IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	13.09.2022
Pronounced On	21.12.2022

CORAM

THE HONOURABLE MR.JUSTICE **S.VAIDYANATHAN**

AND

THE HONOURABLE MR.JUSTICE **C.SARAVANAN**

T.C.A.No.739 of 2008

Commissioner of Income Tax
Central II, Chennai. ... Appellant

Vs.

N.Sasikala ... Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Chennai 'B' Bench, dated 18.10.2007 in I.T.A.No.677/Mds/2002.

For Appellant : Mr.Karthik Ranganathan
Standing Counsel
Assisted by Mr.S.Rajesh,
Junior Standing Counsel

For Respondent : Mr.T.Vasudevan

J U D G M E N T

S.VAIDYANATHAN, J.
AND
C.SARAVANAN, J.

The Commissioner of Income Tax has filed this appeal against the impugned order dated 18.10.2007 of the Income Tax Appellate Tribunal in I.T.A.No.677/Mds/2002.

2. By the impugned order, the Income Tax Appellate Tribunal has allowed the above mentioned appeal filed by the respondent assessee against the order dated 14.03.2002 passed by the appellant herein under Section 263 of the Income Tax Act, 1961 for the Assessment Year 1994-1995. The operative portion of the impugned order dated 18.10.2007 of the Income Tax Appellate Tribunal reads as under:-

> *The Commissioner (A) set aside the issue to the file of the AO to consider these three issues only. He has not given any direction to consider any other issue. In such circumstances, is the AO expected to go beyond the issued considered by the Commissioner (A), more precisely, which are not subject matter of*

first appeal before the Commissioner (A)? In out humble opinion when an assessment order is set aside by appellate authority to AO, it is not open to him to go beyond the issues, to new issues thereby enhancing the assessment. His jurisdiction is limited to the issued which were subject matter of appeal. We place reliance on the decision in the case of Sri Gajalakshmi Ginning Factor Ltd. vs. CIT reported in 22 ITR 502. In the present case, the AO has carried out the directions given by the Commissioner (A) and as such we cannot find that AO's action is erroneous. He duty is to follow the direction of the Commissioner (A). he followed the direction of the Commissioner (A). The Commissioner (A) never directed to consider the DVAC report dt.7.12.1996 issued in the case of Miss J.Jayalalitha under Prevention and Corruption Act. Further in our opinion, the DVAC report is not a record to the proceedings under the I.T. Act. It can be considered for reopening the assessment, not for revoking the provisions under Section 263. When the order is set aside to consider de novo the issues which are subject matter of appeal, it is not expected of the AO to consider fresh issues while passing the giving effect order. In our humble opinion the AO has not committed any mistake by not considering the DVAC report. To consider the DVAC report is out of his jurisdiction. Accordingly it cannot be revised. There may be a mistake in not considering the DVAC report in the original assessment order dt. 27.3.1997 but not in order passed on 20.3.200 which is only a giving effect order. The revision order passed on 14.3.02 is time barred to consider the revision of order dt.27.3.1997. To sum up the assessment order dt.20.3.2000 is not erroneous though it was prejudicial to the interests of revenue, since the AO has carried out the direction given by the Commissioner (A0 vide order dt.26.3.1998 and he

limited his findings to the extent which was subject matter of appeal before the Commissioner (A) and he is not expected to consider any extraneous issue while passing the giving effect order. Further, we draw support from the judgment of the Supreme Court in the case of CIT vs. Alagendran Finance Ltd. reported in 293 ITR 1 wherein it is held as follows:

> *"Held, affirming the decision of the High Court, that the Commissioner had sought to revise only that part of the order of assessment which related to Lease Equalisation Fund; but the proceedings for reassessment had nothing to do with that item of income. The doctrine of merger did not apply in a case of this nature: the period of limitation commenced from the dates of the original assessment and not from the reassessments since the latter had not had anything to do with the Lease Equalisation Fund. This was not a case where the subject-matter of reassessment and the subject-matter of the assessment were the same.*
>
> *.... ....*
>
> *There may not be any doubt or dispute that once an order of assessment is reopened, the previous under-assessment will be held to be set aside and the whole proceedings would start afresh, but that would not mean that even when the subject-matter of reassessment is distinct and different, the entire proceeding would be deemed to have been reopened.*
>
> *Explanation (c) appended to sub-section (1) of section 263 of the Income-tax Act, 1961, which deals with the power of the Commissioner in revision, is clear and unambiguous, as in terms thereof the doctrine of merger applies*

only in respect of such items which were the subject-matter of appeal and not in respect of those which were not."

