

APPEALS AND REVISION

Some key points

Condonation of delay by High Court in respect of statement of case [Section 256(2A)]

The Finance Act, 2010 has inserted sub-section (2A) to section 256 with retrospective effect from 01.06.1981 whereby the High Court may admit an application after the expiry of the period of six months referred to in sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

Condonation of delay by High Court in respect of appeal [Section 260A(2A)]

The Finance Act, 2010 has inserted sub-section (2A) to section 260A with retrospective effect from 01.10.1998 whereby the High court may admit an appeal after the expiry of the period of 120 days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within the prescribed time.

Tests to determine whether there is substantial question of law

The Apex Court in *Sir Chunilal V. Mehta & Sons Ltd v. Century Spinning & Mfg Co Ltd AIR 1962 SC 1314* has laid down the following tests to determine whether there is a substantial question of law –

- (a) whether directly or indirectly it affects the substantial rights of the parties; or
- (b) the question is of general public importance; or
- (c) whether it is an open question in the sense that the issue is not settled by pronouncement of the Supreme Court or Privy Council or by the Federal Court; or
- (d) the issue is not free from difficulty; and
- (e) it calls for a discussion for alternative view.

Question 1

Can a rectification order under section 254 of the Income-tax Act be passed by the Income-tax Appellate Tribunal beyond four years from the date of the order sought to be revised?

Answer

The issue as to whether a rectification order can be passed by the Income-tax Appellate Tribunal under section 254 beyond four years from the date of its order sought to be rectified has been

Direct Tax Laws

addressed in *Sree Ayyanar Spinning and Weaving Mills Ltd. v. CIT* (2008) 301 ITR 434 (SC). Section 254(2), dealing with the power of the Appellate Tribunal to pass an order of rectification of mistakes, is in two parts. The first part refers to the *suo motu* exercise of the power of rectification by the Appellate Tribunal, whereas the second part refers to rectification on an application filed by the assessee or Assessing Officer bringing any mistake apparent from the record to the attention of the Appellate Tribunal. Where the application for rectification is made within four years from the date of the order, the Appellate Tribunal is bound to decide the application on merits and cannot reject the same on the ground of limitation.

Question 2

An Income-tax authority did not file an appeal to the Income-tax Appellate Tribunal against an order of the Commissioner (Appeals) decided against the Income tax department on a particular issue in case of one assessee, Alpi for assessment year 2008-09 on the ground that the tax effect of such dispute was less than the monetary limit prescribed by CBDT. In assessment year 2009-10, similar issue arose in the assessments of Alpi and her sister Palki, which was decided by the Commissioner (Appeals) against the Department. Can the Income-tax department move an appeal to the Tribunal in respect of A.Y.2008-09 against the orders of the Commissioner (Appeals) for Alpi and her sister Palki?

Answer

Under section 268A(1), the CBDT is empowered to issue orders, instructions or directions to the other income-tax authorities, fixing such monetary limits, as it may deem fit, to regulate filing of appeal or application for reference by any income-tax authority.

Under section 268A(2), where an income-tax authority has not filed any appeal or application for reference on any issue in the case of an assessee for any assessment year, due to above-mentioned order/instruction/direction of the CBDT, such authority shall not be precluded from filing an appeal or application for reference on the same issue in the case of the same assessee for any other assessment year or any other assessee for the same or any other assessment year. Further, in such a case, it shall not be lawful for an assessee to contend that the income-tax authority has acquiesced in the decision on the disputed issue by not filing an appeal or application for reference in any case.

In view of above provision, it would be in order for the Income-tax Department to move an appeal to the Tribunal against the orders of the CIT(A) in respect of A.Y.2009-10 both for Alpi and Palki.

Question 3

A petition for stay of demand was filed before ITAT by XYZ Ltd. in respect of a disputed demand for which appeal was pending before it, on which stay was granted by the ITAT vide order dated 1.1.2010. The bench could not function thereafter till 1.2.2011 and therefore, the disputed matter could not be disposed off. The Assessing Officer attached the bank account on 16.2.11 and recovered the amount of Rs.15 lacs against the arrear demand of Rs.25 lacs.

The assessee requested the Assessing Officer to refund back the amount as it holds stay over it. The Assessing Officer rejected the contention of the assessee. Now the assessee seeks your opinion.

