

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 22-08-2016

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

WRIT APPEAL No.276 of 2016
and
C.M.P.No.4512 of 2016

Megatrends Inc
represented by its Mrs.Mita Kalpesh Patel
66, Flat No.12, Alsuha Flats,
Spur Tank Road
Chetpet, Chennai - 600 031 ... Appellant

-vs-

1.The Commissioner of Income Tax, Appeals-4
121, Mahatma Gandhi Road
Chennai - 600 034

2.The Assistant Commissioner of Income Tax
Non Corporate Circle 3
121, Mahatma Gandhi Road
Chennai - 600 034 ... Respondents

Prayer: Writ Appeal filed under Clause 15 of the Letters Patent, against the order, dated 11.02.2016 in W.P.No.37072 of 2015.

For appellant : Ms.T.C.A.Sangeetha

For respondent : Mr.T.S.Ravikumar

JUDGMENT
(made by S.MANIKUMAR, J.)

Writ appeal is directed against the order of the writ court, dated 11.02.2016 made in W.P.No.37072 of 2015 by which, the writ court, declined to interfere with the show cause notice, issued for enhancement of assessment made by the Commissioner of INcome Tax, Appeals-4, Chennai ITA No.85/2015-2016, for the Assessment Year 2012-2013.

2. Facts leading to the appeal are that the appellant, claimed that it is a partnership firm, trading in stocks, shares, debentures, manufacturing, buying, selling and

transporting of various consumer and industrial commodities. The appellant, filed its return for the Assessment year 2012-2013 on 29.09.2012, admitting, a total income of Rs.1,74,36,050/-. The return of income was processed, under Section 143(1) of the Income Tax Act, 1961 and selected for scrutiny. Details were called for, and after considering the same, explanation was given by the assessee. Assessment Order under Section 143(3) of the Income Tax Act, 1961, was passed on 30.03.2015 by the Assistant Commissioner of Income Tax, Chennai, viz. respondent No.2. He has disallowed deductions, made under Section 35(1)(ii) of the Income Tax Act, 1961, to the tune of Rs.2,62,50,000/-, and assessed the income of the assessee at Rs.4,36,86,050/-. Aggrieved by the said order, the appellant/assessee preferred an appeal, on 05.05.2015, to the Commissioner of Income Tax, Appeals-4, Chennai/1st respondent.

3. On 26.10.2015, the Commissioner of Income Tax, Appeals-4, Chennai (1st respondent), issued a notice for hearing of the appeal, fixing the date as 29.10.2015. The said notice was received by the appellant on 28.10.2015. The appellant sought time, till the fourth week of November 2015, for submitting reply.

4. Commissioner of Income Tax, Appeals-4, Chennai, issued a notice dated 6.11.2015, to show cause as to why the assessment of the appellant, should not be enhanced, pointing out that a partnership firm, cannot be a partner in a firm, and hence proposed the appellant, as an AOP (Associate of Person) and not a firm.

5. Being aggrieved by the same, appellant, has filed W.P.No.37072 of 2015 and sought for a writ of certiorari, to quash the show cause notice dated 6.11.2015, issued for enhancement of assessment made by the Assistant Commissioner of Income Tax, Appeals-4, Chennai/2nd respondent, for the Assessment Year 2012-2013.

6. Before the writ court, the appellant has contended that it is a partnership firm, originally constituted on 1.4.1997 and reconstituted vide, Partnership Deed dated 23.12.2006. Contentions have been made that, on 1.4.2011, there were some constitutional changes in the firm, wherein, some partners retired, and new partners joined the firm. Before the writ court, contention has also been made that the appellant has been assessed to income tax, for the past 17 years, as a partnership firm. Further contention has been made that, it is evident that, the Deed of Partnership proved that constituent members of a smaller firm, entering into a larger partnership firm, and that the same is valid. Reliance has also been made on the decision of the Hon'ble Apex court in Dhulichand Laxminarayan [1956] 29 ITR 535, later on, clarified by the Hon'ble Apex Court in Kylasa Sarabhaiah vs. CIT

reported in [1965] 56 ITR 219, and contentions have been that the said decision has been followed by this court, in A.Asha & Co vs. CIT reported in [1973] 87 ITR 57 .

7. Contention has also been made before the writ court, that the impugned show cause notice, is predetermined that the appellant is not a partnership firm, and the said show cause notice, proposing to disallow a sum of Rs.2,62,50,000/- is on the premise that, the appellant is not a firm. The appellant has also contended that the Commissioner of Income Tax, Appeals-4, Chennai / 1st respondent, has no jurisdiction to issue a show cause notice for enhancement of assessment.

8. Before the writ court, setting out the powers, under Section 251(1) of the Income Tax Act, 1961, the Commissioner of Income Tax, Appeals-4 / 1st respondent has submitted that an appeal proceedings is a continuation of the assessment proceedings and that therefore, the appellate authority can himself enter into the arena of assessment, either by pursuing further investigation or causing further investigation to be done. On the above proposition, reliance has been made to a Full Bench decision of this court in State of Tamil Nadu vs. Arulmurugan and Co. reported in 51 STC 381. Referring to Section 11 of the Companies Act, 1956, respondents have contended that the maximum number of persons, who can become partners, in a partnership firm is ten persons, for the purpose of carrying on the business of banking and twenty persons for the purpose of carrying on any other business.

