

अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

**IN THE INCOME TAX APPELLATE TRIBUNAL  
INDORE BENCH, INDORE**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER  
AND  
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**IT(SS)A Nos.30 to 36/Ind/2016**

**Assessment Years:2002-03,2001-02,2003-04 to 2007-08**

Mohd. Atique Shafique Villa, Bunglow No.7, Ahmedabad Palace Road, Bhopal (Appellant)	<b>बनाम/</b> Vs.	ACIT-3(1) Bhopal (Revenue )
P.A. No.AGWPA 6383 N		
Appellant by	Shri Girish Agrawal & Miss Nisha Lahoti, ARs	
Revenue by	Shri S.S. Mantri, CIT- DR	
<b>Date of Hearing:</b>	<b>08.02.2021</b>	
<b>Date of Pronouncement:</b>	<b>16.02.2021</b>	

**आदेश / O R D E R**

**PER KUL BHARAT, J.M:**

These appeals by the assessee are directed against the orders of Id. Commissioner of Income Tax (Appeal)in short 'Ld. CIT(A)-II, Bhopal all dated 29.01.2016 pertaining to Assessment Years 2002-03,2001-02,2003-04 to 2007-08. Earlier these appeals were decided by this bench vide

order 30.04.2019. However, later on the assessee preferred MA Nos. 67 to 73/Ind/2019 for recalling the order on additional grounds raised by the assessee and also computation of agricultural income on lease hold land which was not decided. Therefore, the bench, vide order 26.11.2020, recalled its earlier order to the extent of deciding aforementioned issues. Thereafter, the appeals were heard on the aforementioned issues.

2. During the course of appellate proceedings before this Tribunal the assessee also raised following additional ground of the present appeals:

*“On the facts and in the circumstances of the case and in law, Learned Assessing officer erred in making the addition and passing the impugned assessment order under section 153A r.w.s. 143(3) without reference to any incriminating material found and seized during the course of conduct of search.”*

3. Before us Ld. counsel for the assessee submitted that the additional ground, so raised are legal grounds and germane to the dispute regarding exercising of jurisdiction by the assessing officer hence needs adjudication at any stage in view of the judicial pronouncements. Further Ld. counsel for the assessee submitted that impugned assessments have been completed u/s 153A r.w.s. 143(3).

Additions made by the AO relating to agricultural income on lease hold lands are without reference to any incriminating material found during the course of search conducted in the case of the assessee. The identical additional grounds have been allowed in one of the group case of the assessee in IT(SS)A No.126 to 128/Ind/2016 in case of Taj Grih Nirman Society vide order 08.01.2021.

4. On the other hand, Ld. CIT-DR relied upon the orders of the revenue authorities. However, he fairly conceded that the issues are covered in favour of the assessee as the AO could not make any reference to specific material found during the course of search while making assessments.

5. We have heard the rival submissions and perused the materials available on records. There is no dispute with regard to the fact that the issue so raised goes to the root of the jurisdiction. Ld. counsel for the assessee has drawn our attention to the judgment of the Hon'ble jurisdictional High court in the case of *Nandlal Sachdeva vs. CIT (2012) 19 ITJ 361*. The Hon'ble Court has decided this issue as under:

*“10. The issue with regard to legality of proceedings undertaken u/s 154 after issue of notice u/s 143(2) is a*

*purely legal issue can be raised at any stage. This issue was not raised by the assessee in the first round of appeal either before the CIT(A) or before the Tribunal. On the ground of notice u/s 143(2) having not been issued, the Ld. CIT(A) in the first round of appeal has annulled the assessment, However, in further appeal filed by the Revenue before the Tribunal, it was held by the Tribunal, vide order dated 3.6.2008 that notice was issued u/s 143(2) within the specified time, however, since issue raised on merit were not considered by the Ld. CIT(A), the matter was restored to him for deciding the issue on merit. To give effect to the order of the Tribunal, the ID. CIT(A) issued notice on 1.08.2008 during which a legal issue was also raised before him, but the Ld. CIT(A) did not entertain the same. Now the assessee has pleaded before us that the ld. CIT(A) was not justified in entertaining the legal issue raised before him and also contended that in view of various decisions cited by him as discussed above, the proceedings initiated u/s 154 after the issue of notice u/s 143(2) was not sustainable in law. We found substance in the contention of the Ld. AR the ground of legality of proceedings u/s 154 after issue of notice u/s 143(2) is a purely legal issue, which deserves to be accepted in view of the decision of Hon'ble Supreme court in the case of National Thermal Power Corporation (supra). We also found that all the facts with regard to issue of notice u/s 143(2) and rectification of order passed u/s 154 thereafter, is already on record. As all the facts with regard to the legal issue are already on record, there is no merit in the action of the ld. CIT(A) for declining to entertain the legal issue, even though raised for the first time before him. In the interest of justice and fair play, we restored this legal issue to the file of CIT(A) and direct him to decide the same as per law keeping in view various decisions discussed herein above.”*