Answer

The Appellate Tribunal may, on merit, pass an order of stay in any proceedings relating to an appeal. However, such period of stay cannot exceed 180 days from the date of such order. The Appellate Tribunal has to dispose off the appeal within this period of stay. Where the appeal has not been disposed off within this period and the delay in disposing the appeal is not attributable to the assessee, the Appellate Tribunal can further extend the period of stay originally allowed. Section 254(2A) provides that the aggregate of the period originally allowed and the period or periods so extended or allowed shall not, in any case, exceed 365 days, even if the delay in disposing of the appeal is not attributable to the assessee. If the appeal is not disposed of within such period or periods, the order of stay shall stand vacated after the expiry of such period or periods.

Accordingly, even if an appeal is not heard by the bench, say, due to the bench not functioning or due to the department seeking adjournment, the stay granted by the Appellate Tribunal shall stand vacated after the period of 365 days, inspite of the assessee having taken all steps to ensure speedy disposal of the appeal and having a good prima facie case.

In the present case, the period of 365 days has expired on 31.12.2010, after which date the order of stay stands vacated. Accordingly, the recovery of Rs.15 lacs against the arrear demand of Rs.25 lacs made by the Assessing Officer is in order.

Question 4

An assessee who had been served with an order of assessment passed under section 143(3) read with section 147 on 1.1.2011 had filed an application against this order before the CIT as per section 264 on 11.1.2011. However, the CIT refused to entertain the application on the pretext of premature application. Assessee seeks your opinion.

Answer

An assessee, who is aggrieved by the order of the Assessing Officer under section 143(3) read with section 147 passed on 1.1.2011, had moved an application for revision of order under section 264 on 11.1.2011. The order passed by the Assessing Officer under section 143(3) read with section 147 is an order appellable before the Commissioner (Appeals). The time limit for filing an appeal is 30 days from the date of order i.e. upto 31.1.2011. This time limit had not expired on 11.1.2011 and the assessee had also not waived his right of appeal while filing the application for revision on 11.1.2011 before the Commissioner of Income-tax. The application filed before the Commissioner of Income-tax for revision under section 264 by the assessee will only be considered when the conditions specified under section 264(4) have been complied with. One of the conditions is that the Commissioner shall not revise any order where an appeal against the order lies to the Commissioner (Appeals) or Appellate Tribunal and the time within which such

Direct Tax Laws

appeal may be made has not expired, unless the assessee has waived his right of appeal. In the present case, the time limit had not expired on 11.1.2011 and the assessee had also not waived the right of appeal while filing the application for revision before the Commissioner of Income-tax on 11.1.2011 under section 264. Therefore, the Commissioner's refusal to entertain such application is correct.

Note : In real life situations, the Commissioner could have kept the proceedings in abeyance till the expiry of the time prescribed for filing appeal by the assessee and thereafter could have assumed jurisdiction for making revision besides taking an undertaking from the assessee for waiving his right of appeal. In reality taxpayers usually will not prefer revision in such short time period nor would the Commissioner reject the application, the moment it is received by him.

Question 5

- (a) *The Commissioner of Income-tax issued notice to revise the order passed by an Assessing Officer under section 143. During the pendency of proceedings before the Commissioner, on the basis of material gathered during survey under section 133A, the Commissioner of Income-tax issued a second notice, the contents of which were different from the contents of the first notice. State with reasoning whether the action of the Commissioner is justified as to the second notice.*
- (b) *State the circumstances where the appellant shall be entitled to produce additional evidence, oral or documentary, before the Commissioner of Income-tax (Appeals) other than the evidence produced during the proceedings before the Assessing Officer.*

Answer

- (a) The action of the Commissioner in issuing the second notice is not justified. The term "record" has been defined in clause (b) of *Explanation* to section 263(1). According to this definition "record" shall include and shall be deemed always to have included all records relating to any proceeding under the Act available at the time of examination by the Commissioner. In other words, the information, material, report etc. which were not in existence at the time the assessment was made and came into existence afterwards can be taken into consideration by the Commissioner for the purpose of invoking his jurisdiction under section 263(1). However, at the same time, in view of the express provisions contained in clause (b) of the *Explanation* to section 263(1), such information, material, report etc. can be relied upon by the Commissioner only if the same forms part of record when the action under section 263 is taken by the Commissioner,

Issuance of a notice under section 263 succeeds the examination of record by Commissioner. In the present case, the Commissioner initially issued a notice under section 263, after the examination of the record available before him. The subsequent second notice was on the basis of material collected under section 133A, which was totally unrelated and irrelevant to the issues sought to be revised in the first notice.