9. The respondents have further contended that a partnership between individual members and two other firms would be valid, only when all the partners of both the firms, represent the smaller firms in the larger partnership and mere representation of one of the partners is not valid. It is also contended that a partner may have dual capacity qua the partnership in his personal capacity, and qua the third party in his representative capacity, and that the same does not confer status to the appellant, as firm, automatically, when the other conditions are omitted to be satisfied.

10. Before the writ court, on merits, contention has been made by the department that on verification of records, it was found that M/s.Krupa Trading Co. is having six partners and M/s.DCP Trading Co., and also having six partners, having office at No.67/3, Spur Tank Road, Chetpet, Chennai-31, with 14th and 15th partners, in the appellant firm, thus constituting 16 partners. It is also contended that all the partners in the above firm were not representing the appellant firm, and only one of the partners each represented their respective firms, and therefore, the appellant cannot be considered as a valid partnership firm, as per the law laid down by the Hon'ble Apex Court in Dulichand Laxminarayan v.

Commissioner of Income Tax reported in [1956] 29 ITR 535 (SC). The respondents have contended that the decisions in Kylasa Sarabhaiah vs. CIT reported in (1965) 56 ITR 219 SC followed by this court in A.Asha & Co., vs. CIT reported in (1973) 87 ITR 57 are distinguishable.

11. On the competence of the Commissioner of Income Tax, Appeals-4, Chennai / 1st respondent, in issuing the show cause notice dated 6.11.2015, the respondent has submitted that in an appeal against an order of assessment, the Commissioner of Income Tax (Appeals) may confirm, reduce, enhance or annul the assessment and therefore, challenge to the competency should be rejected. On merits, the respondents have submitted that the appellant is not a partnership firm, as claimed.

12. By filing a reply affidavit, appellant has contended that as per the decision of the Hon'ble Apex Court in Berger Paints India vs. CIT reported in (2004) 266 ITR 99 SC, rule of consistency has to be followed. For the assessment year 2011-2012, there was no such issue of this nature, raised by the respondents. The appellant has also relied on a decision of the Hon'ble Apex Court in Parshuram Pottery Works Co. Ltd. v. ITO reported in (1977) 106 ITR 01 (SC), wherein, it has been held that "we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi judicial controversies as it must in other spheres of human activity." Contention has been made that change of status of the assessee cannot be done during the course of assessment by the appellate authority. Decision of the High Court of Jharkhand in Central Coalfield Limited and ors. vs. Commissioner of Income Tax (Appeals), Ranchi has also been relied on, supporting the contention of the appellant that is a partnership firm.

13. In the sur-rejoinder filed by the respondents, at paragraph 3 of the said affidavit, it has been contended by the respondents that contents of the show cause notice dated 6.11.2015, proposing to assess the appellant as an AOP cannot be termed, as pre-determination of the issue. Further contention has been made that since the impugned show cause notice itself states, "to show cause the assessee/appellant has all the liberty to put forth its case, objecting to the basis and reasoning for the said show cause notice. Contention has also been made that show cause notice has been issued in order to provide an opportunity to the appellant, to file its reply/objections, if any, against the notice. Therefore, the issue against the appellant has not been concluded as yet, and it does not devolve that the appellant is already treated as an AOP. Reliance has been made on the decision of this court in CIT vs. Lotte India Corporation Ltd. in T.C.A.No.2279 of

2006 dated 14.09.2006. Contention on the rule of consistency emphasized by the Hon'ble Apex Court in Berger Paints Ltd. vs. CIT reported in (2004) 266 ITR 99 SC has been distinguished, by the respondents on the ground that it relates to valuation of closing stock and that the same cannot be applied to the case on hand.

14. Adverting to the above submissions and to the issue, as to whether appellant has to be termed as Associate of Person, taking note of the unreported judgment of the Jharkhand High Court, the rival contentions, on the jurisdiction of the Commissioner of Income Tax, Appeals-4, with reference to the statutory provision, Section 251(1)(a) of the Income Tax Act, 1961, and on the show cause notice issued as to why enhancement should not be made for the Assessment years 2002-03, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10, the writ court vide order dated 11.02.2016 in W.P.No.37072/2015, at paragraph Nos.11 to 14 ordered as hereunder:

"11. Since the CIT (Appeals) has expressed the doubts that the petitioner is not a Company and is seeking to reopen assessment of the petitioner company over the years, the Division Bench were of the view that the impugned show cause notices are in excess of jurisdiction and are liable to be quashed. However, the Jharkhand High Court gave liberty to to the CIT (Appeals) to issue a fresh show cause notice in accordance with law.

12. In the case on hand, the Notice under Sec.2561(1) of the Income Tax Act, issued to the petitioner on 6.11.2015 is in respect of the pending appellate proceedings for the Assessment Year 2012-13 and therefore, the judgment, relied upon by the learned counsel for the petitioner is not applicable to the present case.