Accordingly we quash the revision order of the CIT under section 263.

7. In the result, the appeal is allowed.

3. This Tax Case Appeal was admitted on the following substantial questions of law:-

i. *Whether in the facts and circumstances of the case, the Tribunal was right in holding that the Commissioner of Income Tax did not have the power to revise the de novo order of the assessing officer, as there was no specific direction of the first appellate authority on the issue, even though the entire assessment had been set aside to be redone after making enquiries?*
ii. *Whether in the fact and circumstances of the case, the Tribunal was right in holding that the DVAC's report cannot be looked into by the Commissioner of Income Tax for the purpose of revision under Section 263 of the Income Tax Act, 1961 as it is not a proceeding under the Income Tax Act, 1961?*
iii. *Whether in the facts and circumstances of the case whether the reference in Section 263 of the Income Tax Act, 1961 to "records relating to any proceedings under this Act" would include information under other acts which form part of the record of assessment proceedings under the Income*

Tax Act, 1961?

4. When this case was taken up for hearing, a preliminary objection was raised by the learned counsel for the respondent stating that the present appeal filed by the appellant Commissioner of Income Tax was liable to be withdrawn in the light of the monetary policy of the following CBDT Circulars and Letter of Deputy Commissioner of Income Tax:-

i. *Circular No.3/2018, dated 11.07.2018 [F.No.279/Misc.142/2007-ITJ (Pt)].*

ii. *Circular No.17/2019, dated 08.08.2019 in [F.No.279/Misc.142/2007-ITJ (Pt)].*

iii. *Letter dated 26.11.2014 of the Deputy Commissioner of Income Tax, Central Circle-2(2), Chennai-34.*

5. It is submitted that this appeal also ought to have been withdrawn and dismissed in the light of dismissal of T.C.A.No.313 of 2018 filed by the Principal Commissioner of Income Tax - 2 vide order dated 04.08.2022 for the Assessment Year 1996-1997.

6. A reference was made by the learned counsel for the respondent

that Section 268A of the Income Tax Act, 1961 was inserted with retrospective effect from 01.04.1999. It is therefore submitted that the present appeal is liable to be withdrawn as admittedly the dispute amount of tax was below Rs.1 Crore.

7. A reference was also made to the following decisions of this Court and that of the Hon'ble Supreme Court:-

i. ***Commissioner of Income Tax, Tamil Nadu-IV, Madras*** *Vs.* ***M/s.G.K. Enterprises****, 2016 (4) TMI 1286.*

ii. ***Director of Income Tax, Circle 26(1) New Delhi*** *Vs.* ***S.R.M.B.Dairy Forming (P) Ltd.****, 2017 (11).*

8. Opposing the preliminary objection raised by the learned counsel for the respondent assessee, the learned Senior Standing Counsel for the appellant Commissioner of Income Tax submitted that the present case squarely comes within the exceptions provided in Circular No.03/2018 [F.No.279/Misc.142/2007-ITJ (Pt)], dated 11.07.2018 which was amended by Letter F.No.279/Misc.142/2007-ITJ (Pt), dated 20.08.2018, Circular No.5/2019 [F.No.279/Misc./M-84/2018-ITJ], dated 05.02.2019.

9. It is submitted that the respondent was also prosecuted and therefore in terms of Paragraph 10(e) & (f) of the aforesaid circular, the appellant was duty bound to proceed with the present appeal on merits. It is submitted that specifically there is an instruction to not to withdraw the present appeal in the light of the above mentioned circular as amended.