Accordingly, the material on the basis of which the second notice was issued could not be said to be "record" available at the time of examination as emphasised in *Explanation (b)* to section 263(1).

- (b) As per Rule 46A(1) of the Income-tax Rules 1962, an appellant shall be entitled to produce before the Commissioner (Appeals), evidence, either oral or documentary, other than the evidence produced by him during the course of proceedings before the Assessing Officer, only in the following circumstances -
- (a) where the Assessing Officer has refused to admit evidence which ought to have been admitted; or
 - (b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer; or
 - (c) where the appellant was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal; or
 - (d) where the Assessing Officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

Question 6

Discuss the correctness or otherwise of the following propositions in the context of the Income-tax Act, 1961:

- (a) *The powers of the Commissioner of Income-tax (Appeals) to enhance the assessment are plenary and quite wide.*
- (b) *At the time of hearing of rectification application, the Income-tax Appellate Tribunal can re-appreciate the evidence produced during the proceedings of the appeal hearing.*
- (c) *The High Court cannot interfere with the factual finding recorded by the lower authorities and the Tribunal, without any valid reasons.*

Answer

- (a) The proposition is correct in law. The Supreme Court has, in *CIT vs. McMillan & Co. (1958) 33 ITR 182* and *CIT vs. Kanpur Industrial Syndicate (1964) 53 ITR 225*, held that in disposing of an appeal before him, the appellate authority can travel over a whole range of the assessment order. The scope of his powers is co-terminus with that of the Assessing Officer. He can do what the Assessing Officer can do and can also direct him to do, what he has failed to do. He can assess income from sources which have been considered by the Assessing Officer but not brought to tax. He can consider every aspect of the assessment order and give appropriate reliefs.

The Allahabad High Court has, in *CIT v. Kashi Nath Chandiwala (2006) 280 ITR 318*, held that the appellate authority is empowered to consider and decide any matter arising

out of the proceedings in which the order appealed against was passed notwithstanding the fact that such matter was not raised before him by the assessee. The Commissioner (Appeals) is entitled to direct additions in respect of items of income not considered by the Assessing Officer.

Further, the Apex Court has, in the case of *Jute Corporation of India Ltd. vs. CIT* (1991) 187 ITR 688, held that the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. He also has the jurisdiction to permit the appellant to raise an additional ground, if the ground became available subsequently because of change in law or because of change in circumstances and such ground could not have been raised at the time of filing the return or at the time of making an assessment. He must be satisfied that the ground raised is *bona fide* and that the same could not have been raised earlier for good reasons.

Thus, the powers of the appellate authority in enhancing the assessment are very wide and plenary.

- (b) The proposition is not correct as per law. This is because section 254(2) specifically empowers the Appellate Tribunal to amend any order passed by it, either *suo-moto* or on an application made by the assessee or Assessing Officer, with a view to rectifying any mistake apparent from record, at any time within 4 years from the date of the order sought to be amended.

The powers of the Tribunal under section 254(2) relating to rectification of its order are very limited. Such powers are confined to rectifying any mistake apparent from the record. The mistake has to be such that for which no elaborate reasons or inquiry is necessary. Accordingly, the re-appreciation of evidence placed before the Tribunal during the course of the appeal hearing is not permitted. It cannot re-adjudicate the issue afresh under the garb of rectification. This issue came up for consideration before the Punjab & Haryana High Court in the case of *CIT vs. Vardhman Spinning* (1997) 226 ITR 296. The Court observed that the jurisdiction to review or modify orders passed by the authorities under the Act cannot be inferred on the basis of a supposed inherent right.

- (c) The proposition is correct in law. A finding of fact cannot be disturbed by the High Court in exercise of its powers under section 260A. The Income-tax Appellate Tribunal is a fact finding authority and the findings of fact recorded by the Tribunal can be interfered with by the High Court under section 260A only on the ground that the same were without evidence or material, or if the finding is contrary to the evidence, or is perverse or there is no direct nexus between conclusion of fact and the primary fact upon which that conclusion is based.