13. In the show cause notice dated 6.11.2015, the respondent had called upon the petitioner to show cause as to why the amount of Rs.96,60,000/- may not be disallowed as expenditure and added back to the petitioner's taxable income for the relevant year, which is under consideration. By the impugned show cause notice, the respondent had called upon the petitioner to submit his explanation on or before 18.11.2015. Since the petitioner have to explain as to why the said amount may not be disallowed as expenditure and added back to the taxable income of the petitiioiner, they can very well submit their explanation and contest the same, on merits and in accordance with law befoer the CIT (Appeals).

14. In these circumstances, I do not find merits in the writ petition, which is liable to be dismissed. However, I give liberty to the petitioner to submit their explanation before CIT (Appeals) and make their submissions with regard to the query, raised in the impugned show cause notice dated 06.11.2015. After receiving the explanation and hearing the submissions on behalf of the petitioner, the CIT (Appeals) is directed to pass orders, on merits and in accordance with law."

15. Being aggrieved by the aforesaid order, made by the writ court, instant appeal has been filed. Vide judgment dated 23/4/2016, a Hon'ble Division Bench of this court, has allowed the writ appeal, by setting aside the order made in W.P.No.37072/2015 dated 11.02.2016. Subsequently, on 25.04.2016, the appeal has been listed under the caption "for being mentioned", and after hearing the learned counsel for the appellant, order dated 23.04.2016 has been passed recalling the earlier order dated 23.04.2016 and that Writ Appeal No.276/2016 has been directed to be listed for hearing.

16. Material on record further disclosed that as against the recalling order, the appellant has moved the Hon'ble Apex Court in S.L.P.(C) No.19815/2016.

17. On 08.08.2016, when the Writ Appeal came up for hearing, learned counsel for the appellant submitted that S.L.P.(C) No.19815/2016 filed, challenging the order made in W.A.No.276/2016 dated 25.04.2016, has been permitted to be withdrawn, with liberty to approach the High Court for appropriate relief and accordingly, orders were passed on 29.07.2016 by the Hon'ble Apex Court. We perused the copy of the order of the Apex Court. Ms.T.C.A.Sangeetha, learned counsel for the appellant submitted that she would only address the issues raised in writ appeal No.276/2016 and would not make any submissions, with reference to the order dated 25.04.2016.

18. Assailing the correctness of the order made in W.P.No.37072/2015, learned counsel for the appellant reiterated the submissions made before the writ court and contended that the Commissioner of Income Tax, Appeals-4, Chennai has exceeded in his jurisdiction, in issuing the impugned show cause notice dated 6.11.2015, changing the status of the appellant, which was not a part of the proceedings, before the Assistant Commissioner of Income Tax, Chennai/respondent No.2, the Assessing Officer. She also submitted that the first respondent has predetermined the status of the appellant. It is also her contention that

earlier, in the assessment proceedings, the appellant had disclosed all the material facts. She further submitted that the writ court has failed to consider that the Commissioner of Income Tax, Appeals -4 has not applied his mind to the facts and circumstances of the case, and also the provisions of the Income Tax Act, 1961, that a person can be a partner, representing another firm.

19. Learned counsel for the appellant further submitted that the writ court, has also erred to consider that the Commissioner of Income Tax, Appeals-4, Chennai / respondent No.1, has no jurisdiction to issue the impugned show cause notice dated 6.11.2015 for enhancement, proposing to disallow, on the premise, treating the appellant as an Associate of Person.

20. To substantiate the contention that the Commissioner of Income Tax, Appeals-4, has no power to issue a show cause notice or to enhance the assessment, reliance has been made to a decision of this court in Commissioner of Income Tax vs. Chaganlal Kailas & Co. reported in (1984) 148 ITR 7.

21. Per contra, Mr.T.S.Ravikumar, learned senior standing counsel for the Income Tax department submitted that, though rightly or wrongly, the Commissioner of Income Tax, Appeals-4, Chennai in the impugned show cause notice dated 6.11.2015 has referred the appellant as an AOP, the same is based on the perusal of the assessment records, information and facts available before the said authority and that the Commissioner of Income Tax, Appeals-4, Chennai / 1st respondent, has noticed that the appellant/assessee had been wrongly assessed, as a firm, instead of AOP. To arrive at a prima facie conclusion, the Commissioner of Income Tax, Appeals-4, Chennai has also perused schedules 1 and 2 forming part of the balance sheet, wherein, it was shown that the appellant/assessee had 13 share holders, in the status of individuals, belonging to one Patel family and two other shareholders, namely, M/s.Krupa Trading Co. having six partners and M/s.DCP Trading Co., in all, totalling up to 15 shareholders.

22. Learned counsel for the Revenue also pointed that the Commissioner of Income Tax, Appeals-4, Chennai/1st respondent has considered that the last two share holders are firms, and thus prohibited to be partners, in another firm. Taking note of the decision of the Hon'ble Apex Court in Dulichand Lakshminarayanan vs. CIT-II reported in (1956) 29 ITR 535, and by arriving at a prima facie view, the impugned show cause notice dated 6.11.2015 has been issued. According to the learned Senior Standing Counsel for Income Tax Department, challenge to the same is premature and it is always open to the appellant/assessee to submit its response/explanation, to the same.