10. By way of rejoinder, the learned counsel for the respondent submits that Paragraph No.10(e) & (f) of the aforesaid Circular is not applicable to the facts of the present case as the prosecution initiated against the respondent was compounded by the respondent under Section 279(2) of the Income Tax Act, 1961 for the Assessment Year 1993-1994.

11. We have considered the arguments advanced by the learned Senior Standing Counsel for the appellant and learned counsel for the respondent.

12. We are inclined to overrule the preliminary objection raised by the learned counsel for the respondent in the light of the Paragraph No.10

of the aforesaid Circular No.03/2018 [F.No.279/Misc.142/2007-ITJ (Pt)], dated 11.07.2018 as amended by Letter F.No.279/Misc.142/2007-ITJ (Pt), dated 20.08.2018 and Circular No.5/2019 [F.No.279/Misc./M-84/2018-ITJ], dated 05.02.2019. Paragraph No.10(e) & (f) reads as under:-

> *10. Adverse judgments relating to the following issues should be contested on merits notwithstanding that the tax entailed is less than the monetary limits specified in para 3 above or there is no tax effect:*
>
> *(a) .....*
> *.....*
> *(e) Where addition is based on information received from external sources in the nature of law enforcement agencies such as CBI/ED/DRI/SFIO/Directorate General of GST Intelligence (DGGI).*
> *(f) Cases where prosecution has been filed by the Department and is pending in the Court.*

13. In view of the above, we proceed to take up this appeal for final hearing.

14. Before dealing with the substantial questions of law framed in this appeal, we shall narrate the brief facts of the case in the present appeal.

15. The present case pertains to the Assessment Year 1994-95 (relevant to the previous year 1993-94). The facts on record indicate that the respondent had not filed return under Section 139(1) of the Income Tax Act, 1961 for the Assessment Year 1994-95 and therefore, a notice under Section 142(1) of the Income Tax Act, 1961 was issued on 08.11.1994.

16. Thereafter, a letter dated 25.02.1997 was issued requiring the respondent to furnish specific informations and clarifications called for in the said letter, pursuant to which, the respondent filed a return on 10.03.1997 admitting a taxable income of Rs.24,06,900/-.

17. The assessment was completed vide Assessment Order dated 27.03.1997 under Section 144 of the Income Tax Act, 1961 as the respondent failed to furnish any of the documents called for and return of income was not validly explained in the return filed beyond the stipulated time.

18. Meanwhile, a copy of the DVAC's (Directorate of Vigilance and Anti-Corruption) report was sent to the Assessing Officer on 24.07.1997 including the copy of the report dated 07.12.1996 against late Ms.J.Jayalalitha, the former Chief Minister of Tamil Nadu in a search conducted against her.

19. The copy of the DVAC's report dated 07.12.1996 which was forwarded to the Assessing Officer on 24.07.1997 was not acted upon either by issuing a notice for re-assessment under Section 148 of the Income Tax Act, 1961 or revising the assessment immediately under Section 263 of the Income Tax Act, 1961 by calling for the remand report during the pendency of the appeal before the Commissioner of Income Tax (Appeals) or rectifying any errors on the face of record.

20. Meanwhile, the respondent filed an appeal before the Commissioner of Income Tax (Appeals) – II, in ITA.No.88/97-98 against the Assessment Order dated 27.03.1997 passed by the Assessing Officer

under Section 144 of the Income Tax Act, 1961. During the interregnum, the Assistant Commissioner of Income Tax passed an order dated 18.06.1997 under Section 154 of the Income Tax Act, 1961.

21. The Commissioner of Income Tax (Appeals), vide order dated 26.03.1998, after examining the issues, set aside the order of assessment dated 27.03.1997 with the following observations:-

> 15. The Assessing Officer has not chosen to examine the person confirming the lease transaction and the Manager who is stated to have looked after the agricultural operations. Statements of third parties, even if closely related to the appellant, cannot be summarily rejected. The Assessing Officer is required to consider the letters and affidavits of these parties as per law. The order of assessment deserves to be set aside on these points also.
>
> 16. In the light of the foregoing the entire assessment is set aside with the direction to finalise the assessment afresh after carring out enquiries providing proper opportunity to appellant considering her submissions and following due procedure laid down by the law.