*The tribunal allowed the contention of the assessee for raising the legal issue, but remanded the matter to the CIT(A) to consider the aforesaid legal issue.*

*In this appeal the sole contention of the appellant before this court is that in place of remand the Tribunal itself ought to*

*have adverted itself to the legal issue and remand in the matter was not required. While the learned counsel for revenue supported the remand order. In this case, as per the finding recorded by the Tribunal in para 10 of the order, we find that all the facts were before the Tribunal and the Tribunal in this para specifically have recorded this fact. When all the facts for deciding the legal issue were already on record, in the aforesaid circumstances, whether the Tribunal could have remanded the matter or ought to have decided the matter itself it to be seen. The powers of the Tribunal are vested under section 254 of the Income Tax Act. Section 254(1) of the Income Tax Act, 1961 provides thus,*

*“ 254(1) the Appeal Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.”*

*The appellate Tribunal after extending both the parties an opportunity of being heard, can pass such orders thereon as it think fit. Meaning thereby the Tribunal is empowered to decide the legal issue and also other issues based on facts. The powers of the tribunal are very wide. The legislation has given wide powers to the Tribunal under section 254(1).*

*A similar question was considered by the Gujarat High Court in Saurashtra Packaging Pvt. Ltd. CIT (1993) 204 ITR 443)(Guj) in which the division bench of Gujarat High Court held thus:*

*. In our opinion, the contentions raised on behalf of the assessee deserve to be accepted. Though reliance was placed by the assessee on the dissolution deed before the ITO for a different purpose, the fact remains that a copy of the dissolution deed was on the record of the case. As pointed out by the learned advocate for the assessee, the said dissolution deed has provided for rights and liabilities of the assessee which took over the running business of the partnership firm. In view of this material, the Tribunal could have easily looked into the relevant provisions of the Gujarat Sales-tax Act and the Gujarat Sales-tax Rules if that was*

*found necessary and decided the appeals. Thus, there was no justification for setting aside the orders passed by the CIT(A) and sending the matters back to him for a fresh decision. The Tribunal, therefore, can be said to have erred in holding that it was unable to decide the point in controversy finally in the absence of relevant material. In order to save time and avoid multiplicity of proceedings, we are of the opinion that instead of directing the Tribunal to state the case and refer to this Court the questions raised by the assessee, the Tribunal be directed to consider the dissolution deed itself and dispose of the matter finally. It would be open to the parties to produce whatever material they deem fit and necessary for the purpose of deciding the point in issue. This application is disposed of accordingly. No order as to costs.*

*A similar issue came before the Madras High Court in Remgosri Construction (P) Ltd. vs. Income Tax Officer (209) 308 ITR 290 (Mad), in which the Division Bench held in para 8 of the judgments which reads thus:*

*“8.The Tribunal has not set aside the finding of the appellate authority and remitted the entire issue to the file of the AO. The Tribunal had merely contended itself by saying that neither the AO nor the appellate authority had examined the relevant details and that it is not clear whether the records were before the AO. But, it does not appear to be correct since there were materials before the AO as well as the appellate authority for them to draw the respective conclusions. Therefore, we remit the matter back to the Tribunal to decide the matter afresh as expeditiously as possible on the basis of the available materials.”*

*In the aforesaid both the judgments, it has been held that when the entire material is before the Tribunal, the Tribunal in place of remand ought to have decided the matter on its own merits.*

*In this case a pure legal issue was before the Tribunal and the Tribunal itself has recorded that all the facts are*

