

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRA**

WEDNESDAY, THE 10TH DAY OF DECEMBER 2014/19TH AGRAHAYANA, 1936

ITA.No. 13 of 2013 ()

**AGAINST THE ORDER/JUDGMENT IN ITA 684/Coch/2010 of I.T.A.TRIBUNAL,COCHIN
BENCH DATED 27/7/12**

APPELLANT(S):

**THE KERALA MINERALS AND METALS LTD.
(A GOVERNMENT OF KERALA UNDERTAKING), SANKARAMANGALAM
CHAVARA-691 583, KOLLAM.**

BY ADV. SRI.A.KUMAR

RESPONDENT(S):

**COMMISSIONER OF INCOME TAX
ERNAKULAM-682 018.**

**BY ADV. SRI.P.K.R.MENON,SR.COUNSEL, GOI(TAXES)
BY ADV. SRI.JOSE JOSEPH, SC, FOR INCOME TAX**

**THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON 10-12-2014,
ALONG WITH ITA. 87/2013, ITA. 151/2013, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

APPENDIX

APPELLANT'S EXHIBITS

ANNEXURE A: TRUE COPY OF THE ORDER DT 11.12.1972.

ANNEXURE B: TRUE COPY OF THE ORDER DT 12.8.2010.

ANNEXURE C: TRUE COPY OF THE SPECIMEN OF THE MINING
LEASE EXECUTED DT 9.7.1985.

ANNEXURE D: TRUE COPY OF THE MINUTES OF THE MEETING
ILLUSTRATIVELY HELD WITH THE LAND OWNERS DT 21.6.2003.

ANNEXURE E: TRUE COPY OF the PAPER PUBLICATION
EFFECTED ON 4.4.2007.

ANNEXURE F: TRUE COPY OF THE PAPER PUBLICATION
EFFECTED ON 26.8.2009.

ANNEXURE G: COPY OF THE VALUATION STATEMENT PREPARED
DURING THE COURSE OF NEGOTIATED PURCHASE TOGETHER WITH
THE CONNECTED DOCUMENTS IN RESPECT OF THE VALUATION.

ANNEXURE H: TRUE COPY OF THE SALE DEED EXECUTED IN
RESPECT OF THE PROPERTY FORMING THE NEGOTIATED PURCHASE.

ANNEXURE I: TRUE COPY OF THE STATEMENT FOR THE
ASSESSMENT YEAR 2006-07.

ANNEXURE J: TRUE COPY OF THE MEMORANDUM SEEKING
PERMISSION TO RAISE ADDITIONAL GROUND DT 19.6.12.

ANNEXURE K: TRUE COPY OF THE ORDER DT 27.7.12.

ANNEXURE L: TRUE COPY OF THE ASSESSMENT ORDER FOR THE
ASSESSMENT YEAR 2006-07 DT 13.11.2008.

ANNEXURE M: TRUE COPY OF THE ORDER OF THE COMMISSIONER
OF INCOME TAX (APPEALS) FOR THE ASSESSMENT YEAR 2006-07
DT 30.9.2010.

//True Copy//

PA to Judge

Rp

ANTONY DOMINIC & ANIL K. NARENDRAN, JJ.
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I.T.A. Nos. 13, 87 & 151 of 2013
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Dated this the 10th day of December, 2014

J U D G M E N T

Antony Dominic, J.

These appeals are filed by M/s. Kerala Minerals and Metals Ltd., under Section 260A of the Income Tax Act challenging the orders passed by the Income Tax Appellate Tribunal in ITA Nos.684/10, 685/10 and 307/09 whereby the appeals filed by the appellant concerning the assessment years 2005-06, 2006-07 and 2007-08 were dismissed.

2. We heard the learned counsel for the appellant and the learned standing counsel appearing for the department.

3. Since the issues raised in these appeals are connected, we heard these cases together and are disposing of the appeals by this common judgment. The common issue raised before us by the learned counsel for the appellant was regarding the legality of the order passed by the Tribunal in rejecting their prayer to admit two additional grounds.