22. Thus, the Commissioner of Income Tax (Appeals) – II, vide order dated 26.03.1998 in ITA.No.88/97-98 remanded the case back to the

Assessing Officer in the light of Section 251 of the Income Tax Act, 1961 as it prevailed then, to re-examine the issue in the light of the following issues:-

i. Depreciation on vehicles;

ii. Disallowance from loss from M/s.Metal King; and

iii. Disallowance of agricultural income.

23. Pursuant to the order of the Commissioner of Income Tax (Appeals) dated 26.03.1998 in ITA.No.88/97-98, the Assessing Officer passed an Assessment Order dated 20.03.2000 (signed on 28.03.2000) once again under Section 144 of the Income Tax Act, 1961.

24. The total income of the respondent was re-determined as Rs.28,86,030/-. The net tax payable by the respondent including the interest under Section 234A, 234B and 234C of the Income Tax Act, 1961 was computed as Rs.23,86,708/- less the amount already paid under Section 140A of the Income Tax Act, 1961.

25. Meanwhile, the Commissioner of Income Tax invoked Section 263 of the Income Tax Act, 1961 and issued a Notice dated 18.01.2002, to

revise the Assessment Order dated 20.03.2000 (signed on 28.03.2000) passed by the Assessing Officer pursuant to the order dated 26.03.1998 of the Commissioner of Income Tax (Appeals).

26. The aforesaid proceedings was defended by the respondent. It culminated in an order dated 14.03.2002 of the Commissioner of Income Tax (Central), Chennai under Section 263 of the Income Tax Act, 1961, wherein, the Commissioner of Income Tax (Central), Chennai concluded that the Assessment Order dated 20.03.2000 (signed on 28.03.2000) was both erroneous and prejudicial to the interests of the revenue.

27. Pursuant to the aforesaid order, the respondent filed appeal in ITA.No.677/Mds/2002 before the Income Tax Appellate Tribunal which has culminated in the impugned order dated 18.10.2007 of the said Tribunal. Relevant portion of the order has already been extracted above in the beginning of this order.

28. The third assessment order dated 20.03.2003 was also passed by the Assessing Officer under Section 143(3) read with Section 263 of the

Income Tax Act, 1961 by giving effect to order dated 14.03.2002 of the Commissioner of Income Tax (Central), Chennai by re-computing the taxable income as Rs.1,34,33,485/- of the respondent and tax payable by the respondent as follows:-

[Total taxable income – Rs.1,34,33,485/-]

	Income Tax thereon	: Rs.53,52,394/-
Add:	Surcharge @ 12%	: Rs. 6,42,287/-
		: Rs.59,94,681/-
Add:	Interest u/s 234A	: Rs.37,16,652/-
	Interest u/s 234B	: Rs.43,16,112/-
	Interest u/s 234C	: Rs. 43,029/-
	Total	: Rs.1,40,70,476/-
Less : 140A Taxes paid		
10.03.1997	: Rs.677543/-	
31.03.1997	: Rs.750000/-	
28.04.1997	: Rs.178000/-	
29.04.1997	: Rs. 8000/-	: Rs. 16,13,543/-
Balance demand payable		: Rs.1,24,56,931/-

29. On behalf of the appellant, it is submitted that the Income Tax Appellate Tribunal committed an error in allowing the respondent's appeal against the order dated 14.03.2002 passed under Section 263 of the

Income Tax Act, 1961. It is submitted that the report of the DVAC was transmitted to the Income Tax Department on 24.07.1997. It ought to have been considered by the Assessing Officer while passing the Assessment Order dated 20.03.2000 (signed on 28.03.2000).