*already on record, then in the aforesaid circumstances the Tribunal itself ought to have decided the matter itself.*

*Apart from this, the matter relates to the assessment year 2000-01. Earlier the matter was remanded by the Tribunal vide Annexure A-4 on 3.6.2008 and a sufficient period has elapsed in the proceedings and at this juncture if the matter is remanded to decide the aforesaid legal issue, then it will be the another round of litigation. To save time, money and energy, it would be appropriate if the Tribunal is directed to decide on the aforesaid legal issue.*

*In view of the aforesaid we find that the Tribunal erred in remanding the matter to the CIT(A) and accordingly the aforesaid part of the order is hereby set aside and the matter is remanded back to the Tribunal to decide it afresh, in accordance with law. However, while setting aside the aforesaid order, we observe that in case after hearing both the parties, the Tribunal still records an opinion that the matter deserves to be remanded back to decide the issues. The tribunal shall be freed to pass such order, after giving its reasons in this regard.*

6. Further, reliance has been placed on the judgments of Hon'ble M.P. High Court rendered in the case of *DCIT vs. Torquoise Investment & Finance Ltd. (2006) 154 Taxman 80 (MP)* wherein the Hon'ble Court has decided this issue as under:

*15. Coming to the question Nos. 3 and 4, whether the issue could be raised by the assessee before the Tribunal for the first time and having dismissed the cross-objection, the Tribunal could proceed to give a finding on the same, the learned counsel for the assessee has invited our attention to the decision of the CIT(A) Ex./C in IT Appeal No. 112 of 2003 in which reference has been made to the decision of the Hon'ble Madras High*

Court in [CIT v. VR. S.R.M. Firm](#) (supra), but he has erroneously stated that it was held in the said decision that the said dividend is taxable in India under [Sections 8 and 9](#) of the IT Act, 1961, though the decision holds to the contrary. Learned counsel, therefore, contends that the fact that the said decision was cited bears testimony to the fact that contention was raised with regard to the non-taxability of the dividend earned in Malaysia in India under the agreement in question. Learned counsel has further submitted that in the appeals filed by the respondents, they have clearly raised the questions that the Tribunal was not justified in dismissing the cross-objection filed by the assessee on the ground of limitation specially when it took the view that the dividend income was not taxable in India. Attention has also been invited to Rule 27 of the ITAT Rules, 1963. The said rule reads as under:

27. The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him.

16. Reference has also been made to the decision of the apex Court in [National Thermal Power Co. Ltd. v. CIT](#) in which their Lordships have observed that the power of the Tribunal in dealing with appeals is expressed in widest possible terms. The purpose of 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 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, there is no 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 the item. From the above position it is clear, that if the material is on record on the basis whereof objection can be raised, the parties to the appeal cannot be precluded from raising such contention, especially the respondent, in view of Rule 27 of the ITAT Rules, 1963, quoted above. We are, therefore, of the considered view that both questions No. 3 and No. 4 in the Department's appeal deserve to be answered

against the Department. In view of the wide powers that the Tribunal is invested with, as clearly referred to and spelt out by their Lordships in their decision in National Thermal Power Co. Ltd. (supra), the Tribunal cannot be precluded from considering the questions of law arising in an assessment proceeding not raised earlier, and restricted to issues arising out of appeal before the CIT(A). The assessee has also filed appeal from item Nos. 14 to 26 captioned above. Though a large number of questions have been raised by the assessee, the appeals have been admitted on the following questions, as formulated in IT Appeal No. 112 of 2003.

(i) Whether the Tribunal was justified in dismissing the cross-objection filed by the appellant (assessee) on the ground of limitation and if so, whether such finding is sustainable in law ?

(ii) Having considered the case of the assessee on merits and recorded a categorical finding on the merits of the case to the effect that dividend income received from Pan Malaysia cannot be taxed in India, did it not result in allowing the cross-objection so submitted by the appellant/assessee ?

(iii) Having held in favour of the assessee that the dividend income in question is not taxable in the hands of assessee, was it not necessary for the Tribunal to have further recorded the finding that issue relating to grant of credit sought by the assessee has become redundant and hence need not be gone into ?

