

**HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT
JAIPUR**

D.B. INCOME TAX APPEAL No.128/2006.

M/s Kalindee Rail Nirman (Engineers) Limited,

Silvar Oak, C-4, Sawai Jaisingh High-way, Jaipur: through its
Director Shri S.P. Sharma S/o Shri G.L. Sharma aged 56 years
approx. by cast Hindu.

-----Appellant

Versus

1. The Commissioner Of Income Tax-I, NCRB, Statute Circle,
Jaipur.
2. The Dy. Commissioner of Income Tax, Spl. Range-I, NCRB,
Statute Circle, Jaipur.

-----Respondents

D.B. INCOME TAX APPEAL No.34/2008.

M/s Kalindee Rail Nirman (Engineers) Limited,

Silvar Oak, C-4, Sawai Jaisingh High-way, Jaipur: through its
Director Shri S.P. Sharma S/o Shri G.L. Sharma aged 56 years
approx. by cast Hindu.

-----Appellant

Versus

1. The Commissioner Of Income Tax-I, NCRB, Statute Circle,
Jaipur.
2. The Jt. Commissioner of Income Tax, Spl. Range-I, NCRB,
Statute Circle, Jaipur.

-----Respondents

For Appellant : Mr. Naresh Gupta

For Respondent(s) : Mr. Anuroop Singhi

HON'BLE MR. JUSTICE K.S. JHAVERI

HON'BLE MR. JUSTICE VINIT KUMAR MATHUR

Judgment

Per Hon'ble Jhaveri, J.

24/01/2017

1. By way of this appeal, the appellant has challenged the judgment and order of the Tribunal whereby the Tribunal has dismissed the appeal filed by the assessee and confirmed the order of the CIT(A).

2. This Court while admitting the appeal No.128/2006 on 05.07.2007 and appeal No.34/2008 on 20.08.2008 has framed the following substantial questions of law:

"1. Whether Income Tax Appellate Tribunal overlooked and ignored the provision contained in Section 254(1) of the Income Tax Act in non granting relief to the assessee and affirming the order of the Commissioner of Income Tax (Appeals)?

2. Whether the Income Tax Appellate Tribunal overlooked the legal and Constitutional provision that no amount of tax can be recovered without any authority of law and, therefore, the Union could not have been permitted to retain the have been permitted to retain the excess amount of tax paid by the assessee?"

3. Counsel for the appellant has relied upon the decisions of different High Courts.

सत्यमेव जयते

3.1. In the case of S.R. Koshti Vs. Commissioner of Income Tax- (2005) 276 ITR 165, it has been held by Gujarat High Court as under:

"A word of caution. The authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or on not being properly instructed, is over-assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. This Court, in an unreported decision in case of Vinay Chandulal Satia v. Shri N.O.Parekh., the Commissioner of Income Tax, Special Civil Application No. 622/1981, rendered on 20-8-1981, has laid down the approach that the authorities must adopt in such matters in the following terms :

"The Supreme Court has observed in numerous decisions, including [Ramlal and Ors. v. Rewa Coalfields Ltd.](#), AIR 1962 SC 361; [The State of West Bengal v. The Administrator, Howrah Municipality and Ors.](#), AIR 1972 SC 749, and [Babutmal Raichand Oswal v. Laxmibai R. Tarte](#), AIR 1975 SC 1297, that the State authorities should not raise technical pleas if the citizens have a lawful right and the lawful right is being denied to them merely on technical grounds. The State authorities cannot adopt the attitude which private litigants might adopt."

3.2. In the case of Commissioner of Income Tax Vs. Bakelite Hylam Ltd.- (1999) 237 ITR 0392, Andhra Pradesh High Court has held as under:

"On a reading of clause (b) of subsection (4) of [Section 143](#) of the Act, it is clear that on an assessment made under [Section 143\(1\)\(a\)](#) of the Act, and such assessment

results in refund, if such refund exceeds the amount refundable on regular assessment made under [Section 143\(3\)](#) of the Act, the whole or the excess amount so refunded shall be deemed to be the tax payable by the assessee. In other words, in the regular assessment, the tax liability is determined on the basis of giving credit to all the deductions the assessee is entitled to notwithstanding the fact of the assessment made under [Section 143\(1\)\(a\)](#) of the Act. On a careful examination of the words so used in clause (b) of sub-section (4) of [Section 143](#) of the Act, we cannot borrow a different meaning than the one intended by the Legislature to say that the Legislature did not visualise a situation permitting the assessing authority to grant refund also under regular assessment in favour of an assessee.