23. He further submitted that when the appellant has preferred a statutory appeal before the Commissioner of Income Tax, Appeals-4, Chennai, challenging the assessment order dated 30.03.2015 of the Assistant Commissioner of Income Tax, viz. respondent No.2, there cannot be a parallel proceeding before this court. He submitted that as against the impugned notice dated 6.11.2015 issued under Section 251(1) of the Income Tax Act, 1961, it is always open to the appellant to respond and at this juncture, writ petition is not maintainable. Reliance has been made on the decision of this court in Commissioner of Income Tax vs. Express Newspapers Ltd. reported in (2003) 179 CTR 0550.

24. On the reliance to the decision in Commissioner of Income Tax vs. Chaganlal Kailas & Co. reported in (1984) 148 ITR 7, Mr.T.S.Ravikumar, learned senior standing counsel submitted that on pari materia provision in the Tamil Nadu General Sales Tax Act, 1959 dealing with the powers of the appellate authority to issue notice for enhancement, a Hon'ble Full Bench of this court in State of Tamil Nadu vs. Arulmurugan reported in 51 STC 381, held that the Appellate Authority has jurisdiction to issue such notice for enhancement.

25. In this context, learned Senior Standing counsel for the Income Tax department referred to the provisions under Section 251(1) of the Income Tax Act and Section 31(3) of the Tamil Nadu General Sales Tax Act, 1959 and prayed that the latter decision of the Hon'ble Full Bench of this court, be applied to the instant case, and for the above said reasons, prayed for dismissal of the writ appeal.

26. Though on 8.8.2016, Ms.T.C.A.Sangeetha, learned counsel for the appellant made a submission that she would address only the issues raised in instant appeal W.A.No.276/2016, and thus we have recorded her submission, and accordingly directed the Registry to post the writ appeal for final hearing, today, learned counsel for the appellant made submissions on the order, recalling the earlier order dated 23.04.2016. She also submitted that there are contradictory statements made by the Commissioner of Income Tax, Appeals-4, Chennai, in the counter/sur rejoinder affidavits. According to her, the impugned show cause notice dated 6.11.2015, has to be set aside, as without jurisdiction.

Heard the learned counsel for the parties and perused the material on record.

27. At the outset, we would like to address the question as to whether the Commissioner of Income Tax, Appeals-4, Chennai, / 1st respondent, has jurisdiction to issue a show

cause notice for enhancement and in this regard, have a cursory look at the statutory provision.

28. Section 251(1) of the Income Tax Act, 1961 states that in disposing of an appeal, the Commissioner (Appeals) shall have the following powers:

251. Powers of the Commissioner (Appeals) (1)
In disposing of an appeal, the Commissioner (Appeals) shall have the following powers-

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment.

(aa) in an appeal against the order of assessment in respect of which the proceeding before the Settlement Commission abates under section 245HA, he may, after taking into consideration all the material and other information produced by the assessee before, or the results of the inquiry held or evidence recorded by, the Settlement Commission, in the course of the proceeding before it and such other material as may be brought on his record, confirm, reduce, enhance or annul the assessment;

(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;

(c) in any other case, he may pass such orders in the appeal as he thinks fit.

(2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.

Explanation: - In disposing of an appeal, Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant.

29. A bare reading of the provision itself makes it clear that among other things stated supra in the Section, the Commissioner (Appeals) while disposing of an appeal has the power to enhance the assessment. There is no ambiguity in Section 251 of the Income Tax Act, 1961, and therefore, we are not inclined to burden this judgment, incorporating cases, on the interpretation of statutes. However, it is useful to consider few decisions.

Co., reported in 1984 (148) ITR 7 (Mad.), the issue which came up for consideration, was whether, the Appellate Assistant Commissioner, in exercise of the powers of enhancement of source of income, which was not before the assessing officer. At Paragraphs 3 to 5, this Court held as follows:

"3.On the question, the Tribunal, following the decision of the Supreme Court in CIT v. Rai Bahadur Hardutory Motilal chamera, 1967 (66) ITR 443, held that since the assessee had not shown the receipts by way of charity in the return and the same not having been considered by the ITO during the assessment, it was not open to the AAC to bring the charity collections as a trading receipt and to include in the taxable income.

4. The decision of the Tribunal, in so far as it relates to the jurisdiction of the AAC to enhance the assessment, has been challenged in this reference by the Revenue. The Tribunal has not, however, gone into the merits of the assessability of the receipts under the head "Charity" and, therefore, that question also does not arise for consideration by us. On the question of jurisdiction of the AAC to enhance the receipts amounting to Rs. 12,696 collected by the assessee by way of charity, we are of the view that the Tribunal has come to the right conclusion.