In *CIT vs. P. Mohanakala* (2007) 291 ITR 278 and *Commissioner of Agricultural income-tax vs. M.N.Moni* (2007) 291 ITR 387, the Apex Court observed that the High Court had set aside the factual findings of the lower authorities and the Tribunal without any valid reason. The Apex Court held that the findings of fact could not be interfered with by the High Court without carefully considering the facts on record, the surrounding

circumstances and the material evidence. There is no scope for interference with the factual findings, unless the findings are *per se* without reason or basis, perverse and/or contrary to the material on record.

Question 7

Answer the following in the context of provision contained in Income-tax Act, 1961:

Assessment for A.Y. 2008-09 was completed as per section 143(3) considering the various claims so made by the assessee on 23.12.2009. Subsequently, this was reopened under section 147 on certain issues, but excluding the claim of the assessee as to "Lease Equalisation Fund". The order of reassessment was passed on 24.11.2010. The Commissioner within the powers vested under section 263 passed an order on 11.4.2012 rejecting the claim of assessee as to "Lease Equalisation Fund". The assessee challenges that the action of the CIT is not sustainable because the same was barred by limitation.

Answer

This issue was settled by the Supreme Court in *CIT v. Alagendran Finance Ltd. (2007) 293 ITR 1*. The Supreme Court observed that though there was no doubt that once an order of assessment is reopened, the previous assessment will be held to be set aside and the whole proceedings would start afresh, however, it 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. The doctrine of merger would apply only in a case where the subject-matter of reassessment and the subject-matter of assessment are the same. However, in this case, the revision proceedings related to Lease Equalisation Fund, which was not the subject matter of reassessment. Therefore, the doctrine of merger does not apply in this case.

Section 263(2) provides no order shall be made under section 263(1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. The period of limitation as referred to in section 263(2) relates to the assessment in which the claim of the assessee as to Lease Equalisation Fund was considered by the Assessing Officer. This issue was not the subject matter of reassessment proceedings.

Accordingly, the period of limitation shall be reckoned with reference to the original assessment order and not from the date of the order of reassessment. Therefore, in this case, the revision proceedings are barred by limitation since the original assessment order was made on 23.12.2009 and the revision should have been made by 31.3.2012.

Question 8

An assessee, who is aggrieved by all or any of the following orders, is desirous to know the available remedial recourse and the time limit against each under the Income-tax Act, 1961:

- (i) passed under section 143(3) by the Assessing Officer.*
- (ii) passed under section 263 by the CIT.*

Direct Tax Laws

(iii) *passed under section 272A by the Director General.*

(iv) *passed under section 254 by the ITAT.*

Answer

- (i) An assessee, aggrieved by the order passed under section 143(3) by the Assessing Officer, can file an appeal before the Commissioner of Income-tax (Appeals) under section 246A(1) within 30 days of the date of service of the notice of demand relating to the assessment. However, where the assessee does not want to prefer an appeal, then he can move a revision petition before the Commissioner of Income-tax under section 264 within a period of one year from the date of on which the order was communicated to him or the date on which he otherwise came to know of it, whichever is earlier.
- (ii) An assessee, aggrieved by the order passed under section 263 by the Commissioner of Income-tax, can file an appeal to Income-tax Appellate Tribunal under section 253(1)(c) within 60 days of the date on which the order sought to be appealed against is communicated to the assessee.
- (iii) An assessee, aggrieved by the order passed under section 272A by the Director General, can file an appeal before the Income-tax Appellate Tribunal under section 253(1)(c) within 60 days of the date on which the order sought to be appealed against is communicated to the assessee.
- (iv) An assessee, aggrieved by the order passed under section 254 by the Income-tax Appellate Tribunal, can file an appeal before the High Court under section 260A within 120 days from the date of receipt of order of Income-tax Appellate Tribunal, only where the order gives rise to a substantial question of law.

Question 9

Write a brief note on filing of memorandum of cross-objections before the Income-tax Appellate Tribunal.