30. It is submitted that the Income Tax Appellate Tribunal erred in concluding that the DVAC's report dated 07.12.1996 was not a report for the purpose of Section 263 of the Income Tax Act, 1961. It is submitted that the Income Tax Appellate Tribunal erred in holding that the Assessing Officer has not committed any mistake by ignoring DVAC's report sent on 24.07.1997. It is submitted that the assessment completed on 27.03.1997 had been set aside and therefore the assessing officer ought to have taken note of the DVAC's report dated 07.12.1996 which was forwarded earlier on 24.07.1997.

31. It is submitted that the expression 'record' in Explanation 1(b) to Section 263 of the Income Tax Act, 1961 reads as under:-

> *"record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Chief Commissioner or Chief*

Commissioner or Principal Commissioner or Commissioner;

32. It is submitted that the order passed under Section 263 of the Income Tax Act, 1961 dated 14.03.2002 was well within the limitation contemplated under Section 263(2) of the Income Tax Act, 1961. The learned Senior Standing Counsel for the appellant has placed reliance on the following cases:-

i. ***Commissioner of Income Tax, Bhopal*** *Vs.* ***Ralson Industries Ltd.****, [2007] 158 Taxman 160 (SC).*
ii. ***Commissioner of Income Tax*** *Vs.* ***Shree Manjunathesware Packing Products & Camphor Works****, [1998] 96 Taxman 1 (SC).*
iii. ***Commissioner of Income Tax, Cochin*** *Vs.* ***Jacob J.Thaliath****, [2011] 11 taxmann.com 123 (Ker.).*
iv. ***Commissioner of Income Tax, Chennai*** *Vs.* ***Alagendran Finance Ltd.****, [2007] 162 Taxman 465 (SC).*
v. ***Commissioner of Income Tax*** *Vs.* ***Arunaben Sumankumar****, [2002] 124 Taxman 57 (Gujarat).*

33. The learned counsel for the respondent defends the impugned order dated 18.10.2007 passed by the Income Tax Appellate Tribunal and submits that the impugned order passed by the Income Tax Appellate

Tribunal is well reasoned and requires no interference.

34. It is submitted that the assessing officer was bound by the order of the Commissioner of Income Tax (Appeals) dated 26.03.1998 remanding the case back to the assessing officer on three issues referred to *supra* and therefore, there was no error in the Assessment Order dated 20.03.2000 (signed on 28.03.2000).

35. It is submitted that the Revised Assessment Order dated 20.03.2000 (signed on 28.03.2000) indeed revises the first Assessment Order dated 27.03.1997 as is evident from a reading of the order.

36. It is submitted that the scope of remand was limited and therefore, there was no scope for invoking Section 263 of the Income Tax Act, 1961 against the second assessment order dated 20.03.2000 (signed on 28.03.2000).

37. It is submitted that the limitation for invoking Section 263 of the Income Tax Act, 1961 against the order dated 27.03.1997 would have

expired on 31.03.1999. It is further submitted that even if Section 154 of the Income Tax Act, 1961 was to be invoked, the limitation would have expired on 31.03.2001. It is submitted that even if the orders were prejudicial to the interest of the revenue, it cannot be said that the order dated 20.03.2000 (signed on 28.03.2000) was erroneous and therefore, reliance was placed on the decision of the Hon'ble Supreme Court in **Malabar Industrial Co. Ltd.** Vs. **Commissioner of Income Tax**, 2000 (2) TMI 10.

38. The learned counsel for the respondent has relied on the following case laws in support of the case of the respondent:-

i. ***Commissioner of Income Tax*** *Vs.* ***Alagendran Finance Ltd.****, 2007 (7) TMI 304 : 2007 (7) SCC 215.*
ii. ***Kartar Singh*** *Vs.* ***Commissioner of Income Tax, Amritsar****, 1976 (10) TMI 11 : [1978] 111 ITR 184.*
iii. ***Commissioner of Income Tax*** *Vs.* ***Late.Jawaharlal Nagpal (through legal representatives Smt.Kanta Nagpal and others)****, 1987 (8) TMI 41 : [1988] 171 ITR 136.*
iv. ***SP.Kochhar*** *Vs.* ***Income Tax Officer, Dehradun****, 1982 (5) TMI 3 : [1984] 145 ITR 255.*
v. ***Commissioner of Income Tax*** *Vs.* ***SV.Divakar (Through Legal Heir Srikumar Nair)****, 1992 (5) TMI 10 : [1993] 201 ITR 914.*