5. It is, no doubt, true, as has been urged by the learned counsel for the Revenue, that the power of the AAC is plenary and co-extensive with that of the ITO. It has been so held in CIT v. Kanpur Coal syndicate, (1964) 53 ITR 225 (SC). But, that is not conclusive on the question whether the AAC can bring in a new item or source of income which was not before the ITO, and not considered by him at the state of the assessment. On this question, it is seen that the cases have uniformly held that the power of the AAC to enhance an assessment can only relate to the items of income which were before the ITO, and considered by him or the purpose of bringing to tax or for the grant of relief to the assessee. The reasons given by the Supreme Court for restricting the power of the AAC to enhance are found in CIT v. Shapoorji Pallanji Mistry, (1962) 44 ITR 891 (SC), at Page 896. One of the reasons is that if the appellate power extends to matters or items not considered by the ITO, then the assessee will stand deprived of a finding by two Tribunals in respect of the new matter considered by the AAC and one right of appeal. One other reason given by the Supreme Court is that the limit of the power of the AAC to enhance the assessment has been prescribed by the Legislature in ss. 31 and 33B (of the 1922 Act),

taking into account the interpretation placed on those sections by the courts, and that if really the Legislature wanted to make a departure, it would have amended s. 31 and specified its intention clearly. In the said case, the Supreme Court has clearly laid down that, in an appeal filed by the assessee, the AAC has no power to enhance the assessment by discovering new sources of income not mentioned in the return of the assessee or considered by the ITO in the order appealed against. In CIT v. Rai Bahadur Hardutory Motilal Chamarla, 1967 (66) ITR 443, the Supreme Court has again reiterated its view that the power of enhancement of the AAC is restricted by s. 31(3) of the 1922 Act to the sources of income which have been the subject-matter of consideration by the ITO from the point of view of taxability, that the word "consideration" does not mean incidental or collateral examination of any matter by the ITO in the process of assessment, that the matter should be clear from the assessment order that the ITO considered the said item with a view to its taxability or its non-taxability.'

29.2. In Goel Die Cast Ltd., v. Commissioner of Income-Tax (Appeals), reported in 2008 (297) ITR 72 (P & H), after extracting Section 251 of the Income-Tax Act, 1961, a Hon'ble Division Bench of the Punjab and Haryana High Court, at Paragraph 6, held as follows:

'A perusal of the above extracted provisions of s. 251 of the Act, which defines powers of the CIT (A), it is evident that appellate authority has been given powers to confirm, reduce, enhance or annul assessment. The only pre-condition mentioned for exercising the powers to enhance the income is that the same could be done only after providing adequate opportunity of hearing to the assessee. There is no restriction under the Act that the information, which could form basis for enhancement of income, could not be sourced from the AO. The enough safeguard for exercising of such powers in the form of principle of natural justice has been provided.

The Hon'ble Division Bench of Punjab and Haryana High Court also considered a case of the Kerala High Court in Popular Automobiles vs. CIT, (1990) 89 CTR (Ker) 248 : (1991) 187 ITR 86 (Ker) wherein, it has been held as under :

"It was contended before us that it is open to the CIT(A) to enhance the assessment suo motu. The question that was mooted was that the CIT(A) was not obliged to do so, on a motion made by the ITO in that regard. In other words, it was argued that the power vested in the CIT(A), even to enhance an

assessment, is a suo motu discretionary power and the ITO has no right to demand the exercise of that power in any particular case. We see no force in this plea.'

Ultimately, at Paragraph 8, the Division Bench of Punjab and Haryana High Court, held as follows:

'Keeping in view the plain language of s. 251 of the Act and the interpretation given to it by Kerala High Court in Popular Automobiles' case (supra), we are of the view that power to enhance income can be exercised by the CIT(A) even on an information furnished by the AO. For the reasons recorded above, we do not find any merit in the petition and accordingly dismiss the same.'

29.3. In Saheli Synthetics Pvt. Ltd., v. Commissioner of Income-Tax reported in 2008 (302) ITR 126 (Guj.), after considering a catena of decisions, the Gujarat High Court, at Paragraphs 13 to 15, held as follows:

'13.There is a subtle, fine distinction between assessment simplicitor, namely assessment of income, and the assessment order. In practice and in effect an assessment order may contain number of assessments of incomes under one head, depending upon the source of income, and/or under more than one head. Even in case where, an Appellate Authority wants to exercise powers of enhancement, under Sub-section (2) of Section 251 of the Act such powers have to be exercised after giving a notice for enhancement providing for a reasonable opportunity of showing cause and not in absence of such a notice. This provision itself gives an indication that even if the Appellate Authority wants to process a new source of income which forms part of either return of income or the order of assessment, but was not in challenge in appeal before the Appellate Authority, the Appellate Authority has to give a reasonable opportunity of hearing before processing such a source of income and enhancing the assessment.

14. A fortiori if it is not open to the Appellate Authority to enhance an assessment of income without issuing show cause notice one can never contemplate that the Appellate Authority can set aside an assessment so as to enable the Assessing Officer to exercise powers of enhancement vested in the Appellate Authority without the Appellate Authority discharging the statutory obligation cast on the Appellate Authority by virtue of provisions of Section 251(2) of the Act.

