Before S.J. Vazifdar, CJ & Deepak Sibal, J.

M/s VMT SPINNING CO. LIMITED — *Appellant*

versus

THE COMMISSIONER OF INCOME TAX, LUDHIANA AND ANOTHER — *Respondents*

ITA No. 445 of 2015

September 16, 2016

Constitution of India, 1950 — Art. 226 — Income Tax Act, 1961 — Ss.260-A & 254(i) — Income Tax (Appellate Tribunal) Rules, 1963 — Rl.11 & 29 — Against assessment for the year 2007-08, the assessee/appellant filed appeal before Commissioner of Income Tax, which was partly allowed — Two cross appeals filed before the Appellate Tribunal — In the appeal filed by appellant an additional ground taken, which was not raised before the Commissioner, though no new fact was averred — Tribunal rejected the additional ground, because no permission was sought to raise such plea — Having regard to S.254(i) of the Act and Rules 11 and 29 of the Rule, the Division Bench held, that additional ground could be taken, as the Appellate Tribunal could even decide an appeal on a ground neither taken in the appeal nor by its leave — Appeal allowed — Matter remitted to Appellate Tribunal for fresh decision taking into consideration the additional ground.

Held, that Appeals to the Tribunal are preferred under Section 254(1) of the Act which provides that after hearing the contesting parties the Tribunal may pass such orders that it thinks fit. Section 254(1) of the Act, reads as under: -

> **"254** (1) 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."

(Para 4)

Further held, that in the afore-quoted provision the usage of the words "pass such orders thereon as it thinks fit" gives very wide powers to the Tribunal and according to us such powers are not limited to adjudicate upon only the issues arising from the order appealed from. Any interpretation to the contrary would go against the basic purpose for which the appellate powers are given to the Tribunal under Section

254 of the Act which is to determine the correct tax liability of the assessee.

(Para 5)

Further held, that rules 11 and 29 of the Income Tax (Appellate Tribunal) Rules, 1963 (for short – the Rules) are also indicative that the powers of the Tribunal, while considering an appeal under Section 254 (1) are not restricted only to the issues raised before it.

(Para 6)

Further held, that Rule 11 of the Rules provides that the appellant, with the leave of the Tribunal can urge before it any ground not taken in the memorandum of appeal and that the Tribunal while deciding the appeal is not confined only to the grounds taken in the memorandum of appeal or taken by leave of the Tribunal under Rule 11.

(Para 7)

Further held, that rule 29, as quoted above, is to the effect that though parties to the appeal before the Tribunal shall not be entitled to produce additional evidence but if the Tribunal desires the production of any document or examination of any witness or any affidavit to be filed, it can, for reasons to be recorded, do so.

(Para 8)

Further held, that a harmonious reading of Section 254 (1) of the Act and Rules 11 and 29 of the Rules coupled with basic purpose underlying the appellate powers of the Tribunal which is to ascertain the correct tax liability of the assessee leaves no manner of doubt in our minds that the Tribunal while exercising its appellate jurisdiction would have the discretion to allow to be raised before it new or additional questions of law arising out of the record before it. What cannot be done is examination of new sources of income for which separate remedies are provided to the revenue under the Act.

(Para 9)

Radhika Suri, Senior Advocate with Rinku Dahiya, Advocate, *for the appellant*.

Rajesh Katoch, Advocate, for the respondents.

DEEPAK SIBAL, J.

(1) The present appeal under Section 260-A of the Income Tax Act, 1961 (for short – the Act), which pertains to the Assessment Year 2007-08, is at the instance of the assessee impugning therein the order

passed by the Income Tax Appellate Tribunal, Division Bench, Chandigarh (for short – the Tribunal). The appeal is admitted on the following substantial questions of law :-

> "(i). Whether in facts and circumstances of the case, the Income Tax Appellate Tribunal was correct in law in holding that the Grounds of Appeal raised before the ITAT could not be entertained as it was not raised as additional grounds of appeal without seeking leave of the court even though the same was part of grounds of appeal filed before the ITAT by the Appellant?
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> (ii). Whether in facts and circumstances of the case order of the ITAT is contrary to the ratio of the Apex Court in the case of National Thermal Vs. CIT 229 ITR 383 **?"**

(2) The answer to either of the afore-quoted questions would answer the other.