Though the learned Standing Counsel for the Income Tax Department has contended that in the decision cited 205 ITR 585 (supra), the Bombay High Court has examined the scope of [Section 143\(3\)](#) of the Act in the light of the circular issued by the CBDT and held that no refund can be granted to the assessee while completing the assessment under [Section 143\(3\)](#) of the Act, we are not prepared to accept the same. On a careful reading of the said decision, we find that the provisions under [Section 143\(3\)](#) of the Act did not fall for consideration before the Division Bench of Bombay High Court in the said decision. Only a casual reference was made to the amendment brought to [Section 143](#) of the IT Act from the assessment year 1989-90 onwards. The Division Bench in the said decision has no occasion to deal with a question as to whether the Assessing Authority had the power to order refund while making a regular assessment under [Section 143\(3\)](#) of the Act. We are, therefore, of the view that this decision cannot render any assistance to the Revenue to say that the decision of the Bombay High Court is in line with the thinking of the Revenue. Merely because there are certain departmental instructions

as provided in circular Ref.Na549 dated 31-10-1989 issued by the CBDT; we are of the view, such instructions cannot outweigh the statutory provisions of the [Income Tax Act](#) and as such we are not persuaded to hold that the circular instructions of CBDT should bind the Assessing Authority even bypassing the provisions of the [IT Act](#).

Having regard to the above discussion and in the light of sub-section (4) of [Section 143](#) of the Income Tax Act which was inserted by way of amendment in the year, 1989, we are inclined to hold that the Assessing Authority is entitled to determine the quantum of refund also in a regular assessment made under [Section 143\(3\)](#) of the Act.

3.3. In the case of Commissioner of Income Tax Vs. Vali Brothers- (2006) 282 ITR 0149 (All), Allahabad High Court has held as under:

[Section 237](#) of the Act contemplates refund which reads as follows:-

[Section 237-Refunds](#):-

"If any person satisfies the Income Tax Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year he shall be entitled to a refund of the excess."

Under [Section 237](#) of the Act, if the Assessing Officer is satisfied that the amount of tax paid by the assessee for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, the assessee be given refund of the excess amount. In the present case, admittedly, no amount has been held chargeable, therefore, the entire amount deposited towards advance tax

was in excess and was refundable. The argument of learned Standing Counsel that in the present case, proceedings under [Section 148](#) of the Act was dropped, therefore, there was no assessment and as such, the assessee was not entitled for refund, has no merit. In the case of [Esthuri Aswathiah v. Income Tax Officer, Mysore State](#), their Lordships of the Supreme Court held that 'no proceedings' terminated to the assessment proceedings, and that it should be construed as meaning that the assessee had no assessable income. In the case of [M.C.T. Muthuraman v. C.I.T.](#) reported in 50 I.T.R. 656, the Madras High Court held as follows:-

"We are of opinion that the proceedings for 1953-54 and 1954-55 were lawfully terminated by the Income Tax Officer. It is true that [Section 23](#) does not in express terms provide for closing the assessment proceedings with an order that no assessment would be levied. Though, the assessee had offered an item of income for assessment as his, the Income Tax Officer came to the conclusion that it was the Hindu undivided family that was liable to be assessed on that income and not the assessee. It was a conclusion, whether it was right or wrong, that he had jurisdiction to reach; and, once he reached that conclusion, he could not tax the assessee. In [Esthuri Aswathiah v. Income Tax Officer, Mysore State](#), their Lordships of the Supreme Court pointed out that the order 'no proceedings' terminated the assessment proceedings, and that it should be construed as meaning that the assessee had no assessable income. The assessment proceedings that commenced with the returns filed by the assessee were lawfully terminated when they were closed with the entry 'N.A.' Thereafter, the finality of the termination of those assessment proceedings could be vacated only by recourse to [Section 34](#), as this was not a case for the application of [Section 35](#)."

सत्यमेव जयते

3.4. In the case of Seshammal (R.) Vs. Income-tax Officer-
(1999)237 ITR 0185, Madras High Court has held as under:

"The fact that the petitioner had paid the monies to the Government under the mistaken notion that the association of persons would be liable for tax even when the assessment was not required to be made as an association of persons; that the amount though paid was not actually required to be paid and that the State has not refunded those amounts by taking advantage of the mistake committed by the payer is not in dispute. The Act is not intended to benefit the State by enabling it to collect or retain monies not payable to it under the Act. What is required to be collected from the assessee under the Act is only the tax and other amounts properly payable under the Act.

