

## **ITAT has discretion to allow additional ground not raised before CIT(A) after giving hearing chance to other party**

**Summary – The High Court of Punjab & Haryana in a recent case of VMT Spinning Co. Ltd., (the Assessee) held that In terms of section 254(1), Tribunal while exercising its appellate jurisdiction, has discretion to allow to be raised before it new or additional questions of law arising out of record after giving a reasonable opportunity of being heard to other party**

### **Facts**

- For the assessment year in question, the assessee challenged assessment order before the Commissioner (Appeals) which was partly allowed. This led to filing of cross-appeals before the Tribunal i.e. 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 said ground 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 said additional ground was not considered enough.
- On appeal:

### **Held**

- Appeals to the Tribunal are preferred under section 254(1) which provides that after hearing the contesting parties, the Tribunal may pass such orders that it thinks fit.
- In section 254(1) the usage of the words 'pass such orders thereon as it thinks fit' gives very wide powers to the Tribunal and 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 which is to determine the correct tax liability of the assessee.
- Rules 11 and 29 of the Income-tax (Appellate Tribunal) Rules, 1963 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.
- Rule 11 of the 1963 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.

- Rule 29, 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.
- 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 that the Tribunal while exercising its appellate jurisdiction, has 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.
- A perusal of the order passed in *National Thermal Power Co. Ltd. v. CIT* [\[1998\] 229 ITR 383](#) 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.
- Rule 11 in fact 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. 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.
- 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.

- In view of the statement made by 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, the matter is remanded to the Tribunal for adjudicating upon the additional ground on merits.