15. Similarly even where an assessment is set aside simplicitor, without any enhancement proposal, it is always in context of the appeal against an

order of assessment and cannot be read to mean that the Appellate Authority granted powers to the Assessing Officer in relation to items of assessment which were never forming part of Appeal before the Appellate Authority.'

30. Section 31(3) of the Tamil Nadu General Sales Tax Act, 1959 deals with the powers of the Assistant Commissioner and Section 251(1) of the Income Tax Act, 1961 deals with the power of the Commissioner (Appeals). They are tabulated hereunder:

Section 31(3) of the Tamil Nadu General Sales Tax Act, 1959	Section 251(1) of the Income Tax Act, 1961
In disposing of an appeal, the Appellate Assistant Commissioner may, after giving the appellant a reasonable opportunity of being heard, and for the sufficient reasons to be recorded in writing - (a) in the case of an order of assessment - (i) confirm, reduce, enhance or annul the assessment or the penalty or both; (ii) set aside the assessment and direct the assessing authority to make a fresh assessment after such further inquiry as may be directed; or (iii) pass such other orders as he may think fit; or (b) in the case of any other order, confirm, cancel or vary such order Provided that at the hearing of any appeal, the appropriate authority shall have the right to be heard either in person or by a representative.	251. Powers of the Commissioner (Appeals) (1) In disposing of an appeal, the Commissioner (Appeals) shall have the following powers- (a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment. (aa) in an appeal against the order of assessment in respect of which the proceeding before the Settlement Commission abates under section 245HA, he may, after taking into consideration all the material and other information produced by the assessee before, or the results of the inquiry held or evidence recorded by, the Settlement Commission, in the course of the proceeding before it and such other material as may be brought on his record, confirm, reduce, enhance or annul the assessment; (b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty; (c) in any other case, he may pass such orders in the appeal as he thinks fit. (2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.

Co. reported in (1984) 148 ITR 7 relied on by the learned counsel for the appellant rendered on the facts and circumstances of the reported case, would not lend any support to the case of the appellant, on the power of the Commissioner to enhance. Section 251 of the Act, 1961 itself provides the power, and for enhancement, an opportunity should be provided to the assessee. In State of Tamil Nadu vs. Arulmurugan reported in (1994) 51 STC 391, a Hon'ble Full Bench of this court held as follows:

" In one sense, an appeal may be different from an assessment. But the difference lies only in the particular stage of the proceeding and in the particular authority having jurisdiction in the two stages. Basically, an appeal does not differ from an assessment. Just as is the case with any other appeal under our legal system, an appeal from a sales tax assessment is only a rehearing or a retrial. In the absence of any statutory inhibitions or restrictions, an appellate authority has precisely the same powers, exercisable or in the same manner and to the same extent, as the assessing authority has, in the first instance. If this were not the position, no appellate authority can effectively function while hearing and determining an appeal from an assessment. Under the scheme of section 9 of the Central Sales Tax Act, appeals from Central sales tax assessments will have to be dealt with in the same manner and under the same procedure as provided for under the general sales tax law of the concerned State. The jurisdiction of an appellate authority under the Tamil Nadu General Sales Tax Act, 1959, includes the power to confirm, reduce, enhance, or annul, the assessment. It also includes the power to set aside the assessment with a direction to the assessing authority to make a fresh assessment, and also to pass any other order which the appellate authority may think fit. These powers, which are of the widest amplitude, are expressly conferred both on the Appellate Assistant Commissioner and on the Appellate Tribunal, vide sections 31 and 36 of the Tamil Nadu General Sales Tax Act, 1959. The provisions show clearly that the power of the appellate authority concerning an assessment under appeal is no different, and not less wide, than the power of the assessing authority to make the assessment in the first instance. Besides, such power as the appellate authority is empowered to exercise in relation to an assessment under appeal, has got to be exercised only in the same manner and subject to the same conditions, if any, which govern the exercise of the power of assessment by

the assessing authority in the first instance. It follows, therefore, that whatever discretion is conferred on the assessing authority for purposes of assessment must so be regarded, as a matter of statutory construction, to have been conferred on the appellate authority even without the concerned statutory provision expressly naming the appellate authority in that behalf. It goes without saying that an appellate authority, engaged as it is in precisely the same task under the fiscal statute as that of the assessing authority must also be possessed to like powers as those of the assessing authority. It is implicit in the very nature of the appellate jurisdiction, as well as the purposes for which that jurisdiction is created by the statute, that the appellate authority will have to function, in the very image of the assessing authority. Appellate proceedings are often truly described as an extension of the assessment proceedings, or as a continuation of the assessment proceedings. In this context, therefore, it does not matter that a power is conferred, by any provision in the taxing statute or in the statutory rules, eo nomine on the assessing authority, and is silent about the appellate authority or any other authority under the Act. Since the enabling section, or the rule, as the case may be, expressly refers to the assessing authority, as the repository of the power, it is elementary construction to hold that such power can be, and is intended to be, exercised by the assessing authority named in the particular provision concerned. But, it does not mean that the appellate authority and any other fiscal authority who are in seisin of the assessment, either in appeal, or in revision or in any other proceeding, cannot exercise a like power. The fact that the appellate authority is not expressly mentioned in the provision conferring the enabling power, does not mean that the legislature intended to exclude that authority from the purview of the provision."