The argument advanced by counsel for the Revenue that Section 237 of the Act does not permit such refund being made is not supported by the terms of that section. Section 237 of the Act provides that if monies have been paid in excess of the amount for which the payer is "properly chargeable under the Act for that assessment year" such person is entitled to get the refund of the excess amount. The entire amount paid by the assessee was in excess of the amount which was actually chargeable. The assessee was, therefore, entitled to have refund of the excess amount.

Section 237 of the Act does not specify that an assessment order must be made and that some amount must be found to be payable as tax and that some amount in excess of that amount should have been paid. It is not a pre-condition for invoking that section that some liability for tax must have been cast upon the person claiming refund."

3.5. In the case of Gujarat Gas Co. Ltd. Vs. Joint Commissioner of Income-tax (Assessment)- (2000) 245 ITR 0084, Gujarat High Court has held as under:

"In this case, according to us, the Assessing Officer was not bound by the said circular and yet the Assessing Officer has considered the circular and, therefore, he has not exercised powers independently. He has not exercised his own discretion.

In the instant case, therefore, in paragraph 12, after rounding off the taxable income the following paragraph found in the assessment order, which reads as under, is quashed and set aside.

"However, as per the Central Board of Direct Taxes, New Delhi's Circular No.549 (see [1990] 182 ITR (St.)1), para. No.5.12, dated October 31, 1989, the assessed income shall not be less than the returned income. In view of the above, the total income will be Rs.5,13,86,320."

The Assessing Officer shall make the assessment order without keeping in mind the circular which he has referred to in the assessment order within a period one month from the date of receipt of the writ."

3.6. In the case of Commissioner of Income Tax Vs. Bharat General Reinsurance Co. Ltd. (1971) 081 ITR 0303, Delhi High Court has held as under:

"It is true that the assessed itself had included that dividend income in its return for the year in question but there is no estoppel in the [Income-tax Act](#) and the assessed having itself challenged the validity of taxing the dividend during the year of assessment in question, it must be taken that it had resiled from the position which it had wrongly taken while filing the return. Quite apart from it, it is incumbent

on the income-tax department to find out whether a particular income was assessable in the particular year or not. Merely because the assessed wrongly included the income in its return for a particular year, it cannot confer jurisdiction on the department to tax that income in that year even though legally such income did not pertain to that year. We are, therefore, of the view that the income from dividend was not assessable during the assessment year 1958-59 but* it was assessable in the assessment year 1953-54. It cannot, therefore, be taxed in the assessment year 1958-59."

3.7. In the case of Jute Corporation of India Ltd. Vs. Commissioner of Income Tax and another- (1991) 187 ITR 688 (SC), the Supreme court has held as under:

"Power to enhance Tax on discovery of new source of income is quite different than granting deduction on the admitted facts fully supported by the decision of this Court. If the tax liability of the assessee is admitted and if the Income Tax Officer is afforded opportunity of hearing by the Appellate Authority is allowing the assessee's claim for deduction on the settled view of law, these appears to be no good reason to curtail the powers of the appellate authority under [Section 25 1\(1\) \(a\)](#) of the Act.

In [Commissioner of Income Tax, U.P.v. Kanpur Coal Syndi- cate](#), [1964] 53 I.T.R. 225 a three Judge Bench of this Court discussed the scope of [Section 31\(3\)\(a\)](#) of the Income Tax Act, 1922 which is almost identical to [Section 251\(1\)\(a\)](#). The Court held as under:

"If an appeal, lies, [Section 31](#) of the Act describes the powers of the Appellate Assistant Commissioner in such an appeal. Under [Section 31\(3\)\(a\)](#) in disposing of such an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment; under clause (b)

thereof he may set aside the assessment and direct the Income Tax Officer to make a fresh assessment. The Appellate Assistant Commissioner has, therefore, plenary powers in disposing of an appeal. The scope of his power is conterminous with that of the Income Tax Officer. He can do what the Income Tax Officer can do and also direct him to do what he has failed to do."