(3) For the Assessment Year in question, through order dated 29.12.2009, the assessee was assessed to tax, which order was challenged by the assessee through an appeal filed before the Commissioner of Income Tax, Ludhiana (for short – the Commissioner), which was partly allowed. This led to filing of cross-appeals before the Tribunal-one by the Revenue and the other by the assessee. In the Memorandum of Appeal filed before the Tribunal, the assessee raised an additional ground with regard to calculation of Minimum Alternate Tax to be carried forward to the subsequent year. According to the assessee, in the Assessment Order, the same had not been correctly calculated. As this ground was to challenge the above computation made in the assessment proceedings and had not been raised before the Commissioner, the Tribunal refused to adjudicate upon the same as according to the Tribunal prior leave of the Tribunal through an application in writing should have been obtained before raising the additional ground. An oral request made by the assessee to raise this additional ground was not considered enough. The Tribunal held that in the absence of any request in writing for admission of an additional ground in the appeal, the Revenue would be put to serious prejudice as it would have no opportunity to counter the request of the assessee in this regard. For arriving at the above conclusion, the Tribunal relied upon a judgment of the Gujarat High Court in ***Smt. Arundhati Balkrishna and others*** *versus* ***G. M. Singhvi, Income Tax***

Officer, Group Circle III-2, Ahmedabad and others[1], a judgment of Allahabad High Court in ***Commissioner of Income Tax*** *versus* ***Sahara India***[2] as also a judgment of this Court in ***Echo Shella*** *versus* ***Commissioner of Income Tax***[3].

(4) Appeals to the Tribunal are preferred under Section 254(1) of the Act which provides that after hearing the contesting parties the Tribunal may pass such orders that it thinks fit. Section 254(1) of the Act, reads as under: -

> **"254** (1) 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."

(5) In the afore-quoted provision the usage of the words "pass such orders thereon as it thinks fit" gives very wide powers to the Tribunal and according to us such powers are not limited to adjudicate upon only the issues arising from the order appealed from. Any interpretation to the contrary would go against the basic purpose for which the appellate powers are given to the Tribunal under Section 254 of the Act which is to determine the correct tax liability of the assessee.

(6) Rules 11 and 29 of the Income Tax (Appellate Tribunal) Rules, 1963 (for short – the Rules) are also indicative that the powers of the Tribunal, while considering an appeal under Section 254 (1) are not restricted only to the issues raised before it. Rules 11 and 29 read as under:-

> **11. Grounds which may be taken in appeal.-** The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule:
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> **Provided that** the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground.

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[1] (1976) 103 ITR 763 (Guj.)
[2] (2012) 347 ITR 331 (All.)
[3] (2007) 293 ITR 234 (P&H)

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> **29. Production of additional evidence before the Tribunal.-** The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any documents to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or, if the income-tax authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them, or not specified by them, the Tribunal, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced.

(7) Rule 11 of the Rules provides that the appellant, with the leave of the Tribunal can urge before it any ground not taken in the memorandum of appeal and that the Tribunal while deciding the appeal is not confined only to the grounds taken in the memorandum of appeal or taken by leave of the Tribunal under Rule 11.

(8) Rule 29, as quoted above, is to the effect that though parties to the appeal before the Tribunal shall not be entitled to produce additional evidence but if the Tribunal desires the production of any document or examination of any witness or any affidavit to be filed, it can, for reasons to be recorded, do so.

(9) A harmonious reading of Section 254 (1) of the Act and Rules 11 and 29 of the Rules coupled with basic purpose underlying the appellate powers of the Tribunal which is to ascertain the correct tax liability of the assessee leaves no manner of doubt in our minds that the Tribunal while exercising its appellate jurisdiction would have the discretion to allow to be raised before it new or additional questions of law arising out of the record before it. What cannot be done is examination of new sources of income for which separate remedies are provided to the revenue under the Act.

(10) The Apex Court in ***National Thermal Power Co. Ltd.*** *versus* ***Commissioner of Income Tax***[4], while considering the question whether the Tribunal has jurisdiction to examine a question of law, which was earlier not raised before the authorities, but which would

[4] (1998) 229 ITR 383 SC

have a bearing on the determination of tax liability of the assessee, held as under :-

> **"5.** 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.
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> 6. In the case of Jute Corporation of India Ltd. v. C.I.T. . 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.

7. 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., C.I.T, v. Anand Prasad (Delhi), C.I.T. v. KaramchandPremchand P. Ltd. and C.I.T. v. Cellulose Products of India Ltd. . 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. The reframed question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits."