vi. ***Deputy Commissioner of Income Tax (Assessment)*** *Vs.* ***Surat Electricity Co. Ltd.****, 2011 (4) TMI 1163 : [2011] 337 ITR 271.*

39. It is submitted that the scope of remand was limited and therefore there is no scope for invoking Section 263 of the Income Tax Act, 1961 against the second assessment order dated 20.03.2000 (signed on 28.03.2000).

40. Under these circumstances, it is prayed that the questions of law be answered in favour of the respondent. It is therefore prayed for dismissal of this appeal confirming the impugned order of the Income Tax Appellate Tribunal.

41. We have considered the arguments advanced by the learned Senior Standing Counsel for the appellant and the learned counsel for the respondent on merits.

42. The appeal is a continuation of the original proceedings. It is a journey to ascertain the facts. The facts on record indicate that when the

assessment was made under Section 144 read with Section 143 of the Act on 27.03.1997, the petitioner had not furnished the required information called for. After the aforesaid Assessment Order dated 27.03.1997 was passed, the information relating to investments and incomes of the respondent was furnished on 24.07.1997.

43. At that stage, the respondent had filed an appeal before the Commissioner of Income Tax (Appeals) in I.T.A.No.88/97-98 which culminated in an order dated 26.03.1998 remanding the case back to the Assessing Officer. Information that was furnished to the Assessing Officer by the DAVC was not brought to the notice of the Commissioner of Income Tax (Appeals) when the aforesaid order dated 26.03.1998 was passed by the latter.

44. When the second Assessment Order dated 28.03.2000 was passed pursuant to the order dated 26.03.1998 of the Commissioner of Income Tax (Appeals) in I.T.A.No.88/97-98, the Assessing Officer had necessary information that was forwarded after the order dated 27.03.1997 was passed. However, this could not be considered as the scope of remand

was limited to the three issued as stated above.

45. At the same time, order dated 26.03.1998 of the Appellate Commissioner remanding the case back to the Assessing Officer to pass a fresh *de novo* order on the three grounds specified therein, is to be construed as an interlocutory order. Law relating to the interlocutory order has been dealt with by the various Courts.

46. Under Section 105(1) of the Civil Procedure Code, 1908, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

47. As per Sub-Section (2) to Section 105 of Civil Procedure Code, 1908, notwithstanding anything contained in Sub-Section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its

correctness.

48. In **Maharajah Moheshur Singh** Vs. **The Bengal Government**, (1859) 7 M.I.A. 283, 302, it was observed as follows:-

> *We are of opinion that this objection cannot be sustained. We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the appellate court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. We believe there have been very many cases before this Tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication.*

49. This Court in **S.Senniappa Mudaliar** Vs. **The Government of Madras**, (1965) ILR 2 Mad 397 applied Section 105(2) of the Civil Procedure Code, 1908 and held that "*a finding which affects only a*

portion of the data on which the order of assessment is based, has to be viewed as interlocutory in character and the principles laid down in Maharajah Moheshur Singh v. The Bengal Government (1859) 7 M.I.A. 283, will apply". It was further held that "an order in such circumstances though appealable under the statute, was interlocutory in character, forming only a stage in the process of making the final assessment.