32. In light of the statutory provision Section 251 of the Income Tax Act, 1961 and the decision supra, we have no hesitation to conclude that the Legislature has conferred powers on the first appellate authority to enhance the tax liability, subject to of course, to provide an opportunity to the assessee, by issuing a show cause notice.

33. On the prayer to set aside the show cause notice, it is useful to consider few decisions.

in 1987 (2) SCC 179, at Paragraph 9, held as follows:

"When a show cause notice is issued to a government servant under a statutory provision calling upon him to show cause, ordinarily the government servant must place his case before the authority concerned by showing cause and the courts should be reluctant to interfere with the notice at that stage unless the notice is shown to have been issued palpably without any authority of law. The purpose of issuing show cause notice is to afford opportunity of hearing to the government servant and once cause is shown it is open to the Government to consider the matter in the light of the facts and submissions placed by the government servant and only thereafter a final decision in the matter could be taken. Interference by the court before that stage would be premature, the High Court in our opinion ought not have interfered with the show cause notice.

33.2. The Supreme Court in *Special Director v. Mohd. Ghulam Ghouse* reported in 2004 (3) SCC 440, at paragraph 5, held as follows:

"This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the

court. Further, when the court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted."

33.3 In *Union of India v. Kunisetty Satyanarayana*, reported in 2006 (12) SCC 28, the Supreme Court, held that,

" 15. Writ jurisdiction is discretionary jurisdiction and hence, such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.

16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter."

34. The issue to be considered is whether the Commissioner of Income Tax, Appeals-4, Chennai, has jurisdiction to consider the status of the appellant as an AOP, in the appeal by the assessee and consequently, to issue the impugned show cause notice, proposing to disallow Rs.96,60,000/- paid, as remuneration, as interest to the partners, as not an allowable expenditure, and therefore, as to why the same should not be added back the taxable income. Reasons for the Commissioner of Income Tax, Appeals-4, Chennai, to arrive at a prima facie conclusion that the appellant/assessee as an AOP, as deduced from the impugned show cause notice are, that,

" From the perusal of the assessment record and the information and facts available in the relevant file before the undersigned, it has been noticed that while completing the assessment, the assessee has been assessed wrongly in the status of firm, instead of an AOP, though the essential conditions to gain the status of the firm required u/s 184 of the IT Act, was absent for the year under consideration. On verification of the schedules 1 and 2 forming part of the Balance Sheet, it is seen that the assessee entity has 13 shareholders in the status of individuals belonging to the Patel family and 2 other shareholders namely, DCP Trading Company and Kripa Trading Company, in all totalling up to 15 shareholders. The last two shareholders are firms and hence they

are prohibited to be partners in another firm.

The Honourable Supreme Court in the case of Dulichand Lakshminarayanan vs. CIT-II (1965) 29 ITR 535, has held that the partnership is a relationship between persons who have agreed to share the profits of the business carried on by all or any of them acting for all and the persons who enter into partnership being called individually as partners and collectively as FIRM. The word 'PERSON' contemplates only natural, legal persons and, therefore, a firm cannot be a partner. Since the shareholders DCP Trading Company & Kripa Trading Company, are not separate natural or legal entities, their continuance as shareholders in the assessee firm automatically devolves to treat the assessee as an AOP."

35. It is the submission of Mr.T.S.Ravikumar, learned senior standing counsel for the Income Tax department that rightly or wrongly, the Commissioner of Income Tax, Appeals-4, Chennai has proposed to treat the assessee as an AOP, and that the appellant has an opportunity to submit his reply to the opinion, expressed on the change of status, writ petition is not maintainable. In this regard, a cursory reading of paragraph No.3 of the impugned show cause notice dated 6.11.2015, indicates that only on the opinion expressed, treating the appellant/assessee as an AOP, the impugned show cause notice has been issued, calling upon the appellant/assessee, as to why the above said sum of Rs.96,60,000/-, should not be disallowed and added back to the income of the appellant, for the relevant year, under consideration. At this juncture, it is relevant to consider what the respondent in his counter affidavit and in the sur rejoinder, has contended, on the aspect of status.

" It is submitted that on verification of the records, it was found that two firms namely Ms/.Krupa Trading Co., having six partners and M/s.DCP Trading Co., also having six partners, having office at No.67/3, Spur Tank Road, Chetpet, Chennai-31 were the 14th and 15th partner in the petitioner firm consisting of 16 partners. Since all the partners in both the above firms were not representing in the petitioner firm and only one of the partner each, represented their respective firm, and therefore the petitioner cannot be considered to be a valid partnership firm as per the law laid down by the Hon'ble Supreme Court of India in the case of Dulichand Laxminarayanan v. Commissioner of Income-Tax [1956] 29 ITR 535(SC). It is submitted that later decision in Kylasa Sarabhaiah vs CIT (1965) 56 ITR 219 and which followed by the Madras High Court in A.Asha & Co.,

v CIT (1973) 87 ITR 57 has only distinguished the facts with that of the decision in Dhulichand Laxminarayanan (1956) 29 ITR 535 that a firm can be a partner in another firm, provided all the partners of the smaller firms are signatories to the deed of the larger firm and never disapproved it."