4. The additional grounds raised by the appellant, the contentions urged and the decision taken thereon are seen from

paragraphs 9 and 10 of the order passed by the Tribunal in ITA No.307/09 arising out of assessment for the assessment year 2005-06 and these paragraphs are extracted below for reference;

“9. The assessee has moved a petition with a prayer to admit the following additional grounds:-

a) whether on law, and having regard to the facts and circumstances of the case, the expenditure incurred by way of payments effected during the year for the buildings that existed on the land acquired for mining and demolished immediately such acquisition to prepare such land acquired for the purpose of mining operations, is allowable as revenue expenditure incurred in the course of mining of essential raw materials u/s.37(1) of the Income Tax Act, 1961?

b) without prejudice to the above, the cost incurred for preparation of land to make it minable, for mining the essential raw materials, incurred under the authority of a statutory license vested with the appellant, if not allowable as revenue expenditure, is to be treated as an intangible asset eligible for amortization for depreciation being cost

incurred for acquiring business or commercial right in the nature of license?

These grounds were not raised before the tax authorities and they have been raised before the tribunal for the first time. It was submitted that these additional grounds involve legal issue and accordingly the assessee prayed for their admission. When the Tribunal asked the Ld. AR as to whether the facts relating to the above said legal issues are available on record, the Ld. AR fairly admitted that the relevant facts are not available on record. However, by placing reliance on the decision of the Hon'ble Kerala High court in the case of CIT vs. Kerala State Co-operative Marketing Federation Ltd. (193 ITR 624), the Ld. AR pleaded for the admission of these additional grounds.

10. On the contrary, the Ld. DR submitted that these additional grounds cannot be admitted as the relevant facts are not available on record and for this proposition, she placed reliance on the decision of the Hon'ble Supreme Court in the case of National Thermal Power Corporation Ltd. vs. CIT reported in 229 ITR 383 and also on the decision of the Madhya Pradesh High Court in the case of CIT vs. Tollaram Hassomal

reported 298 ITR 22. In the judicial hierarchy, the decision of the superior court is required to be preferred. On the issue whether a new claim raised for the first time before the tribunal can be admitted or not, the decision of the Hon'ble Supreme Court in the case of National Thermal Power Corporation Ltd. vs. CIT (supra) is available as on today. According to the said decision, a new claim involving legal issue can be admitted, provided all the facts relating thereto are available on record. In the instant case, though the additional grounds raised by the assessee may involve legal issue, yet the facts relating to there to are not available on record. Accordingly, by following the decision of Hon'ble Supreme Court in the case of National Thermal Power Corporation, supra, we decline to admit the additional grounds raised by the assessee."

5. According to the learned counsel for the appellant, the accounts being part of the record before the assessing officer and since expenditure claimed is reflected in the audited accounts, the Tribunal should not have accepted the contention of the revenue that the aforesaid grounds raised for the first time before

it could not be entertained since facts relating thereto were not available on record. Counsel sought to substantiate his contentions by referring to the judgment of this Court in **C.I.T. v. Kerala State Co-op. Marketing Fed. Ltd** (193 ITR 624) and also referred to the Apex Court judgment in **C.I.T. v. Nirbheram Daluram** [(1997) 10 SCC 373].

6. On the other hand, learned standing counsel referred us to the admission on behalf of the appellant before the Tribunal as contained in para 9 extracted above that the relevant facts were not available on record. He also relied on the judgment of the Apex Court in **National Thermal Power Co. Ltd. v. C.I.T.** {1998 (229) ITR 383} and sought to sustain the order passed by the Tribunal.

7. We have considered the submissions made by both sides. Admittedly, the grounds which were raised by the appellant before the Tribunal and noticed by it in para 9 extracted above and the factual contention in support thereto were not raised before the assessing officer or before the first appellate authority. The question is whether, in such a situation, the assessee is

entitled to raise such an additional ground for the first time before the Appellate Tribunal. This precise question fell for consideration of the Apex Court in **NTPC case** (supra). In that judgment, following the earlier judgment in **Jute Corporation of India Ltd. v. CIT** {(1991) 187 ITR 688}, the Apex Court held thus;

“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.

In the case of Jute Corporation of India Ltd. v. CIT (1991) 187 ITR 688, 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.