50. This view was followed by the Full Bench of the Kerala High Court in **M.Syed Alavi and others** Vs. **State of Kerala**, [1981] 48 STC 150 (Ker.), wherein, it was concluded as follows:-

> *17. In the instant case, it is true that no appeal was filed against the decision dated 12th April, 1976, of the Appellate Assistant Commissioner. The effect of non-filing of an appeal is that the finding is binding on the assessing authority when the case went back to that authority and also on the Appellate Assistant Commissioner while disposing of the appeal from the revised decision of the assessing authority.* ***It is not binding on the Appellate Tribunal in the appeal filed under Section 39 against the decision of the Appellate Assistant Commissioner. The Appellate Tribunal was free to arrive at its own decision on the question of liability of the petitioners to assessment to sales tax****.*
>
> *18. It is thus clear that it was under an erroneous interpretation of the law that the Appellate*

Tribunal held that it had no jurisdiction to decide the issue regarding the petitioners' liability to assessment. The order of the Appellate Tribunal is, therefore, set aside. The cases are remitted to the Appellate Tribunal for fresh disposal on the merits. The revision cases are disposed of accordingly.

(emphasis applied)

51. The above view of the Full Bench of the Kerala High Court was recently followed by a Division Bench of this Court in **State of Tamil Nadu** Vs. **Sharada Enterprises**, (2019) 71 GSTR 107.

52. The Hon'ble Supreme court in **Satyadhyan Ghosal and others** Vs. **Smt.Deorajin Debi and another**, AIR 1960 SC 941, after adverting to the decisions of the Privy Council in **Ram Kirpal Shukul** v. **Musumat Rup Kuari**, (1883) 11 I.A. (P.C.) 37, observed in paragraph Nos.15 & 16 as follows:-

15. .....As regards the orders of remand it had been held that under s. 591 of the Code a party aggrieved by an order of remand could object to its validity in an appeal against the final decree, though he might have appealed against the order under Section 588 and had not done so. The second sub-section of Section 105 precludes an appellant from taking, on

an appeal from the final decree, any objection that might have been urged by way of appeal from an order of remand.

16. It is clear therefore that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order. A special provision was made as regards orders of remand and that was to the effect that if an appeal lay and still the appeal was not taken the correctness of the order of remand could not later be challenged in an appeal from the final decision. ***If however an appeal did not lie from the order of remand the correctness thereof could be challenged by an appeal from the final decision as in the cases of other interlocutory orders.*** *The second sub-section did not apply to the Privy Council and can have no application to appeals to the Supreme Court, one reason the supreme Court against an order of remand.* ***There appears to be no reason therefore why the appellant should be precluded from raising before this Court the question about the applicability of Section 28 merely because he had not appealed from the High Court's order of remand, taking the view against him that the section was applicable.*** *We are unable to agree with the learned Advocate that the decision of the Privy Council in Ram Kirpal Shukul's Case affects this matter at all.*

(emphasis applied)

53. The Hon'ble Supreme Court in **Sukhrani (dead) rep. by its legal representatives** Vs. **Hari Shanker and others**, AIR 1979 SC. 1436

held as under:-

> *It is true that at an earlier stage of the suit, in the proceeding to set aside the award, the High Court recorded a finding that the plaintiff was not entitled to seek reopening of the partition on the ground of unfairness when there was neither fraud nor misrepresentation. It is true that the plaintiff did not further pursue the matter at that stage by taking it in appeal to the Supreme Court but preferred to proceed to the trial of his suit. It is also true that a decision given at an earlier stage of a suit will bind the parties at later stages of the same suit.* ***But it is equally well settled that because a matter has been decided at an earlier stage by an interlocutory order and no appeal has been taken therefrom or no appeal did lie, a higher Court is not precluded from considering the matter again at a later stage of the same litigation.***
>
> *(emphasis applied)*

54. In **J. K. Cotton Spinning & Weaving** Vs. **Commissioner of Income Tax**, 1963 47 ITR 906 All, one of the questions referred to the Allahabad High Court was "whether the Income Tax Officer could include the dividend income deemed to have been received by the assessee at such reassessment, which could not have been included in the total income at the time of original assessment". The High Allahabad

