(2018) 03 BOM CK 0115

Bombay High Court (Nagpur Bench)

Case No: INCOME TAX APPEAL NO. 121 OF 2017

THE PR. COMMISSIONER OF INCOME TAX, NAGPUR		APPELLANT
	Vs	
SHRI. KARIM KAMRUDDIN MALIK		RESPONDENT

Date of Decision: March 26, 2018

Acts Referred:

- Income Tax Act, 1961 - Section 260-A, 271(1)(c)

Hon'ble Judges: B.P. DHARMADHIKARI, J, ARUN D. UPADHYE, J

Bench: Division Bench

Advocate: Anand Parchure, Bhushan Mohta, A.S. Jaiswal, Radhika Bajaj

Final Decision: Allowed

Judgement

B.P. DHARMADHIKARI, J.

1.Heard Shri Parchure with Shri Mohta, learned counsel for the appellant and Shri Jaiswal, learned Senior Advocate with Mrs. Bajaj, learned counsel

for the respondent.

2.The present Appeal has been admitted on 10.01.2018 and was directed to be placed for hearing on 28.02.2018. The question formulated by this

Court then reads :

Whether on the facts and in the circumstances of the case and in law, Hon'ble ITAT was justified to entertain a ground by an oral submission without

there being any specific ground raised before it and without any defence, submission and pleadings made by the assessee at the first instance before

assessing officer, or before the CIT(A) with regard to his contention of defective show cause notice issued by the assessing officer for penalty under

Section 271(1)(c) of the Income Tax Act, 1961.

On that day, hearing came to be adjourned to today. Today, Shri Jaiswal, learned Senior Advocate appearing for the assessee has sought adjournment

to verify the position emerging after the judgment of the Income Tax Appellate Tribunal (I.T.A.T.) Bombay, in the case of Meherajee Cassinath

Holdings Pvt. Ltd. vs. Assistant Commissioner of Income Tax, reported at (2017) 49 CCH 247 and judgment delivered by Pune Tribunal, in the case

of Kanhaiyalal D. Jain vs. Assistant Commissioner of Income Tax, reported at (2016) 48 CCH 469.

His submission is, these judgments have looked into the Division Bench judgment of this Court in the case of CIT vs. Smt. Kaushalya & Ors. reported

at 216 (1995) ITR 660 (Bom.) and said judgment adopted the view expressed earlier in the case of CIT & Anr. vs. Manjunath a Cotton and Ginning

Factory, reported at (2013) 359 ITR 565 (Karnataka) and in the case of CIT vs. Shri Samson Perinchery, (2017) 392 ITR 4 (Bom.). Appellants most

probably acquiesced in it and hence the present challenge itself is unsustainable.

3.Shri Parchure, learned counsel, however, has pointed out very limited question of law on which appeal has been admitted. He submits that if this

question is answered in favour of the revenue, larger exercise attempted by Shri Jaiswal, learned Senior Advocate, will not be open at all. He further

adds that in any case the authorities ought to have looked into and recorded a finding of prejudice and thereafter only proceeded to look into the law on

the point. He is relying upon Rule 27 and submits that I.T.A.T. is taking recourse to said Rule to permit the respondents before it to support the order

appealed against, though he may not have challenged the adverse findings recorded therein. According to him, without giving revenue, which was not

appellant before the I.T.A.T., necessary opportunity in this respect, such a course of action is not available.

4.Shri Jaiswal, learned Senior Advocate has invited our attention to the questions raised in memo of appeal under Section 260-A of the Income Tax

Act, 1961, before this Court and the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. vs. Commissioner of

Income Tax, reported at 1996 (64) CCH 1401. According to him, the revenue has effectively participated in hearing of Appeal by the I.T.A.T.

5.The question to be answered by this Court is only about the propriety on the part of and power with the I.T.A.T. to examine the ground raised

before it orally for the first time. In Appeal Memo filed before this Court under Section 260-A of the Income Tax Act, the questions of law are raised

in para 10 and relevant question at sub-para (ii) is in this respect. During arguments, our attention was invited to the pleadings in para 9 to urge that the

pleadings in para 9 show the factual background in which the challenge has been raised.

6.Our attention has been invited to various judgments which consider the impact of omission to score out irrelevant limb or irrelevant clause in notice

issued under Section 271(1)(c)of the Income Tax Act. The learned counsel for the appellant also at one stage urged that concealment and submission

of inaccurate particulars may be one and the same thing. The learned Senior Advocate for the respondent - assessee has attempted to counter it.

7.We have to restrict the hearing and consideration of the question as framed.

8.The judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. vs. Commissioner of Income Tax, (supra) shows that

there assessee forwarded a letter on 16.07.1983 and sought to raise additional grounds. The I.T.A.T. framed five questions while making reference to

the Hon'ble Apex Court but did not examine additional grounds raised by the assessee on merits. The Hon'ble Apex Court was considering the

question which fell for its determination and it reads as under :

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 ?

9.The Hon'ble Apex Court in para 2 has observed that it was not answering the question relating to merits of the contentions additionally sought to be

raised. In para 3, it has observed as under :

Under s. 254 of the IT Act the 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 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 s. 254 only to decide the

grounds which arise from the order of the CIT(A). 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.

10.The appellant before us does not complain of no opportunity of hearing by the I.T.A.T. in proceedings before it. From the appeal memo as also the

question as formulated by this Court on 10.01.2018, the attempt of the appellant - department is to demonstrate incomplete consideration or then non-

application of mind. The facts mentioned in paragraph 9 of appeal memo have also been urged orally before us. It is claimed that the respondent -

assessee, after service of notice under Section 271(1)(c) upon him, never objected to it alleging non application of mind by the Assessing Officer and

did not raise any question, going to its root, at the earliest or even before the Commissioner of Income Tax (Appeal). Even before I.T.A.T. while

opposing the order, no such effort was made and orally the contentions based upon omission to strike down some part or portion in notice, not

applicable in the matter, were raised. Thus, the fact that such an objection which should have been raised at the earliest, was not raised before the

authority imposing penalty or then before CIT (A) or then in appeal memo, is lost sight of. The impact of failure to raise it ""so"", is also not evaluated.

11.The question whether such a ground needed to be taken at the first available opportunity, the impact of failure to so raise it, therefore, need to be

answered in present matter. The perusal of order passed by the I.T.A.T. does not show consideration of this aspect. The other contentions which

pertain to merits of the matter, therefore, need not be gone into and cannot be gone into by this Court in present appeal.

12.In present facts when the I.T.A.T. has not looked into the effect of omission to raise such a contention at the first available opportunity, we are

inclined to answer the question in favour of the revenue. Accordingly, we quash and set aside the order dated 30.06.2017 and restore Appeal ITA No.

199/Nag/2013 back to file of I.T.A.T., Nagpur, for its fresh consideration in accordance with law. We give liberty to the respondent - assessee to

raise his contentions on legality of notice under Section 271(1)(c) of the Income Tax Act by adding appropriate ground and grant liberty to the

department to raise appropriate challenge thereto.

13.Needless to mention that the rival contentions on merits and even in relation to examination of impact of omission to raise such an issue, are kept

open and can be looked into by the I.T.A.T., uninfluenced by our observations.

14.Income Tax Appeal is accordingly allowed and disposed of in above terms. However, in the facts and circumstances of the case, there shall be no

order as to costs.