Answer

Section 253(4) of the Income-tax Act, 1961 gives the respondent, in every appeal filed before the Income-tax Appellate Tribunal, a right to file a memorandum of cross-objections against any part of the order of the Commissioner (Appeals). This right of filing a memorandum of cross-objections is an independent right given to the respondent in an appeal and is in addition to the right of appeal which may or may not be exercised by the assessee or the Assessing Officer under section 253(1) or section 253(2). The memorandum of cross-objections has to be in the prescribed form and verified in the prescribed manner and has to be filed within 30 days of the receipt of notice of the appeal. The Tribunal is empowered to permit filing of memorandum of cross-objections after the expiry of the prescribed period if sufficient cause is shown. Such memorandum of cross-objections will be disposed of by the

Appellate Tribunal as if it were an appeal presented within the time specified in section 253(3). There is no fee for filing a memorandum of cross-objections.

Question 10

An appeal was preferred by the assessee to the Commissioner (Appeals) against the order of assessment made by the Assessing Officer. The appeal was allowed by the Commissioner (Appeals). The assessee later found that he was entitled to a certain deduction, which was neither claimed by him nor allowed by the Assessing Officer in the course of assessment. The issue of deduction was not raised by the assessee in the appeal before the Commissioner (Appeals) and was not considered by the Commissioner (Appeals). Examine the power of the Commissioner to revise under section 264 the order of assessment in order to allow such deduction on an application by the assessee.

Answer

Section 264(4)(c) provides that the Commissioner shall not revise an order which has been made the subject of an appeal to the Commissioner (Appeals). This bar remains unaffected by the scope of the appeal to the Commissioner (Appeals). Therefore, the fact that the relief claimed in the application filed by the assessee under section 264(1) was not the subject matter of appeal to the Commissioner (Appeals) does not alter the position that the order of assessment was the subject of the appeal.

The Supreme Court has, in *Hindustan Aeronautics Ltd. v. CIT (2000) 243 ITR 808*, held that the Commissioner has no power to revise any order under section 264, if the order has been made subject to an appeal to the Appellate Tribunal, even if the relief claimed in the revision is different from the relief claimed in the appeal.

The word 'order' in section 264(4)(c) refers to the order appealed against and not to the relief claimed in appeal. In view of this, the Commissioner cannot exercise his powers under section 264 to revise the order of assessment and allow the deduction claimed by the assessee in his application.

Question 11

S, an individual, filed his return of income for the assessment year 2010-11 erroneously offering for taxation, interest received from notified Relief Bonds exempt under section 10(15)(iic), in the said return. The Assessing Officer completed the assessment under section 143(3) on 20.4.2011 accepting the income returned by S. S had furnished complete particulars relating to the interest income in the return of income. S approaches you for advice regarding the steps to be taken to secure exemption of the income. Advise S about the various remedies available under the Income-tax Act, 1961 for the redressal of his grievance.

Answer

S can file an appeal under section 246A, against the order of assessment, to the Commissioner (Appeals). The law is well settled that an appeal can be filed by an assessee even against inclusion in assessment, of such income erroneously included by him in the return of income. Reliance is placed on the decision of the Delhi High Court in *CIT v. Bharat General Reinsurance Co. Ltd.* (1971) 81 ITR 303.

If an assessee makes a mistake in submitting a return of income and submits to be assessed on a particular income before the assessing authority, he is not estopped or precluded by law from preferring an appeal and showing to the appellate authority that the income is, in fact, either wholly or partly, not exigible to tax. If such a contention is taken, it is the duty of the appellate authority to examine the matter and determine the proper tax leviable. There is no question of invoking the doctrine of estoppel in such a case [*Narsepalli Oil Mills v. State of Mysore* (1973) 32 STC 599 (Mys.)]

In the alternative, S can file a revision petition under section 264 with the Commissioner of Income-tax seeking exemption of interest from Relief Bonds, not claimed in the return of income and not allowed in the order of assessment.

The other course of action S could take is to file an application under section 154 with the Assessing Officer, seeking rectification of the order of assessment made. The consistent judicial view is that exemption not claimed by the assessee and not allowed by the Assessing Officer, though the material relating thereto was in the return of income, constitutes a mistake apparent from the record within the meaning of section 154 of the Act.