Court answered as follows:-

When an Income-tax Officer makes a fresh assessment in compliance with the Appellate Assistant Commissioners directions, he is of course bound by the directions, but, subject to them, he has the same powers as he had originally when making an assessment under section 23. The reassessment is nothing but a second assessment in substitution of the assessment made previously and set aside by the Appellate Assistant Commissioner on appeal. ***There are no restrictions at all on the powers of the Income-tax Officer when he proceeds to reassess the income; subject to the directions given in the Appellate Assistant Commissioners order, he has to proceed as if he were making an assessment under section 23 the time when he proceeds to reassess. He is not bound or restricted by anything that had happened either when he made the original assessment or when the appeal was heard by the Appellate Assistant Commissioner; he is governed only by the findings of the Appellate Assistant Commissioner.*** *He is not bound by his own findings arrived at in the original assessment; they do not operate as res judicata and undoubtedly have not the force of an order.* ***The findings arrived at by the Appellate Assistant Commissioner and the directions given by him are binding on him, not as res judicata, but as orders to which he is subject. He is free to take into consideration any relevant material that came into existence for the first time after the original assessment order was made by him. Consequently, the Income-tax Officer in the instant case was competent, when reassessing the income of the assessee, to consider the orders passed by him under section 23A and to treat the assessee as having derived larger income from the***

dividends than that shown by it in its returns and accepted as correct in the original assessment orders. He was free to take into account the materials which existed on the date of the reassessment and was not confined to those materials which existed on the date of the original assessment orders. *His finding arrived at in the original assessment proceedings that the income from the dividends shown in the return was correct might have been correct but fell with the assessment order itself and was neither operative nor binding in the reassessment proceeding. By the time he came to reassess the assessee he had the section 23A orders before him under which the assessee was deemed to have received larger income from the dividends. The assessment for 1941-42 was based on the income of the accounting year 1940. The original assessment was made on December 31, 1945, and the order was set aside by the Appellate Assistant Commissioner on March 31, 1947. In the meantime, the section 23A order had been passed on December 14, 1946, and on March 3, 1949, on which the Income-tax Officer reassessed the assessee, he had to reassess him on the basis of the income deemed to have been received by it in accordance with the section 23A order. If he had not made the original assessment and was making the assessment for the first time on March 12, 1949, it cannot be disputed that he would make it on the basis that the assessee had received the larger income in accordance with the section 23A and, when he are assessed it, he had the same jurisdiction as he would have if the reassessment were an assessment for the first time.*

55. Thus, it follows that the remand order of the Commissioner of

Income Tax (Appeals) was not binding on the Appellate Tribunal in the appeal filed before it. The Appellate Tribunal was free to arrive at its own decision on the question of liability of the respondents.

56. Impugned order of the Tribunal allowing the appeal of the respondent, in our view, is therefore unsustainable. The orders passed by the Assistant Commissioner both on 27.03.1997 before remand and after remand on 28.03.2000 pursuant to the remand order dated 26.03.1998 of the Commissioner of Income Tax (Appeals) in I.T.A.No.88/97-98 have not only resulted in an order which is prejudicial to the interest of the revenue but also in an erroneous order. As an Appellate Commissioner, it was incumbent on the part of the Appellate Commissioner to have taken note of the latches and mistakes committed by the Assessing Officer while passing the assessment order dated 27.03.1997 before remanding the case for passing a fresh assessment order.

57. Equally, the Appellate Tribunal was at fault while passing the impugned order. It ought to have seen the mistakes committed by the Assessing Officer which resulted in an erroneous order being passed in

favour of the respondent which was prejudicial to the interest of the revenue. In our view, the power was rightly exercised by the Commissioner of Income Tax while invoking Section 263 of the Income Tax Act, 1961. Therefore, the Tribunal erred in allowing the respondent assessee's appeal.

58. Under these circumstances, we are inclined to allow this appeal and answer the substantial questions of law in favour of the appellant revenue.

59. In the light of the above, this Tax Case Appeal is allowed. No cost.

S.V.N., J. C.S.N., J.
21.12.2022

Internet : Yes / No
Index: Yes/ No
jen

To
Income Tax Appellate Tribunal,
Chennai 'B' Bench