(emphasis supplied) The above observations are squarely applicable to the interpretation of [s. 251\(1\)\(a\)](#) of the Act. The declaration of law is clear that the power of the Appellate Assistant Commissioner is co-terminus with that of the Income Tax Officer, if that be so, there appears to be no reason as to why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income Tax Officer. No exception could be taken to this view as the Act does not place any restriction or limitation on the exercise of appellate power. Even otherwise an Appellate Authority while hearing appeal against the order of a subordinate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations if any prescribed by the statutory provisions. In the absence of any statutory provision the Appellate Authority is vested with all the plenary powers which the subordinate authority may have in the matter. There appears to be no good reason and none was placed before us to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income Tax Officer."

3.8. In the case of National Thermal Power Co. Ltd. Vs. Commissioner of Income-tax- (1998) 229 ITR 0383, the Supreme Court has held as under:

"3. The assessee contended that on account of two orders of Special Benches of the

Tribunal in the cases of Arasan Aluminium Industries (P) Ltd. and Nagarjuna Steels Ltd., the assessee learnt that the interest earned in this manner before the setting up of business is not taxable as income and it goes to reduce the capital cost of the plant. On learning about this legal position, the assessee sought to include the above three grounds in its grounds of appeal. The Tribunal has declined to entertain these additional grounds.

4. The Tribunal has framed as many as five questions while making a reference to us. Since the Tribunal has not examined the additional grounds raised by the assessee on the merits, we do not propose to answer the questions relating to the merits of those contentions. We reframe the question which arises for our consideration in order to bring out the point which requires determination more clearly. It is as follows:

Where on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of the assessee, whether the Tribunal has jurisdiction to examine the same ?

5. Under [Section 254](#) of the Income-tax Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under [Section 254](#) only to decide the

grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.

6. In the case of [Jute Corporation of India Ltd. v. C.I.T.](#) . this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.”

3.9. In the case of Ahmedabad Electricity Co. Ltd. Vs. Commissioner of Income-tax- (1993) 199 ITR 351 (Bom), the Bombay High Court has held as under:

"In the case of the Appellate Assistant Commissioner there is an express power granted to him to enhance the tax liability. This is because the Department does not have a right of appeal before the Appellate Assistant Commissioner. As far as the Appellate Tribunal is concerned, the case may be, if it is aggrieved by any part of the order of the Appellate Assistant Commissioner. Therefore, any express power of enhancement has not been conferred on the Appellate Tribunal. The Tribunal can, in a given case, in dealing with an appeal filed by the Department or considering its cross-objections, enhance the tax liability of the assessee if the Tribunal accepts the contention of the Department.

Dr. Balasubramanian, learned advocate for the Department contends that, under [section 254](#), the Tribunal can decide only points raised or allowed to be raised before it; and further that the Tribunal cannot permit raising of points not arising from the order of the Appellate Assistant Commissioner. We do not find anything in [section 254](#) which would thus restrict the powers of the Appellate Tribunal while considering an appeal before it. As we have said earlier, the basic purpose of an appeal procedure in an income-tax matter is to ascertain the correct tax liability of the assessee in accordance with law. Therefore, at both the stages, either before the Appellate Assistant Commissioner or before the Appellate Tribunal, the appellate authority can consider the proceedings before it and the material on record before it for the purpose of determining the correct tax liability of the assessee. The appellate authorities of course, cannot travel beyond the proceedings and examine new sources of income. For this purpose, other separate remedies are provided to the Department under the income-tax Act. But, apart from this, there is nothing in [section 254](#) or [section 251](#) which would indicate that the appellate authorities are confined to considering only the objections raised before them or allowed to be raised before

them either by the assessee or by the Department, as the case may be. They can consider the entire proceeding to determine the tax liability of the assessee. But they cannot travel beyond the proceedings to bring in new sources of income. The Explanation to [section 251\(2\)](#) clearly brings out this aspect. The Explanation clarifies the extent of the powers of an Appellate Assistant Commissioner. But, even before the Explanation was added to [section 251](#), that section and the corresponding previous section had been interpreted by our High Court and other High Courts in the same manner."

