

**INCOME TAX APPELLATE TRIBUNAL  
MUMBAI 'I' BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President)  
and Sandeep S Karhail (Judicial Member)]**

ITA No.426/Mum/2022  
Assessment Year: 2004-05

**Rahul Rajnikant Parikh** ..... **Appellant**  
*701 Panchavati Bldg, Off Yari Road, Versova,  
Andheri (W), Mumbai 400061 [PAN: AFUPP8362H]*

**Vs.**

**Income Tax Office (International Taxation)**  
**Circle 3 (3)(2) Mumbai** ..... **Respondent**

**Appearances:**

**Vijaykumar S. Biyani** *for the appellant*  
**Milind Chavan** *for the respondent*

Date of concluding the hearing : June 01, 2022  
Date of pronouncement the order : August 26, 2022

**O R D E R**

**Per Pramod Kumar, VP:**

1. By way of this appeal, the assessee-appellant has challenged the correctness of the learned CIT(A)'s order dated 5<sup>th</sup> January 2021, in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 for the assessment year 2004-05.

2. When this appeal came up for hearing, learned counsel for the assessee invited our attention to the fact that learned CIT(A) has not disposed of assessee's grievance against the reopening of the assessment, on the short ground that this grievance was not raised in the first round of proceedings. The action of the learned CIT(A) is assailed to be legally sustainable in view of the well settled legal position, particularly in the light of Hon'ble jurisdictional High Court's judgment in the case of *Inventors Industrial Co Ltd. vs CIT [(1992) 194 ITR 548*

**(Bom)]**. We are thus urged, without prejudice to the assessee's grievances as merits of the case, to remit the matter to the file of the learned CIT(A) for adjudication on merits on the reopening aspect.

3. Learned Departmental Representative relied upon the stand of the CIT(A). It is pointed out that we are at present in the second round of proceedings before the Tribunal, as a result of limited issue as merits being remanded to the Assessing Officer. It is contended that the jurisdictional issue regarding reassessment validity cannot, therefore be raised at this stage.

4. The plea is indeed well taken, and is squarely covered, in favour of the assessee by Hon'ble jurisdictional High Court's judgment in the case of *Inventors Industrial (supra)* wherein Their Lordship has, *inter alia*, observed as follows:-

*In order to answer the question of law referred to us, it is first necessary to consider the nature of the new ground raised, i.e., whether it really questions the jurisdiction of the Income-tax Officer to make reassessment, in other words, whether it goes to the very root of the matter. We will then have to consider whether such a ground can be raised for the first time before the Appellate Assistant Commissioner, jurisdiction to make reassessment not having been challenged before the Income-tax Officer himself. Lastly, we will have to consider whether the fact of such a ground not having been raised in the earlier appeal against the order of reassessment completed under section 147/143(3) would make any difference in the legal position.*

*For this purpose, it is desirable to refer to the new ground urged by the assessee in appeal in the words of the Appellate Assistant Commissioner himself:*

*"Mr. Mehta attended before he has first challenged the validity of the initiation of the proceedings under section 147(a) of the Act. In his view, the said provisions of section 147(a) can be invoked only in a case where the Income-tax Officer had reason to believe that by reason of the omission or failure on the part of the assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts for the assessment for that year, income chargeable to tax had escaped assessment for that year ..." (Note : the original order contains grammatical mistakes and typing errors. The extracted portion reproduced as it is.)*

*Having regard to the following observations of the Supreme Court in the case of CIT v. Kurban Hussain Ibrahimji Mithiborwala [1971] 82 ITR 821, 823:*

*"It is well-settled that the Income-tax Officer's jurisdiction to reopen an assessment under section 34 depends upon the issuance of a valid notice. If the notice issued by him is invalid for any reason, the entire proceedings taken by him would become void for want of jurisdiction."*

*and the following observations of the Supreme Court in Johri Lal (HUF) v. CIT [1973] 88 ITR 439, 441 :*

*"Before proceedings under section 34(1)(a) could be validly initiated, the Income-tax Officer must have reasons to believe that by reason of the omission or failure on the part of the assessee to make a return of his income under section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits and gains chargeable to income-tax have escaped assessment for that year, or have been underassessed, or assessed at too low a rate, or have been made the subject matter of excessive relief under the Act, or excessive loss or depreciation allowance have been computed. The formation of the required opinion by the Income-tax Officer is a condition precedent. Without formation of such an opinion he will not have jurisdiction to initiate proceedings under section 34(1)(a). The fulfilment of this condition is not a mere formality but it is mandatory. The failure to fulfil that condition would vitiate the entire proceedings ..."*