(11) A perusal of the above shows that the Apex Court has clearly held that the Tribunal, while exercising appellate jurisdiction under Section 254 of the Act, can consider questions of law arising from the assessment proceedings, which had not been raised earlier. The view that the Tribunal would be confined to decide only the issues arising out of the appeal before the Commissioner was a view, which was considered to be too narrow and thus, the Tribunal was held to have powers to allow or not to allow a new ground to be raised before it for adjudication. It further held that where the Tribunal was only required to consider a question of law arising from the facts, which were already on record in the assessment proceedings, such question of law should be allowed to be raised to correctly assess the tax liability of

an assessee.

(12) The observations in paragraph-6 that the Appellate Assistant Commissioner must be satisfied that the ground raised could not have been raised earlier for good reasons, are obviously in respect of cases where some factual aspect is also involved and not where only a pure question of law is involved. This is clear from the observation in paragraph-7 that where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings, it is necessary to consider that a question in order to correctly assess the tax liability of an assessee. The reason is obvious. Where disputed questions of facts are involved, it would unnecessarily delay the assessment proceedings and may in certain circumstances place an unfair burden upon the Revenue such as when the proceedings have been pending for a long period of time and it is difficult to ascertain the facts. Such cases would deprive the Revenue an opportunity of meeting the case on facts effectively.

(13) In the case before us Mrs. Suri made a statement that the assessee would not rely upon any additional evidence and would proceed only on the basis of the facts admitted by the department. In other words she stated that the assessee intended to and would raise a question of law and would not rely upon any disputed questions of facts. In these circumstances there was no justification in preventing the assessee from raising the additional point.

(14) The judgment of the Apex Court in ***National Thermal**'s case (supra)* was considered and followed by this Court in ***Avery Cycle Industries Ltd.*** *versus* ***Commissioner of Income Tax***[5], wherein it was held as under :-

> **"4.** When the facts raised in the instant appeal are examined in the light of the principle laid down by the Hon'ble Supreme Court, then no doubt it felt that all the facts relevant to the additional ground seeking depreciation allowance are on record. The Tribunal is only to decide the claim of depreciation made by the assessee as per the Income Tax Act, 1961. The additional ground could be raised by the assessee in appeal before the Tribunal under Rule 11 of the Appellate Tribunal Rules, 1963. In the present case, the following additional ground has been

[5] (2007) 292 ITR 493 (P&H)

raised, as is evident from the perusal of the additional ground of appeal, dated 9- 4-2004 (annexure A-6):

That the W.D.V. of the assets in respect of old as well as new units of Pahwa Steel and Tube Mills (P. S. T. M.), a unit of Avery Cycle Industries Ltd., has not been brought forward correctly from the preceding assessment year.

5. In view of the above, the impugned order dated 29-10-2004, (annexure A-l) passed by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh, is hereby set aside and the Tribunal is directed to deal with the aforementioned additional ground in accordance with law."

(15) To the same effect is a Full Bench decision of the Bombay High Court in ***Ahmedabad Electricity Co. Ltd.*** *versus* ***Commissioner of Income Tax***[6], wherein it was held as under :-

"In view of the above decisions, it is quite clear that the Appellate Tribunal has jurisdiction to permit additional grounds to be raised before it even though these may not arise from the order of the Appellant Assistant Commissioner, so long as these grounds are in respect of the subject-matter of the entire tax proceedings.**"**

(16) In the order impugned before us none of the above referred judgments were noticed by the Tribunal.

(17) The Tribunal referred to the following observations of the judgment of Gujarat High Court in ***Smt. Arundhati Balkrishna and others*** *versus* ***G.M. Singhvi, Income Tax Officer, Group Circle-III-2, Ahmedabad and others***[7]:-

"……where, in an appeal to the Appellate Assistant Commissioner by the assessee against an order of assessment, the assessee has not questioned the decision of the Income-tax Officer on a point decided, and the Appellate Assistant Commissioner has not in his order considered that point, the assessee is not entitled to question the decision of the officer on that point in an appeal to the Appellate Tribunal against the order of the Appellate Assistant Commissioner and the Tribunal is not entitled to

[6] (1993) 199 ITR 351
[7] (1976) 103 ITR 763

allow the assessee to agitate the question under the guise of granting leave under rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963."