The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal (vide, e.g., CIT v. Anand Prasad [1981] 128 ITR 388 (Delhi), CIT v. Karamchand Premchand P. Ltd. [1969] 74 ITR 254 (Guj) and CIT v. Cellulose Products of India Ltd [1985] 151 ITR 499 (Guj) [FB]). Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be

raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.”

8. Reading of the aforesaid paragraphs of the Apex Court judgment show that the Appellate Tribunal, which has been conferred with wide powers under the Act, is entitled to permit the parties before it to raise new questions before it for the first time. However, that freedom available to the Appellate Tribunal and the parties, is subject to the condition that the relevant facts in respect of the claim raised before the Tribunal are available on record. In ***Jute Corporation of India Ltd.,*** (supra), Supreme Court has also laid down that each case has to be considered on facts and that where the appellate authority is satisfied that the ground raised was a bona fide one and that the same could not have been raised earlier for good reasons, the appellate authority is entitled to permit the parties to urge new contentions.

9. In so far as these cases are concerned, we have already referred to the statement made by the authorised representative, who appeared for the appellant before the Tribunal that the relevant facts were not available on record.

However, this statement made by the authorised representative was sought to be explained by the learned counsel for the appellant by contending that what he intended was that the facts were not available in the records before the Tribunal. However, since the statement made before the Tribunal is not a qualified one, as now sought to be made out, we are unable to accept the argument now urged. If that be so, the view taken by the Tribunal is fully supported by the principles laid down by the Supreme Court in **Jute Corporation of India** (supra) and **NTPC case** (supra).

10. In so far as the Division Bench judgment of this Court in the **Kerala State Co-operative Marketing Federation Ltd.,** (supra) is concerned, learned counsel for the appellant relied on paragraphs 23 and 24 thereof, which reads thus;

"23. Following the decisions of the Supreme Court cited above and agreeing with the view expressed by the Madras High Court in R.Brahadesswaran's case (supra), we hold that an appellant before the Tribunal could raise any new or additional point for the first time in appeal before the Tribunal even though it had

not been raised in any form either before the assessing authority or before the Commissioner (Appeals). We further hold that when once any such new or additional ground is raised before the Tribunal, they are duty bound to entertain that ground and render a decision thereon either themselves or by remanding the matter if further investigation into the facts is necessitated.

24. The Tribunal permitted the assessee to raise the additional ground claiming deduction of the amount accrued as per the Kerala General Sales Tax Act towards purchase tax for pepper. Accepting the contention of the assessee that it was omitted to be claimed before the ITO, the assessee was also found entitled to claim the same since that is a statutory liability which accrued during the year in question. A contention was also raised before the Tribunal that the same liability was allowed in a subsequent assessment year. It was for these reasons that the Tribunal permitted the assessee to raise the additional ground and remitted the matter to the file of the Commissioner (Appeals) to look into the matter afresh and decide the same according to law."

11. First of all, this case was decided before the **NTPC case** (supra) was decided by the Apex Court. Secondly, this case also does not strike a note of departure from the principles laid down in **Jute Corporation of India Ltd.**, (supra) or **NTPC case** (supra) and all that this judgment recognises is the entitlement or the duty of the appellate authority to entertain and deal with the contentions raised before it for the first time. This judgment does not in any manner dispense with the requirements of availability of relevant facts on record, the *bona fides* of the ground raised and the necessity of good reasons why the contention could not have been raised on earlier occasions. Though, the omission to urge the fresh grounds may not have been due to any malafide intention, in so far as these cases are concerned, we are satisfied that the relevant facts were not on record and that the appellant had no good reason whatsoever why these contentions were not urged on earlier occasions when the matter was pending before the assessing officer or the first appellate authority.

12. Resultantly, we have to confirm the order passed by the Tribunal dismissing ITA No.307/Coch/2009. Since ITA Nos.

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684 and 685/10, which are the subject matter of ITA Nos.13 and 87/13, are also decided on the reasoning adopted by the Tribunal in ITA No.307/Coch/2009, these appeals also will have to be dismissed.

Accordingly, these appeals are dismissed without any order as to costs.

Sd/-
**ANTONY DOMINIC
JUDGE**

Sd/-
**ANIL K. NARENDRAN
JUDGE**

Rp

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PA to Judge