*we hold that the formation of belief by the Income-tax Officer to the effect that income of the assessee had escaped assessment is one of the conditions precedent for the assumption of jurisdiction to make a re-assessment. Placing reliance on section 21 of the Code of Civil Procedure and the Supreme Court decision in the case of Director of Inspection of Income-tax (Investigation) v. Pooran Mall and Sons [1974] 96 ITR 390, it was suggested on behalf of the Revenue that all cases of challenge to jurisdiction did not result in making an order of reassessment a nullity. There was a marked distinction between want of basic or inherent jurisdiction and irregular exercise of jurisdiction and that, in the present case, the Income-tax Officer had basic and/or inherent jurisdiction to make an order of reassessment on the assessee and the assessee was merely questioning the initiation of the reassessment proceedings. With respect, we do not see any merit in this submission on behalf of the Revenue for more than one reason. In the first place, in view of the Supreme Court judgments referred to in the earlier paragraph, it must be shown by the Revenue that the material relied on had a nexus to the formation of the belief that the assessee's income had escaped assessment and formation of the requisite belief must be considered as one of the conditions precedent for the assumption of jurisdiction to make assessment under section 148. Secondly, it has also been held by the Supreme Court in a number of judgments that assessment made under section 148/143(3) without the valid formation of belief as to the escapement of income is void ab initio or a nullity. For this purpose, it is desirable to refer to another Supreme Court decision in the case of Superintendent of Taxes v. Onkarmal Nathmal Trust, AIR 1975 SC 2065, where in the context of the provisions of section 7 of the Assam Taxation (On Goods Carried by Road or on Inland Waterways) Act (10 of 1961), it was held that the provision which confers jurisdiction for assessment and reassessment could never be waived for the simple reason that the jurisdiction could neither be waived nor created by consent. His Lordship Beg J., as he then was, pointed out in his concurring judgment at page 2077 that, if the notice under section 7(2) was a condition precedent to the exercise of jurisdiction to make the best judgment assessment, the doctrine of waiver could never confer jurisdiction so as to enable parties to avoid the effect of violating a mandatory provision on a jurisdictional matter even by agreement. Accordingly, this ground raised before the Appellate Assistant Commissioner, in our judgment, questioned the very jurisdiction of the Income-tax Officer to make a reassessment and was as such a ground that went into the root of the matter.*

*This takes us to the second aspect of the question, namely, whether such a ground could be taken before the Appellate Assistant Commissioner, the assessee not having challenged the jurisdiction of the Income-tax Officer to make a reassessment before the Income-tax Officer himself. This aspect, in our view, does not present any difficulty at all in view of the recent judgment of the Supreme Court in the case of Jute Corporation of India Ltd. v. CIT [1991] 187*

*ITR 688, which is specifically on the question of jurisdiction of the Appellate Assistant Commissioner or the Commissioner of Income-tax (Appeals). The Supreme Court, it may be stated, in that case, referred to its earlier decision in Add. CIT v. Gurjargravures P. Ltd. [1978] 111 ITR 1 and explained and distinguished the same. The law in this regard is, thus, to be taken as settled. The powers of the first appellate authority, whether the Appellate Assistant Commissioner or the Commissioner of Income-tax (Appeals) are coterminous with those of the Income-tax Officer, subject to the limit that these authorities could do all that the Income-tax Officer could do or have done. It is a different thing whether, in a given case, these authorities might or might not entertain a ground not urged before the Income-tax Officer in the exercise of their judicial discretion. It cannot, however, be said that they have no jurisdiction to do so. Accordingly, we hold that the Appellate Assistant Commissioner had jurisdiction to entertain the impugned ground urged before him by the assessee even though the jurisdiction to make reassessment as such was not challenged before the Income-tax Officer.*