(18) These observations are contrary to the judgment of the Supreme Court in ***National Thermal Power Co. Ltd***. *case (supra).* Infact the Full Bench of the Bombay High Court in ***Godavari Sugar Mills Ltd.*** *case (supra)* dealing with Rule 11 observed as under:-

"**19.** In this connection a reference may also be made to the Income Tax (Appellate Tribunal) Rules, 1963 which have been framed under section 255(5) of the Income Tax Act, 1961. Under Rule 11 of the Appellate Tribunal Rules the appellant shall not, except by leave of the Tribunal urge or be beard in support of any ground not set forth in the memorandum of appeal but the Tribunal in deciding an appeal shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule; (underlining * ours); provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being beard on that ground. So that in deciding the appeal the Tribunal is not restricted to the grounds which are taken or which have been allowed to be taken in the memorandum of appeal."

(19) In our view Rule 11 infact supports the assessee and not the department.

(20) Rule 11 infact confers wide powers on the Tribunal, although it requires a party to seek the leave of the Tribunal. It does not require the same to be in writing. It merely states that the appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal. In a fit case it is always open to the Tribunal to permit an appellant to raise an additional ground not set forth in the memorandum of appeal. The safeguard is in the proviso to Rule 11 itself. The proviso states that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground. Thus even if it is a pure question of law, the Tribunal cannot consider an additional ground without affording the other side an opportunity of being heard. We venture to state that even in the absence of the proviso it would be incumbent upon the Tribunal to afford a

party an opportunity of meeting an additional point raised before it. Moreover, even though Rule 11 requires an appellant to seek the leave of the Tribunal, it does not confine the Tribunal to a consideration of the grounds set forth in the memorandum of appeal or even the grounds taken by the leave of the Tribunal. In other words the Tribunal can decide the appeal on a ground neither taken in the memorandum of appeal nor by its leave. The only requirement is that the Tribunal cannot rest its decision on any other ground unless the party who may be affected has had sufficient opportunity of being heard on that ground.

(21) In the present case the Tribunal ought to have exercised its discretion especially in view of the fact that the assessee intends raising only a legal argument without reference to any disputed questions of fact.

(22) In ***Sahara India's*** *case (supra)*, which was also relied upon by the Tribunal, the Tribunal had permitted an additional ground to be raised and the issue decided by the Court was with regard to how the Tribunal should have proceeded thereafter.

(23) The Tribunal ought to have considered the judgment as a whole and ought not to have relied upon the head note alone. The judgment infact supports the assessee. As noted in the opening paragraph the Tribunal had admitted an additional ground and allowed the relief to the assessee on that ground. The Division Bench noted that the Tribunal while admitting the additional ground had not discussed the full facts of the case. In paragraph- 19 the Court observed that when the facts of the case are neither clear nor discussed by the Tribunal, the Tribunal having permitted the assessee to raise additional grounds treating it to be a legal ground in appeal for the first time, should have set aside the order of the Commissioner of Income Tax (Appeals) and remanded the case to him for deciding the appeal afresh rather than to decide the same on the merits for the first time by itself. Upon remand the CIT(A) would have been in a position to examine the issue for the first time in relation to the additional ground. In any event, the observation that the Tribunal had overlooked the fact that the ground did not arise from the order of the CIT(A) is not in accordance with the judgment of the Supreme Court. The judgment in any event appears to have turned on the facts of the case, namely, that the facts of that case were neither clear nor discussed by the Tribunal. Moreover, it is important to note that the Court infact held that the matter ought to have been remanded to the Tribunal and did infact remand the matter to

the CIT(A) for fresh adjudication as per law. The judgment, therefore, in any event is clearly distinguishable.

(24) The judgment of this Court in the case of ***Echo Shella's*** *case (supra)* which was also relied upon by the Tribunal also has no application to the facts of the present case as in that case, the issue was with regard to raising of a new ground for the first time before the High Court in an appeal under Section 260-A of the Act.

(25) In view of the above, while allowing the appeal we answer the substantial questions of law in favour of the appellant-assessee.

(26) In view of the afore-referred statement made by learned senior counsel appearing on behalf of the appellant-assessee that for the decision on the new ground raised by the assessee, no additional evidence would be led and that such question arose from the facts which were already on the record of the assessment proceedings and further being convinced that a decision upon the new ground raised by the assessee would only help in determining the assessee's correct tax liability, after setting aside the impugned order, we remand the matter to the Tribunal for adjudicating upon the additional ground on merits. The Tribunal would be at liberty to remand the matter further, if it so deems fit.

P.S. Bajwa