Question 12

The assessment of Ashok for assessment year 2009-10 was completed under section 143(3) on 15th January, 2011. The Commissioner acting under section 263 directed the Assessing Officer to add certain amount appearing in the balance sheet in total income of Ashok.

Ashok did not challenge the order of the Commissioner under section 263 by filing appeal to the Tribunal. The Assessing Officer passed a fresh assessment order on 1st October, 2011 including the said amount in total income of Ashok pursuant to the order of the Commissioner.

Ashok disputed the fresh assessment order in appeal to Commissioner (Appeals) under Section 246A. The Commissioner (Appeals) dismissed the appeal on the ground that the Assessing Officer only complied with direction of the Commissioner under section 263, which was not disputed by Ashok in appeal to Tribunal. Examine the correctness of the stand taken by the Commissioner (Appeals).

Answer

An assessee can file an appeal to the Tribunal against the order passed by the Commissioner u/s 263. However, in this case, the assessee did not file any appeal to the Tribunal against the order of the Commissioner u/s 263. He waited for the fresh assessment order to be

passed by the Assessing Officer in pursuance of the direction of the Commissioner. The order of any fresh assessment made under section 150 pursuant to a direction contained in an order of revision under section 263 is itself appealable under section 246A(1)(b). Therefore, the mere fact that the assessee did not dispute the order of the Commissioner by filing an appeal to the Tribunal does not take away the right of the assessee to dispute the fresh assessment order by filing appeal to Commissioner (Appeals) u/s 246A. Therefore, the stand taken by the Commissioner (Appeals) is not correct in law.

Question 13

Discuss the following propositions:

- (i) *The Income Tax Appellate Tribunal cannot admit additional evidence during the hearing of the appeal.*
- (ii) *The Commissioner of Income Tax can revise an order during the pendency of an appeal before the First Appellate Authority.*
- (iii) *The Commissioner of Appeals cannot admit an appeal filed beyond 30 days from the date of receipt of order by an Assessee.*

Answer

- (i) Rule 29 of Appellate Tribunal Rules, 1963 deals with production of additional evidence before the Appellate Tribunal.

The parties to the appeal shall not be entitled to produce additional evidence, either oral or documentary, before the Tribunal. However, the following are the exceptions to this rule –

- (a) where the Tribunal requires any document 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
- (b) where 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 the them.

In case (a) above, the Tribunal may allow such document to be produced or witness to be examined or affidavit to be filed.

In case (b) above, the Tribunal may allow such evidence to be adduced.

However, in both cases, the Tribunal should record its reasons in writing.

- (ii) Revision of orders by the Commissioner can be carried out under section 263 or section 264.

Revision of orders prejudicial to the interest of revenue [Section 263]

Section 263(1)(c) provides that if an order passed by the Assessing Officer has been the subject matter of any appeal, the same cannot be revised. However, at the same time,

the power of the Commissioner under sub-section (1) of section 263 shall extend to such matters as had not been considered and decided in such appeal.

Revision of other orders [Section 264]

The Commissioner shall not revise any order under section 264, where an appeal against the order lies to the Commissioner (Appeals) or to the Appellate Tribunal, but it has not been made and the time within which such appeal may be made has not expired. However, if the assessee has waived his right of appeal, the Commissioner can revise the order under this section.

- (iii) As per section 249(3) of the Income-tax Act, the Commissioner (Appeals) may admit an appeal after the expiry of the period of 30 days specified in section 249(2) if he is satisfied that the appellant had sufficient cause for not presenting the appeal within the prescribed time.

Question 14

An assessee is aggrieved by the order of the Assessing Officer and requests you to contest the same by filing an appeal before the Commissioner of Income-tax (Appeals) as well as by filing a revision petition before the Commissioner under section 264 of the Act. Can the assessee invoke simultaneously both the remedies against the order of the Assessing Officer.

Answer

Section 264(4) provides that the Commissioner shall not revise any order under section 264 in the following cases –

- (a) Where any appeal against the order lies to the Commissioner (Appeals) or to the Appellate Tribunal but has not been made and the time within which such appeal may be made has not expired or, in the case of an appeal to the Commissioner (Appeals) or the Appellate Tribunal the assessee has not waived his right of appeal ; or
- (b) Where the order has been made the subject of an appeal to the Commissioner (Appeals) or to the Appellate Tribunal.

