

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 187 of 2001

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI Sd/-

and

HONOURABLE MR.JUSTICE G.R.UDHWANI Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

FIDELITY SHARES AND SECURITIES P. LTD.....Appellant(s)

Versus

DY. C. I. T.(ASSESSMENT)....Opponent(s)

Appearance:

MR JP SHAH, ADVOCATE for the Appellant(s) No. 1

MRS MAUNA M BHATT, ADVOCATE for the Opponent(s) No. 1

CORAM: HONOURABLE MR.JUSTICE KS JHAVERI
and
HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 13/06/2016

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. By way of this Appeal, the Appellant - has challenged the judgment and order dated 12.03.1999 of the Income Tax Appellate Tribunal, Ahmedabad Bench "B", Ahmedabad in ITA No.1889/Ahd/1993 for the Assessment Year : 1989-90 whereby the Appeal of the Department was allowed.

2. While admitting the matter on 16.07.2001, the following substantial questions of law were framed by the Court for consideration :-

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in adjudicating a ground of appeal not taken by the Department viz. whether the surplus of service charges i.e. total service charges less expenses connected therewith is to be excluded from the total profit of the business?

2. Whether, on the facts and in the circumstances of the case, the

Tribunal was right in holding that such surplus is to be excluded from the profits of business for arriving at export profit under sec. 80HHC?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in adjudicating a ground of appeal not taken by the revenue viz. whether Rs.16,39,443/- being sale of REP licence will form part of total turnover?

4. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that Rs.16,39,443/- being sales of REP licence it is to be included in total turnover for the purpose of deduction u/s. 80HHC?

5. Whether the Tribunal had the power to pass such an order whereby the total income of the assessee was far much more than the total income assessed by the Assessing Officer and that too, in absence of any grounds of appeal taken by the revenue praying for such decision and without hearing the assessee on such proposed result?"

3. At the outset, learned Counsel for the appellant has stated that he does not press into service the issues 1, 2, 3 and 4. Qua issue No.5, it is

submitted that the said issue is covered by the decision of this Court in the case of **Mcorp Global (P) Ltd. v. Commissioner of Income-tax, Ghaziabad** reported in [2009] 178 taxman 347 (SC) and Paragraph 6 of the said judgment reads as under :-

"6. In the case of Hukumchand Mills Ltd. v. CIT reported in (1967) 63 ITR 232 this Court has held that under Section 33(4) of the Income-tax Act, 1922 (equivalent to Section 254(1) of the 1961 Act), the Tribunal was not authorized to take back the benefit granted to the assessee by the AO. The Tribunal has no power to enhance the assessment. Applying the ratio of the said judgment to the present case, we are of the view that, in this case, the AO had granted depreciation in respect of 42,000 bottles out of the total number of bottles (5,46,000), by reason of the impugned judgment. That benefit is sought to be taken away by the Department, which is not permissible in law. This is the infirmity in the impugned judgment of the High Court and the Tribunal."

Learned Counsel for the appellant has taken this Court to the relevant issues raised in this Appeal which are detailed

hereunder :-

As per	U/s.	Profit of Business x Export Turnover ----- Total Turnover	80HHC Relief
Assessee		2,08,55,959 x 3,02,19,746 ----- 3,20,09,756	=19689678
Assessing Officer	143(3) order	2,11,92,759 x 3,02,19,746 ----- 4,79,42,313	=13351438 (32009756 +17507000 - 1639443)
Assessing Officer	154 order	2,11,92,759 x 3,02,19,746 ----- 4,95,81,756 with 16,39,443	=12927582
CIT (Appeals)		2,11,92,759 x 3,02,19,746 ----- 3,20,09,756 + 17,50,700 ----- 3,37,60,456	=19582000
Order of Tribunal		54,36,459 x 3,02,19,746 ----- 3,37,69,456	=4892813

Learned Counsel for the appellant has also drawn our attention to Sections 251(1)(a) and 253 of the Income Tax Act as also to Section 24(5) of the Wealth Tax Act, which read as under :-

Section 251(1)(a) of the Income Tax Act

"Power of the Commissioner (Appeals)

251(1) In disposing of an appeal, the Commissioner (Appeals) shall have the following powers -

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment."

Appeals to the appellate Tribunal

"253. (1) Any assessee aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

(a) an order passed by a [Deputy Commissioner (Appeals)] [before the 1st day of October, 1998] [or, as the case may be, a Commissioner (Appeals) under [***] [section 154], [***] section 250, [section 271, section 271A or section 272A]; or

(b) an order passed by an Assessing Officer under clause (c) of section 158BC, in respect of search initiated under section 132 or books of account, other document or any assets requisitioned under section 132A, after the 30th day of June, 1995, but before the 1st day of January, 1997; or

(ba) an order passed by an Assessing Officer under sub-section (1) of section 115VZC; or

(c) an order passed by a [Principal Commissioner or] Commissioner [under section 12AA [or under clause (vi) of sub-section (5) of section 80G] or] under section 263 [or under

section 271] [or under section 272A] [***] or an order passed by him under section 154 amending his order under section 263] [or an order passed by [Principal Chief Commissioner or] Chief Commissioner or a [Principal Director General or] Director General or a [Principal Director or] Director under section 272A; [or]]

(d) an order passed by an Assessing Officer under sub-section (3), of section 143 or section 147 [or section 153A or section 153C] in pursuance of the directions of the Dispute Resolution Panel or an order passed under section 154 in respect of such order;]

(e) an order passed by an Assessing Officer under sub-section (3) of section 143 or section 147 or section 153A or section 153C with the approval of the [Principal Commissioner or] Commissioner as referred to in sub-section (12) of section 144BA or an order passed under section 154 or section 155 in respect of such order;

(f) an order passed by the prescribed authority under sub-clause (vi) or sub-clause (via) of clause (23) of section 10.]”

Section 24(5) of the Wealth Tax Act, 1957

“(5) The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and any such orders

may include an order enhancing the assessment or penalty: ⁴⁴⁶ [Provided that if the valuation of any asset is objected to, the Appellate Tribunal shall,

(a) in a case where such valuation has been made by a Valuation Officer under section 16A, also give such Valuation Officer an opportunity of being heard;

(b) in any other case, on a request being made in this behalf by the ⁴³⁹ [Assessing Officer], give an opportunity of being heard also to any Valuation Officer nominated for the purpose by the Assessing Officer;

Provided further that no order enhancing an assessment or penalty shall be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement."

4. Learned Counsel for the respondent Mrs. Mauna M. Bhatt has supported the order of the Tribunal and contended that in view of the observations, the Tribunal has all the powers to enhance and/or deduct the benefits given by the Assessing Officer.

5. We have heard learned Advocates for the respective parties. In view of the above referred decision in the case of **Mcorp Global (P) Ltd.** (supra), we are of the view that the contention raised by learned Counsel for the appellant requires to be accepted as the Tribunal has no power under the Income Tax Act to enhance the assessment in Appeal in view of the statutory provisions. Hence, issues No.1 to 4 are not considered and the issue No.5 is answered in favour of the assessee and against the department.



Sd/-

(K.S. JHAVERI, J.)

Sd/-

(G.R. UDHWANI, J.)

CAROLINE