3.10. In the case of Commissioner of Income-Tax (Central), Madras Vs. Indian Express (Madurai) Pvt. Ltd.-(1983) 140 ITR 705 (Mad), the Madras High Court has held as under:

"The primary purpose of the statute is to levy and collect the income-tax. This is based on the cardinal principle, which has been incorporated as a veritable constitutional provision, that no tax can be levied or collected save under authority of law. The task of an appellate authority under the taxing statute, especially a non-departmental authority like the Tribunal, is to address its mind to the factual and legal basis of an assessment for the purpose of properly adjusting the taxpayer's liability to make it accord with the legal provisions governing his assessment. Since the be-all and end-all of the statutory provisions, especially those relating to the administration and management of income-tax, is to ascertain the tax-payers' liability correctly, to the last pie, if it were possible, the various provisions relating to appeal, second appeal, reference and the like can hardly be equated to a lis or dispute as arises between the two parties in a civil litigation. Although the income-tax statute makes the Department or its officers figure as parties in appeal proceedings, they are not in the strict sense what are called by American writers as parties to adversary proceedings. This is so, because the very object of the appeal is

not to decide a point raised as a dispute, but any point which goes into the adjustment of the taxpayer's liability. In that sense, a view prevails, even in England, that the authorities sitting in appeal in a tax case, cannot be regarded as deciding a lis, but they are only engaged in an administrative act of adjusting the taxpayer's liability. Under our fiscal jurisprudence, we may regard the appellate authorities as exercising quasi-judicial functions in the same sense as a taxing officer does. But, even so, the proceedings before them lack the basis elements of adversary proceeding. It, therefore, follows that the discussion and the scope of the appellate jurisdiction of the Tribunal and other authorities under the tax code cannot be pursued by drawing a parallel to civil litigation with particular reference to appeals from decrees, and the like. The insistence on one party to the appeal being entitled to the fruits of finality, as it is called, and the appellate authority being confined to the subject-matter of the appeal are all ideas which might have relevance if the discussion centers on purely civil litigation and such like adversary proceedings as in an industrial dispute. But in a case where the Revenue is all the while a party, in a manner of speaking, and is also at the same time, an authority vested with the responsibilities of drawing up the assessment and laying down the correct liability, it would not be in accord with the scheme of the Act to impose restrictions on the ambit and the power of the Tribunal by such like notions as finality, subject-matter of the appeal, and the like. The statutory provision in [s. 33\(4\)](#) of the 1922 Act and [s. 254](#) of the 1961 Act which confers appellate jurisdiction on the Tribunal clearly lays down that the Tribunal, in disposing of an appeal, may pass such orders thereon as it thinks fit. Excepting that the expression "subject-matter" has taken the fancy of many learned and eminent judges, that is an expression which is not employed by the provision conferring the jurisdiction in the Tribunal. "

4. Counsel for the respondent has supported the order of the Tribunal and contended that the view taken by the Tribunal in view of concurrent finding is required to be affirmed.

5. We have heard Mr. Gupta learned counsel for the assessee and Mr. Singhi learned counsel for the department.

6. Taking into consideration the view taken by the Gujarat High Court, Allahabad High Court, Madras High Court and Andhra Pradesh High Court, we are of the opinion that the contention raised by the appellant that on acceptance of the scrutiny, if he is entitled for other benefits which he has not claimed, the same be refunded to him i.e. after the proceeding if it is found that assessee is entitled for refund, the same should be refunded as the State cannot recover the tax more than what is due to it.

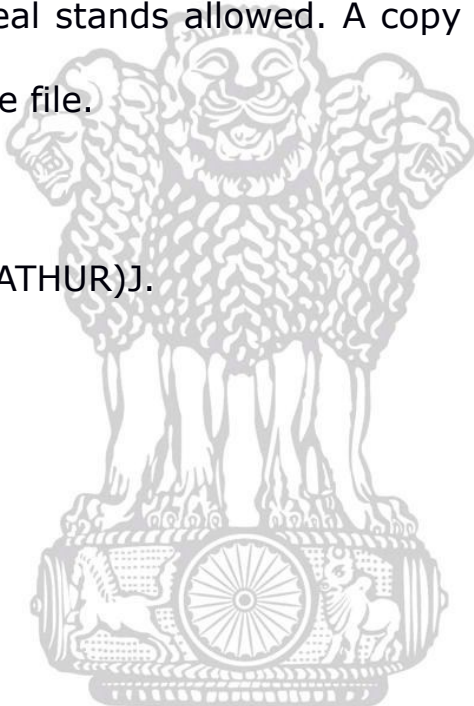
7. The issue is answered in favour of the assessee and against the department.

8. The appeal stands allowed. A copy of this judgment be placed in each of the file.

(VINIT KUMAR MATHUR)J.

(K.S. JHAVERI)J.

bblm/



सत्यमेव जयते