Even though the provisions of section 246A do not specifically bar an appeal being filed simultaneously along with a revision petition under section 264, it is clear from a reading of section 264 that the assessee is barred from seeking revision unless he has waived the right of appeal.

Therefore, it is clear that the assessee can either apply for revision before the Commissioner under section 264 or file an appeal before the Commissioner of Income-tax (Appeals), but cannot invoke both the remedies simultaneously.

Question 15

An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal if the High Court is satisfied that the case involves a substantial question of law. Under what circumstances does a question become a substantial question of law?

Answer

To be a substantial question of law, the issue must be debatable and not previously settled by the law of the land or a binding precedent. It must have a material bearing on the decision of the case, in so far as the rights of the parties before it are concerned., It means having substance, essential, real, important or considerable. It is to be understood as something in contradistinction with technical or academic.

To be a substantial question there must be foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by the Court of facts. If the appraisal of the evidence suffers from a material irregularity or is based on inadmissible evidence or from conjectures or surmises, it gives rise to a substantial question of law. [Santosh Hazari v. Purushottam Tiwari 251 ITR 84 (SC)].

Question 16

In the assessment of a firm, the Assessing Officer made two additions (i) Unexplained cash credits Rs.1 lac. (ii) Disallowance under section 43B. The firm filed an appeal before the CIT and being unsuccessful before the Appellate Tribunal only on the addition of unexplained cash credits. It was not successful in either forum. With regard to the disallowance under section 43B, it did not file any appeal, but preferred a revision petition before the CIT under section 264, who dismissed it on the ground that the assessment was the subject matter of an appeal to the Appellate Tribunal. The assessee relies on the Board's circular under which the CIT is empowered to accept such a petition. Is the petition maintainable?

Answer

The Supreme Court in *Hindustan Aeronautics Ltd v. CIT* (248 ITR 898) has laid at rest any controversy on this point. It has held that under section 264, the Commissioner has no power to revise any order which has been made the subject matter of an appeal to the Appellate Tribunal, even if the relief claimed in the petition is different from the relief claimed in appeal. With regard to the Board's circular, the instructions are, no doubt, binding on the authorities under the Act but where the Supreme Court or High court has declared the law on the question arising for consideration, it will not be open to a court to direct that a circular would be given effect to, over-riding the order of the High Court or Supreme Court.

Question 17

Discuss the correctness or otherwise of the following with reference to the provisions of the Income-tax Act.

Direct Tax Laws

- (i) *Commissioner (Appeals) has no power to decide a matter that was not raised before him.*
- (ii) *The Income-tax Appellate Tribunal cannot amend its orders*
- (iii) *A case before the Appellate Tribunal cannot be dealt when there is a difference of opinion amongst the members of the Bench*
- (iv) *An appeal shall lie to the High court against the order of the Tribunal.*

Answer

- (i) This proposition is not correct. Under the Explanation to section 251(2) the Commissioner (Appeals) in disposing of an appeal, may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, even if such matter was not raised before him by the appellant. The power of admission of any grounds of appeal is conferred on the CIT (Appeals) under section 250(5), if he is satisfied that the omission in the grounds of appeal was not wilful or unreasonable.
- (ii) The proposition is not correct. Under section 254(2), the Tribunal may, within four years from the date of the order, rectify any mistake apparent from record if it is brought to its notice either by the Assessing Officer or by the assessee. However, an amendment which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the assessee shall not be made unless a notice has been given to the assessee of the intention to do so and a reasonable opportunity of being heard has been given. The Tribunal, however, has no inherent power to review its own order.
- (iii) This proposition has been negatively stated and is not correct. Under section 255(4), if the members of a Bench of the Tribunal differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority. If the members are equally divided, they shall state the point or points on which they differ and the case shall be referred to the President for hearing on such point or points by one or more members of the Tribunal. Such point shall be decided according to the opinion of majority of the members of the Tribunal who heard the case, including those who first heard it.
- (iv) Under section 260A(1), an appeal shall lie to the High Court from every order passed by the Appellate Tribunal upto the date of establishment of the National Tax Tribunal, if the High Court is satisfied that the case involves a substantial question of law.

To be “substantial”, a question of law must be debatable, not previously settled by law of the land or a binding precedent and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned.