

Appeals and Revision

Some Key Points

As per section 260A(1), 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.

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.

High Court empowered to condone delay in filing of appeals

In order to clarify the true legislative intent, sub-section (2A) has been inserted in section 260A with retrospective effect from 1.10.1998 to specifically provide that the High Court has and always had the power to condone the delay and admit an appeal after the expiry of the period of 120 days, if it is satisfied that there was sufficient cause for not filing the appeal within that period.

Question 1

Discuss the correctness or otherwise of the following statements with reference to the provisions of the Income-tax Act, 1961:

- (i) *An appeal before Income-tax Appellate Tribunal cannot be decided in the event of difference of opinion between the Judicial Member and the Accountant Member on a particular ground.*
- (ii) *A High Court does not have an inherent power to review an earlier order passed by it on merits.*

Answer

- (i) The statement given is not correct. As per the provisions of section 255, in the event of difference in opinion between the members of the Bench of the Income-tax Appellate Tribunal, the matter shall be decided on the basis of the opinion of the majority of the members. In case the members are equally divided, they shall state the point or points of difference and the case shall be referred by the President of the Tribunal for hearing on such points by one or more of the other members of the Tribunal. Such point or points shall be decided according to the opinion of majority of the members of the Tribunal who heard the case, including those who had first heard it.
- (ii) The statement given is correct. As per the decision given by the High Court in the case of *Deepak Kumar Garg v. CIT (2010) 327 ITR 448*, the power to review the order passed is not an inherent power but need to be expressly provided in the statute by way of specific provisions or by way implication. It was observed that, by virtue of section 260A(7), the power of re-admission or restoration of the appeal is always enjoyed by the High Court. However, such power cannot be treated to be a power to review its earlier order on merits as it is not expressly provided for in the law.

Question 2

Does the Income-tax Appellate Tribunal have the following powers?

- (i) *Power to allow the assessee to urge any ground of appeal which was not raised by him before the Commissioner (Appeals);*
- (ii) *Power to recall its own order.*

Answer

- (i) The Income-tax Appellate Tribunal has the power to entertain question raised for the first time. The Tribunal is not confined only to the issues arising out of the appeal before the Commissioner (Appeals). It has the power to allow the assessee to urge any ground not raised before the Commissioner (Appeals). However, the relevant facts in respect of such ground should be on record. The decision of the Supreme Court in the case of *National Thermal Power Company Limited vs. CIT (1998) 229 ITR 383 (SC)* supports this view.

However, under section 80A(5), there is a restriction to this power of the Income-tax Appellate Tribunal. This section provides that where the assessee fails to make a claim in his return of income for any deduction under section 10AA or under any provision of Chapter VI-A under the heading "C.—Deductions in respect of certain incomes", no deduction shall be allowed to him thereunder.

- (ii) The Delhi High Court, in *Lachman Dass Bhatia Hingwala (P) Ltd. v. ACIT (2011) 330 ITR 243 (Delhi)(FB)* observed that the justification of an order passed by the Tribunal recalling its own order is required to be tested on the basis of the law laid down by the Apex Court in *Honda Siel Power Products Ltd. v. CIT (2007) 295 ITR 466*, dealing with the Tribunal's power under section 254(2) to recall its order where prejudice has resulted

to a party due to an apparent omission, mistake or error committed by the Tribunal while passing the order. Such recalling of order for correcting an apparent mistake committed by the Tribunal has nothing to do with the doctrine or concept of inherent power of review. It is a well settled provision of law that the Tribunal has no inherent power to review its own judgment or order on merits or reappreciate the correctness of its earlier decision on merits. However, the power to recall has to be distinguished from the power to review. While the Tribunal does not have the inherent power to review its order on merits, it can recall its order for the purpose of correcting a mistake apparent from the record.

When prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is the duty of the Tribunal to set it right. The Delhi High Court observed that the Tribunal, while exercising the power of rectification under section 254(2), can recall its order in entirety if it is satisfied that prejudice has resulted to the party which is attributable to the Tribunal's mistake, error or omission and the error committed is apparent.

Question 3

Can a rectification order under section 254 of the Income-tax Act, 1961 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 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.

If Income-tax Appellate Tribunal, *suo motu*, makes the rectification of its order, then the order has to be passed within 4 years from the date of order to be revised. Where the application for rectification is made within four years from the date of the order by the Assessing Officer or the assessee, the Appellate Tribunal is bound to decide the application on merits and not on the ground of limitation i.e. order can be passed after expiry of 4 years from date of order sought to be revised. However, the application for rectification cannot be filed belatedly after 4 years [*Ajith Kumar Pitaliya vs ITO* (2008) 167 Taxmann 24 (M.P.)]

Question 4

What do you mean by substantial question of law?

Answer

The expression “substantial question of law” has not been defined anywhere in the Act. However, it has acquired a definite meaning through various judicial pronouncements. The tests are:

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

Question 5

Examine the correctness of the following statement:

The Appellate Tribunal is empowered to grant indefinite stay for the demand disputed in appeals before it.

Answer

Section 254(2A) provides that the Appellate Tribunal, where it is possible, may hear and decide an appeal within a period of four years from the end of the financial year in which such appeal is filed.

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. However, the aggregate of period originally allowed and the period so extended should not exceed 365 days even if the delay in disposing of the appeal is not attributable to the assessee. The Appellate Tribunal is required to dispose off the appeal within this extended period. 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.

Therefore, the statement given in the question is not correct.

Question 6

Is Commissioner (Appeals) empowered to consider an appeal filed by an assessee challenging the order of assessment in respect of which the proceedings before the Settlement Commission abates?

Answer

Section 251(1) lists the powers of the Commissioner (Appeals) in disposing of an appeal. Clause (aa) of section 251(1) empowers the Commissioner (Appeals), in an appeal against the assessment order in respect of which the proceeding before the Settlement Commission abates under section 245HA, to confirm, reduce, enhance or annul the assessment after taking into consideration the following -

- (1) all the material and other information produced by the assessee before the Settlement Commission;
- (2) the results of the inquiry held by the Settlement Commission;
- (3) the evidence recorded by the Settlement Commission in the course of the proceeding before it; and
- (4) such other material as may be brought on his record.

Question 7

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 2011-12 on the ground that the tax effect of such dispute was less than the monetary limit prescribed by CBDT. In assessment year 2012-13, 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. 2012-13 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. 2012-13 both for Alpi and Palki.

Question 8

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 1.1.2013. The bench could not function thereafter till 1.2.2014 and therefore, the disputed matter could not be disposed off. The Assessing Officer attached the bank account on 16.2.2014 and recovered the amount of ₹ 15 lacs against the arrear demand of ₹ 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 31.12.2013, after which date the order of stay stands vacated. Accordingly, the recovery of ₹ 15 lacs against the arrear demand of ₹ 25 lacs made by the Assessing Officer is in order.

Question 9

An assessee who had been served with an order of assessment passed under section 143(3) on 1.1.2014 had filed an application against this order before the CIT as per section 264 on 11.1.2014. 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) passed on 1.1.2014, had moved an application for revision of order under section 264 on 11.1.2014. The order passed by the Assessing Officer under section 143(3) 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 31.1.2014. This time limit had not expired on 11.1.2014 and the assessee had also not waived his right of appeal while filing the application for revision on

11.1.2014 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 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 11.1.2014 and the assessee had also not waived the right of appeal while filing the application for revision before the Commissioner of Income-tax on 11.1.2014 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 10

- (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 after issue of the first notice, 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 11

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 Coal 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.

Thus, the powers of the Commissioner of Income-tax (Appeals) 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 12

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

The assessment for A.Y. 2011-12 was completed as per section 143(3) considering the various claims so made by the assessee on 23.12.2012. 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 24.11.2013. The Commissioner within the powers vested under section 263 passed an order on 11.4.2015 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 23.12.2012 and the revision should have been made by 31.3.2015.

Note – The difference between partial merger and total merger has been explained for the understanding of the students. The doctrine of partial merger would apply in the case of section 263.

The third proviso in section 147, inserted by Finance Act, 2008, provides that the doctrine of partial merger shall apply to reopening in a case where an assessee has filed an appeal etc. for an assessment year. It has been provided that the Assessing Officer may assess or reassess such income, other than income which has been the subject matter of any appeal or reference or revision, which is chargeable to tax and has escaped assessment. The doctrine of partial merger also holds good for section 154.

However, the concept of total merger would apply in the case of section 264. The Commissioner of Income-tax 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 and irrespective of the fact whether the appeal is by the assessee or by the Department as the concept of total/complete merger is applicable for section 264.

Question 13

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.*
- (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 14

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) or of the Deputy Commissioner (Appeals) or of the Assessing Officer in pursuance of direction of Dispute Resolution Panel. 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) of section 253(2A). 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) or section 253(3A). There is no fee for filing a memorandum of cross-objections.

Question 15

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.

Note: In case the deduction is in relation to deduction under section 10AA or deduction related to certain income under Chapter VI-A can be claimed only by way of filing of return of income. In case the assessee fails to make a claim for such deduction in the return of income, no deduction shall be allowed to him [Section 80A].

Question 16

S, an individual, filed his return of income for the assessment year 2013-14 erroneously offering for taxation, interest received from notified Relief Bonds exempt under section 10(15), in the said return. The Assessing Officer completed the assessment under section 143(3) on 20.4.2014 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.

Question 17

The assessment of Ashok for assessment year 2012-13 was completed under section 143(3) on 15th January, 2014. The Commissioner acting under section 263 directed the Assessing Officer to add a certain amount appearing in the Balance Sheet in the 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, 2014 including the said amount in the 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 under section 263. However, in this case, the assessee did not file any appeal to the Tribunal against the order of the Commissioner under section 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) under section 246A. Therefore, the stand taken by the Commissioner (Appeals) is not correct in law.

Question 18

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, 1961, 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 19

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 20

In the assessment of a firm, the Assessing Officer made two additions (i) Unexplained cash credits ₹ 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.

Hence, the petition is not maintainable.

Question 21

Discuss the correctness or otherwise of the following with reference to the provisions of the Income-tax Act, 1961.

- (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 by the President of the Appellate Tribunal 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, 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.

Question 22

Discuss how an appeal before Income Tax Appellate Tribunal can be dealt with when there is a difference of opinion amongst the members of bench.

Answer

As per section 255(4), if the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority.

However, if the members are equally divided, they should state the point or points on which they differ.

The case shall then be referred by the President of the Appellate Tribunal for hearing on such point or points by one or more of the other members of the Appellate Tribunal.

Thereafter, such point or points shall be decided according to the opinion of the majority of the members of the Appellate Tribunal who have heard the case, including those who first heard it.

Question 23

If an assessee fails to make a claim for any deduction in the return of income, he loses his opportunity for claiming such deduction at the assessment stage or subsequent stage. Do you agree with the proposition?

Answer

- (i) As per section 80A(5), where the assessee fails to make a claim in his return of income for any deduction under section 10AA or under any provision of Chapter VIA under the heading "C - Deductions in respect of certain incomes", no deduction shall be allowed to him thereunder at a later stage. However, it can be claimed through a revised return provided the time limit for filing the revised return as mentioned in section 139(5) has not expired.
- (ii) However, the restriction under section 80A(5) is not applicable for other deductions under Chapter VIA or to deductions under any particular head of income.

It may be noted that the Supreme Court in the case of *Goetze India Ltd. v. CIT 284 ITR 323* has held that a fresh claim for deduction can be made before the Assessing Officer only by filing a revised return of income.

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The Supreme Court has, however, made it clear that the adjudication was only with reference to the power of the Assessing Officer to entertain a fresh claim for deduction otherwise than through a return of income and does not impinge on the power of the Tribunal under section 254.

Therefore, if an assessee fails to claim a deduction under Chapter VIA other than deductions mentioned in section 80A(5), it

- (1) can be claimed by him by making an application for rectification of a mistake apparent from record under section 154 before an Income-tax Authority or under section 254 before the Appellate Tribunal. The availability of the impugned deduction should be apparent from the details furnished in the return of income or in the statements/details filed in case of assessment under section 143(3).
- (2) can be claimed before Commissioner (Appeals) by raising the additional ground, if the Commissioner (Appeals) is satisfied that such a ground could not have been raised at the time of filing of return or at the time of making of the assessment order and such ground became available because of change in law or change in circumstances.
- (3) can be allowed by the Income-tax Appellate Tribunal even if such an issue was not raised before lower authorities. This can be done *suo moto* or an application made by the assessee.

- (4) can be claimed under section 264 before the Commissioner of Income-tax, if the same has not been allowed by the Assessing Officer.

Therefore, the proposition that any deduction not claimed in the return of income, cannot be claimed at the assessment stage or subsequent stage is not true.

Self-examination Questions

1. Explain briefly the four stages of appeal under the Income-tax Act, 1961.
2. List ten orders appealable before the Commissioner (Appeals).
3. What are the powers which can be exercised by the Commissioner (Appeals) while disposing of an appeal?
4. Write short notes on the following -
 - (a) Constitution of Appellate Tribunal
 - (b) Time limit for disposing appeals.
5. Which are the orders against which an aggrieved assessee can file an appeal to the Appellate Tribunal?
6. Write short notes on -
 - (a) Appeal to the Supreme Court
 - (b) Provision for avoiding repetitive appeals
7. Discuss the Commissioner's powers to revise an order prejudicial to the interests of Revenue.
8. Explain the Commissioner's powers under section 264 to revise other orders.
9. The assessee, Mr. Ram, declared the cost of construction of cinema theatre at ₹ 10.53 lakh, based on the registered valuer's report. The Assessing Officer accepted the value of the theatre as declared by the assessee and completed the assessment. However, the Commissioner, on enquiry, found that the assessee had availed a loan of ₹ 17 lakh from a leasing company declaring the value of the theatre at ₹ 27.40 lakh. Therefore, the Commissioner, after giving the assessee an opportunity of being heard, set aside the order of assessment and directed the Assessing Officer to make fresh assessment after verification and enquiry. On appeal before the Tribunal, the assessee questioned the order of the Commissioner by contending that the invocation of the provision under section 263 is not sustainable in law, since there was no information relating to any proceedings under the Income-tax Act, 1961 available before the Assessing Officer which show that the assessment was erroneous and prejudicial to the Revenue. Discuss the correctness of the assessee's contention.

Answers

9. This issue was resolved by the Madras High Court in *CIT v. Dr. K. Ramachandran (2004) 139 Taxman 320*. The High Court observed that the *Explanation* to section 263 provides

that the term “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 the examination by the Commissioner. In *CIT v. Shree Manjunathesware Packing Products & Camphor Works (1998) 231 ITR 53(SC)*, the Apex Court made it clear that section 263 enables the Commissioner to call for and examine the records of any proceedings under the Act and pass such orders thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment or canceling the assessment and directing a fresh assessment, if he considers that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. For this purpose, record would include not only record which was available to the Assessing Officer at the time of passing the assessment order, but would include the records available with the Commissioner at the time of passing of the order by the Commissioner.

The High Court also relied on its earlier decision in the case of *CIT v. M.N. Sulaiman (1999) 238 ITR 139*, wherein it followed the above decision of the Supreme Court. The High Court further held that the *Explanation* added to section 263(1) in the year 1988 has to be regarded as declaratory.

Therefore, since the term “record” includes all records available at the time of passing of order under section 263 by the Commissioner and is not restricted to information available to the Assessing Officer at the time of passing the assessment order, the assessee’s contention is not correct.