(iv). Having decided the issue in favour of the assessee, whether the Tribunal was justified in then allowing the appeal filed by the Department or the Tribunal should have then either dismissed the appeal filed by the Revenue or should have held it to have rendered infructuous in the light of a categorical finding recorded in favour of the assessee ?

17. Though in view of our answer to the questions formulated in the Revenue appeals, it is not necessary to decide the questions formulated in the appeals filed by the assessee, we may

*observe that since we have held that the dividend income is not chargeable under the Act in view of the agreement, the question with regard to the grant of credit for the TDS in relation therewith, is rendered redundant.”*

7. In the light of the above judgments of the Hon'ble jurisdictional High Court additional ground raised by the assessee is admitted for adjudication.

8. Additional ground is *qua* the addition made without reference to any seized documents. Ld. Counsel for the assessee contended that the impugned addition deserves to be deleted on the sole ground that there is no reference to the seized material. The addition has been made purely on the basis of material already available with the revenue. Such conduct of the Assessing Officer is not justifiable and is contrary to the judicial pronouncements.

9. Before us, Ld. CIT-DR could not controvert the submission made by the assessee by bringing any contrary material on record. Ld. CIT-DR also fairly conceded that the issues are covered in favour of the assessee by the judicial pronouncements. This Tribunal after following binding precedents in IT(SS)ANo.126 to 128/Ind/2016 held as under:

*“15. We have heard rival contention and perused the records placed before us. We find that the A.O has made addition by observing as under;*

*7. It is noticed hat in this ease assessee has not submitted even a single paper as additional evidences. The submissions made by the assessee were already considered by the then Assessing Officer and after examination of the same, he has given the following findings in his assessment order:-*

*“In the year under consideration, assessee has shown current liability of Rs.20,00,000/- In the order sheet entry dated 11.10.2008, assessee was asked to furnish. details of current liability viz. Name, Address and Amount. On which assessee is not able to submit any details except copy of account of advance for plot. Further, in the order sheet entry dated 15.10.2008, assessee was asked to furnish Bank Statement and Return of Income. Bu: assessee is not able to submit any details in this regard. Even the name and address of the members of the society has not been produced.*

*In the light of above discussion, assessee is not able to prove, identity, creditworthiness arid genuineness of advances received. Therefore, advance of Rs.20,00,000/- will be deemed to be treated as income of the assessee.”*

*The said findings of the Assessing Officer was also confirmed by the CIT(A)-II, Bhopal. During the set aside proceedings also the assessee has failed to give any documentary evidence in support of cash credit available with him. Therefore, The assessee has failed to prove identity, creditworthiness and genuineness of the advances received. Therefore, an amount of Rs.20,00,000/- is hereby added to the total income of the assessee under section 68 of the Act. I am also satisfied that the assessee has concealed his income and also furnished inaccurate particulars of income within the meaning of the section 271 (1) (c) of the Income Tax Act 1961. Hence, penalty proceedings u/s. 271(1)(c) are being initiated separately.*

*16. From the above observation of the A.O it is evident that the A.O has not made any specific reference to the incriminating material found during the search. Under these facts non reference to the incriminating material*

*by the A.O is contrary to the settled position of law. We hold accordingly. This ground of assessee's appeal is allowed."*

10. Having gone through the material available on record and rival submissions as above, we find that no documents relating to agriculture land taken on lease were found during the course of search, therefore, no addition should have been made in absence of any incriminating material found during the course of search relating to agriculture income. In search assessment, any undisclosed income, which can ultimately be added, is only to the extent of any unrecorded assets / material found or any incriminating documents found as representing undisclosed income earned. Thus, it is evident that the A.O has not made any specific reference to the incriminating material found during the search in respect of additions made by him. Under these facts non reference to the incriminating material by the A.O is contrary to the settled position of law. Thus, the assessments, so framed, are bad in law. Therefore, we quash the assessment orders under consideration. We hold accordingly. This additional ground of assessee's appeals is allowed.

11. In result, these appeals filed by the assessee are allowed.

Order was pronounced in the open court on 16.02.2021.

Sd/-  
(MANISH BORAD)  
ACCOUNTANT MEMBER

Sd/-  
(KUL BHARAT)  
JUDICIAL MEMBER

Indore; दिनांक Dated :16/02/2021

*Patel/PS*

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

**Assistant Registrar, Indore**