"3. I submit that the petitioner has accepted that the assessing officer has the power to issue notice in the event of change of status of the assessee. Further the petitioner has also accepted that the power of the appellate authority is co terminus with the power of the assessing officer. This being the case, the contention of the petitioner that the issuance of the show cause by this respondent cannot be termed as excessive jurisdiction of the powers conferred under the Act. I submit that the show cause notice giving the basis, reasoning and decisions of the Supreme Court for assessing the petitioner as an AOP cannot be termed as pre determination of the issue. Since the impugned notice itself notes "to show cause" and the petitioner has all the liberty to put forth its case objecting the basis and reasoning for the said show cause notice. In this connection the show cause notice has been issued in order to provide opportunity to the petitioner to file its reply/objections if any against the notice. Therefore the issue against the petitioner has not been concluded as yet and it does not devolve that the petitioner is already treated as an AOP. Reliance is placed on Hon'ble Madras High Court's decision in the case of CIT vs. Lotte India Corporation in T.C.(A) No.2279 of 2006 dated 14.09.2006. The other decisions relied upon are not applicable to the facts and circumstances of the case."

36. From the material on record, it could be deduced that there is a prima facie opinion on the status of the appellant, as to whether it is a firm or an AOP. As rightly pointed out by Ms.T.C.A.Sangeetha, learned counsel for the appellant, contradictions in the statement of the Commissioner of Income Tax, Appeals-4, Chennai from the above two paragraphs extracted supra, is apparent. Though at one stage, the Commissioner of Income Tax, Appeals-4, Chennai makes a prima facie statement, regarding the status of the appellant as an AOP, in the sur rejoinder dated 15.01.2016, the appellate authority has stated that there is no predetermination of the issue, and that it has not been concluded yet.

37. The question now to be decided by us, is whether the

impugned show cause notice dated 6.11.2015, has to be set aside, on the grounds of jurisdiction, or to allow the Commissioner of Income Tax, Appeals to decide the status of the assessee. The authority, in his affidavit on oath has stated that, the issue is yet to be decided. True that in the earlier years, the issue was not raised. Merely because, it was not raised, it cannot be said that the Commissioner, has no powers to decide, if the Assessing Officer, has failed to advert to the said aspect. On this aspect, we are of the considered view, that it is only a show cause notice and it is always open to the appellant to respond.

38. While considering the scope and powers of the appellate authority, under the Income Tax Act, 1961, courts have consistently held that the power of the first appellate authority are coteminous with that of the Assessing Officer and that the appellate authority can do what the Assessing Officer ought to have done and also direct the latter to do what he has failed. Appeal is also continuation of original proceedings and unless some fetters are placed upon the powers of the appellate authority by express words, the appellate authority can exercise all the powers as that of the original authority. If the Assessing Officer, has erred in concluding the status of the assessee as a firm, it cannot be said the Commissioner of Appeals, has no jurisdiction to go into the issue.

39. In the light of the averments on oath, in the sur rejoinder, made before this court, and on the facts and circumstances of the case, we are of the considered view that the Commissioner of Income Tax, Appeals-4, Chennai, without being influenced by any of the observations made in the impugned show cause notice dated 6.11.2015, should decide the status of the assessee, with reference to the statutory provisions, and decisions relied on, and simultaneously, consider the explanation, materials and supporting documents, if any to be filed by the appellant, in response to the show cause notice and accordingly answer, as to whether disallowance should be made or not, depending upon the answer on the first issue.

40. Writ Appeal is disposed of in the above terms. However, there shall be no order as to cost. Consequently, the connected civil miscellaneous petition is closed.

41. Inasmuch as the matter pertains to adjudication, where the appellant is required to be heard in person and evidence, if any, to be recorded, an outer limit of six weeks time is fixed. Taking note of the above, appellant is directed to submit the reply/objections, within such time, to be fixed by the Commissioner of Income Tax, Appeals, and the respondent is directed to pass orders, at the earliest, notwithstanding the outer limit fixed by this court. Appellant is directed to

extend cooperation and not to protract the proceedings, except, for bonafide cause. It is made clear that if for any bonafide or genuine reasons, the respondent is not in a position to pass orders, within the time frame fixed by this court, contempt proceedings shall not be entertained.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

Asr

To

1.The Commissioner of Income Tax, Appeals-4
121, Mahatma Gandhi Road
Chennai - 600 034

2.The Assistant Commissioner of Income Tax
Non Corporate Circle 3
121, Mahatma Gandhi Road
Chennai - 600 034

1 cc to M/s.T.Ravikumar, Advocate, sr.47730
1 cc to TCA. Ramanujam, Advocate, sr.47926

W.A.No.276 of 2016

nr co
kra 22.09.2016

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