*Coming now to the third and the last aspect of the question, pertinent facts may be stated once again. What has been held by us so far is applicable to a case in which a ground is taken for the first time before the Appellate Assistant Commissioner in appeal against the original assessment or reassessment. In the present case, in the appeal against the original or the first order of reassessment, the order of assessment was not challenged on the ground of jurisdiction. The only ground taken was that the Income-tax Officer was not justified in rejecting the assessee's explanation as regards genuineness of certain cash credits and that if proper opportunity was given, the assessee could prove the genuineness of the cash credits. The Appellate Assistant Commissioner accepted the assessee's contention and he, with the consent of the Income-tax Officer who was present, set aside the assessment for the purpose. The assessee had not even challenged the jurisdiction of the Income-tax Officer to make a reassessment when he was making the reassessment after giving the assessee an opportunity in pursuance of the aforesaid order of the Appellate Assistant Commissioner. In the appeal filed by the assessee for the second time before the Appellate Assistant Commissioner against an order of reassessment on remand, the ground challenging the jurisdiction of the Income-tax Officer to make the reassessment was not taken. This was taken as an additional ground at the time of hearing of appeal against the fresh order of reassessment passed on remand. It is in this background that it was strongly urged on behalf of the Revenue that the jurisdiction of the Income-tax Officer to make a fresh reassessment in pursuance of the order of the Appellate Assistant Commissioner itself being limited, the jurisdiction of the Appellate Assistant Commissioner in an appeal against such an order of reassessment must necessarily be limited and, therefore, the Tribunal justifiably held that the Appellate Assistant Commissioner had no jurisdiction to admit such a ground. Great emphasis was laid on the fact that in both the Gujarat High Court decisions relied upon by Shri Sathe, the fresh or new ground was taken in the same or original proceedings and not in the second round of proceedings unlike the case before us.*

*The question to be considered is as to whether the assessee has to urge the plea of lack of jurisdiction before the Income-tax Officer would make any material difference qua ground challenging the jurisdiction to initiate re-assessment proceedings. For this purpose, it is necessary to refer to our court's judgment in CWT v. N.A. Narielwalla [1980] 126 ITR 344. Referring, with approval, to the Punjab and Haryana High Court decision in the case of Vijay Kumar Jain v. CIT [1975] 99 ITR 349, our court held that a ground by which the jurisdiction of the Income-tax Officer to make assessment is challenged can be allowed to be taken in an appeal before the Tribunal even though such a ground was not taken before the Income-tax*

*Officer or the Appellate Assistant Commissioner. The facts in that case were that for the assessment year 1961-62, the Wealth-tax Officer, acting under section 19A, had assessed the wealth of the deceased in the hands of the executor. On appeal, the Appellate Assistant Commissioner confirmed the assessment order. On appeal to the Tribunal, a new ground was taken for the first time that section 19A was introduced in the Wealth-tax Act with effect from April 1, 1965, and the assessment was, therefore, without jurisdiction. The Tribunal entertained the ground and our court upheld the order of the Tribunal. In Ugar Sugar Works Ltd. v. CIT [1983] 141 ITR 326, our court was faced with a similar problem. In this case, the question of the Tribunal's jurisdiction was considered at length. It was held that the Tribunal's jurisdiction under section 254 was restricted to passing of orders on the subject-matter of the appeal though within the four corners of the subject-matter of appeal. However, within the four corners of that jurisdiction, the Tribunal was clothed with almost the same powers as those of the Appellate Assistant Commissioner except that of enhancement. The judgment in CWT v. Narielwalla (N.A.) [1980] 126 ITR 344 (Bom) was noticed and not adversely commented upon. It was distinguished observing that (headnote) :*

*"The question as to the initial jurisdiction in making an order would stand on a different footing, as in such cases the question of jurisdiction of the Income-tax Officer would always be present as a part of the subject-matter of the appeal at all stages of the appeal, either before the Appellate Assistant Commissioner or the Tribunal, as, such jurisdiction is always presumed to be existing in an authority before the passing of the order."*

*In CIT v. Belapur Sugar and Allied Industries Ltd. [1983] 141 ITR 404, our court followed the decision in CWT v. Narielwalla (N.A.) [1980] 126 ITR 344 (Bom) and held (headnote) :*

*"... that the earlier notices issued under section 148 of the Income-tax Act, 1961, that is, the three notices issued on March 31, 1965, March 31, 1965, and December 10, 1965, respectively, were invalid, because by that time the determination under section 163 of the said Act had not properly taken place. Since these notices were invalid, the reassessment done in pursuance thereof was also invalid."*

*Thus, so far as our court is concerned, it can be taken to be settled law that a point which goes to the jurisdiction of the assessment can be allowed to be taken in an appeal before the Tribunal even though it was not taken before the Income-tax Officer or the Appellate Assistant Commissioner.*

*We find that the Supreme Court also, in the case of R.J. Singh Ahluwalia v. State of Delhi, AIR 1971 SC 1552, at p. 1553, held in the context of new ground raised before it for the first time :*

*"This ground of challenge had, of course, not been raised in either of the two courts below but since it went to the root of the case, being a jurisdictional point, we considered it just and proper to allow it to be raised."*

*Again, in the case of G.M. Contractor v. Gujarat Electricity Board, AIR 1972 SC 792 at p. 793 the Supreme Court held as under :*

*"It is stated that this ground goes to the very root of the matter but was not raised before the High Court. The appellants objected to this fresh ground being allowed to be taken up, but we*

*consider that as this ground goes to the very root of the matter, it should be allowed after the appellants are compensated by costs."*

*The Gujarat High Court has, of course, taken the very view in its two decisions in CIT v. Nanalal Tribhovandas [1975] 100 ITR 734 and P.V. Doshi v. CIT [1978] 113 ITR 22. Indirectly, the Allahabad High Court in CIT v. Hari Raj Swarup and Sons [1982] 138 ITR 462, has also taken the same view.*

*We, therefore, hold that a ground by which the jurisdiction to make assessment itself is challenged can be urged before any authority for the first time.*

*This, however, does not solve the problem before us. All the cases referred to by us above are the cases dealing with same round of litigation. In the case before us, the new ground was raised for the first time not in appeals arising out of the same proceedings. It was taken in collateral proceedings. Reassessment under section 147 was made on August 27, 1959. More or less a consent order was obtained in appeal thereagainst as a result of which the order of reassessment stood set aside for the purpose of giving an opportunity to the assessee to prove the genuineness of certain cash credits. The ground questioning jurisdiction to reassess was not raised even in the second round of proceedings before the Income-tax Officer who completed reassessment afresh on March 28, 1970. No such ground was taken originally even in the appeal filed against the second reassessment. The ground in dispute was taken at the time of hearing before the Appellate Assistant Commissioner. In view of the latest decision of the Supreme Court in the case of Jute Corporation of India Ltd. [1991] 187 ITR 688, it cannot be disputed that the assessee could have raised this ground before the Appellate Assistant Commissioner in his appeal against the first order of reassessment. The pertinent question is whether the new ground could be taken in reassessment proceedings after remand. This takes us to another aspect of the question, namely, whether the assessee could have taken such a ground before the Income-tax Officer himself in these proceedings because if he could have done so, the powers of the Appellate Assistant Commissioner being coterminous, it would be open to him to do so before the Appellate Assistant Commissioner as well. The other aspect would be whether being a ground challenging the very jurisdiction to make reassessment, such a ground could be taken before any authority and at any stage of the proceedings. In this context, it will be necessary in the first instance to ascertain the scope of fresh assessment to be made by an Income-tax Officer when the Appellate Assistant Commissioner sets aside the assessment and directs the Income-tax Officer to make fresh assessment with some directions. The legal position does not appear to be very clear on the subject. One view is that while making a fresh assessment, the Income-tax Officer has, subject to the Appellate Assistant Commissioner's directions, the same powers which he had while making the original assessment. He is entitled to disregard his own previous findings. He can take into account materials not previously existing and tax income not originally assessed. Likewise, it may be open to the assessee to raise objections to the assessment or to the quantum which he had not raised originally before him or the Appellate Assistant Commissioner. The other view is that the Income-tax Officer is, while passing orders in pursuance of the orders of the appellate authority, required to consider only those matters about which there was a dispute before the appellate authority and directions had been given. Even where the appellate order does not contain such specific directions, under certain circumstances, it may have to be read as remitting the case only on the issues in appeal and, in that event also, the Income-tax Officer cannot re-examine other issues. Consequently, the assessee may not be able to raise contentions which were not raised by him in the original proceedings.*



*By order*

*Assistant Registrar/Sr. PS*  
*Income Tax Appellate Tribunal*  
*Mumbai benches, Mumbai*