expressions "more or less" indicate? In Concise Oxford Dictionary, Tenth Edition "more" means greater or additional amount or degree. In Webster Universal Dictionary, "more" means greater in number, size, amount, degree quantity and/or a greater or additional quantity, amount, portion, number etc. In the Law Lexicon the expression "more" greater in amount, extent, number or degree. Considering this dictionary meaning it would be clear that the word "more" has been understood to means greater or additional. Similarly, the word 'less' in Concise Oxfort Dictionary has been explained as, smaller amount of, fewer in number, to a smaller extent. Can therefore the language used in sub-clauses (b) and (c) of section 256 be read in the context of a loss which has been suffered.

14. Our attention was invited to the judgements of the Supreme Court in Commissioner of Income Tax (Central) Delhi Vs. Harprasad & Co. P. Ltd. 1975(99), ITR 118 in Commissioner of Income Tax Vs. J.H. Gotla & Co. 156 ITR 323, and Commissioner

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of Income Tax Vs. P. Doraiswamy Chetty 183 ITR 159. In our opinion, reliance on the same is completely misplaced.

In the first decision the Supreme Court had to consider whether an assessee was entitled to set off a capital loss that was incurred by it in a year when capital gains were not chargeable against a capital gain that arose to it in a year when capital gains became chargeable. It is in that context that the Supreme Court observed at page 124 of the report that the words "income" or "profits and gains" should be understood as including losses also, so that, in one sense "profits and gains" represent "plus income" whereas losses represent "minus income". In other words loss is a negative profit and as both positive and negative profits are of a revenue character both must enter into computation wherever it becomes material in the same mode of taxable income. It is submitted that the observations made by the Supreme Court as aforesaid must be confined to the issue which the Court was considering and the said decision would in no manner affect the interpretation to be placed on the words "total income" as appearing in section 253(6).

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In CIT Vs. J.H. Gotla 156 ITR 323 the assessee was claiming that the loss incurred by him in an earlier previous year from a business carried on by him should be permitted to be carried forward and set off against the income that arose to his wife and minor children which was clubbed with his income. The case of the revenue was that such set-off was not permitted as the set-off was permissible only against the income of a business, profession or vocation carried on by the assessee in that year. The Supreme Court rejected this argument and held that it was permissible to set-off the loss. In so doing it observed at page 338 of the report that "it can be accepted without much doubt that income would include loss". But from this observation it does not follow that the total income assessed in so far as the Petitioner is concerned is in a sum in excess of Rs. Two hundred thousand so as to bring its case within the scope of clause (c).

The last decision of the Supreme Court in CIT Vs. P. Doraiswamy 183 ITR 559 merely follows the principle laid down in Gotla's case. The Supreme Court had to consider whether the assessee was entitled to carry forward to the subsequent years not

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only his share but also the share of loss of his wife from a firm in which both were partners. The revenue was of the view that the clubbing provision would apply only to income and not a loss which contention was rejected by the High Court and on further appeal by the Supreme Court. This decision, therefore, also does not throw any light on the issue that this Hon'ble Court has to consider.

15. In our opinion, on the plain interpretation of section 253(6) there can be no doubt that the petitioner was not obliged to pay the fee in excess of Rs.500/-. The words 'less and more' must be given the ordinary meaning. In the instant case, the petitioner has been admittedly assessed to loss. In such a case, there are two possible ways of determining what is the total income computed by the Assessing Officer. The first is that the Petitioner is assessed to a nil income and has been permitted to carry forward a loss that is determined or secondly that the Petitioner is assessed to an aggregate loss of Rs.9,00,97,980/- Whichever way one looks at it the income computed by Respondent No.2 is less than Rs. One hundred thousand and, therefore, clause (a) would apply. If, on the other hand, one takes the view that as the

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Petitioner is assessed at a loss clauses (a) or (b) or (c) cannot apply as they postulate assessment out of a positive figure than, it is only clause (d) which applies and, even so, the fee payable would be Rs.500/-. In any view of the matter it can never be said that the Petitioner's case fall within clause (c) as held by Respondent no.1. For clause (c) to apply the total income of the assessee computed by the Assessing Officer has to be more than Rs. Two hundred thousand. The expression "total income" is defined in section 2(45) of the Act to mean the total amount of the income referred to in section 5, computed in the manner laid down in the Act. It would thus be clear that in order for clause (c) to apply the total income assessed has to be in excess of Rs. Two hundred thousand. The use of the words "more than" would also indicate that it has to be a positive figure in excess of Rs. Two hundred thousand.

16. Another aspect of the matter which requires consideration is the words "in the case to which appeal relates in clause (c) and an inference should be drawn that it is the item in dispute that has to be considered by determining the amount of fee that is payable. In our opinion, such a contention is not permissible considering

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the clear language of clause (c). What has to be determined is the purpose for deciding the quantum of fee that has to be paid and what is the total income that is computed by the Assessing Officer for the year to which the appeal relates. It is that figure that determines the quantum of fee payable. Let us take an illustration cited on behalf of the petitioner. Take a case where an assessee declares a loss of Rs.10 lakhs after claiming a deduction of Rs. 10,50,000/- by way of interest. The Assessing Officer comes to the conclusion that the interest is to be disallowed. Therefore he computes the total income of Rs.50,000/-. In such a case even though the disputed amount on the appeal would be Rs. 10,50,000/- but it is not the case of the respondents that the fee payable will be any amount of Rs.500/- because the case falls within scope of clause (a). However assuming the assessee had determined the loss of return of Rs.13 lakhs which was arrived at by making the aforesaid claim of Rs.10,50,000/- and if this claim was disallowed the loss would be determined at Rs.2,50,000/-. In such an eventuality considering the revenues stand, it is clause (c) that applies in case the amount is disputed in appeal is Rs. 9,50,000/- but because the amount of loss computed is rs. 2,50,000/- but numerically as a whole number larger than Rs.Two

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lakhs. This contention overlooks the clear language of clause (c) and therefore cannot be sustained.

17. Considering the above discussions in our opinion, the expression "more and less"will have to be given the natural meaning. It can only be more than a negative income even if the expression "income" is held to be both positive and negative income. Negative income cannot be more. It will always be less. In that event the language of 6(a) that would be attracted. The other way of looking at it is if the total income can be considered even to be the loss then the absence of it will not be covered by either (a), (b) or (c) of sub-section (6). It will be clause (d) of sub-section (6) which will apply. It is no doubt true that on behalf of the respondents, the learned counsel has submitted that clause (d) would normally apply to other cases like penalties, interest levy, denying of refund and the like.

18. However, considering the entire scheme of the Act and the history of the purpose of the amendment, we have no difficulty in holding that either clause (a) or (d) of sub-section (6) of section 253 would be attracted but considering the earlier discussion

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regarding that loss would also be covered by the expression "total income", we would hold that in such a case it would be covered by clause (d). If that be so, the appellants were right in paying court fee of Rs.500/-. In view of that, order dated 21st January 2009 is set aside and appeal is restored to file as properly stamped.

19. Rule made absolute accordingly. There shall be no order as to costs.

(J.H. BHATIA, J) (F. I. REBELLO, J)

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