

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**MAHARASHTRA VALUE ADDED TAX APPEAL NO.3 OF 2021
IN
VAT SECOND APPEAL NO.101 OF 2014**

The State of Maharashtra
Through Addl. Commissioner of Sales Tax,
VAT-I, Maharashtra State, Mumbai. ... Appellant

Vs.

M/s. M.M. Sales Corporation
102/2, Deepti Green, Opp. Bombay Cabreg School,
Opp. Saher Road, Andheri (East),
Mumbai – 400 099. ... Respondent

Mr. Himanshu B. Takke, AGP for the Appellant-State.
Mr. Ratan Samalo for the Respondent.

**CORAM: DHIRAJ SINGH THAKUR AND
ABHAY AHUJA, JJ.
RESERVED ON : 15th JULY, 2022
PRONOUNCED ON : 8th SEPTEMBER, 2022**

JUDGMENT : (PER ABHAY AHUJA, J.)

1. This is an Appeal preferred by the State of Maharashtra challenging the judgment and order dated 15th January, 2020 passed by the Maharashtra Sales Tax Tribunal in VAT Second Appeal No.101 of 2014 under Section 27 of the Maharashtra Value Added Tax Act, 2002 (for short the 'MVAT Act, 2002') proposing

the following substantial questions of law :-

“(a)Whether the Sales Tax Tribunal on the true and proper construction of Section 23(5) of Maharashtra Value Added Tax, 2002, was justified in holding that disallowance of Respondent’s claim for concessional rate of tax in respect of transaction stated in ‘C’ forms issued by Varsha Controls Gear under the Maharashtra Value Added Tax, 2002 ?

(b)Whether the Sales Tax Tribunal on the true and proper construction of Section 23(5) of the Maharashtra Value Added Tax, 2002, was justified in allowing the Respondent’s appeal ?

(c)Whether the Sales Tax Tribunal was justified in interpreting Section 23(5) of the MVAT Act, 2002, with regard considering the claim of the Respondent which was not part of the Assessment Order ?

(d)Whether on true and correct interpretation of the Section 23(5) of the MVAT Act, 2002, the Tribunal was justified in liberally interpreting and expanding the scope of the statutory provisions contained in Section 23(5) of the MVAT Act, 2002, when there is no ambiguity in the statute ?”

2. The Respondent-M/s. M.M. Sales Corporation is stated to be a reseller of iron and steel and a dealer registered under the MVAT Act, 2002.

3. The Deputy Commissioner of Sales Tax assessed the Respondent-Dealer for the period from 1st April, 2005 to 31st March, 2006 under the Central Sales Tax Act, 1956 raising a total demand of Rs.6,11,828/- on the Respondent-Dealer. The Respondent-Dealer was served with a notice in Form 603 under Section 64 of the MVAT Act, 2002, but did not attend on the appointed date and, therefore, a

notice in Form VI(E) was issued and served requesting him to attend on 27th June, 2013, which also the Respondent-Dealer did not attend. The Deputy Commissioner therefore passed the Assessment Order dated 29th June, 2013 for the Assessment Year 2013-14 under Section 23(5) of the MVAT Act, 2002 to the best of his judgment on the basis of available record.

4. Against the Assessment Order, the Respondent-Dealer filed an Appeal to set aside the Assessment Order stating that the same was ex-parte and also to accept the 'C' forms received from M/s. Varsha Controls Gear for the corresponding sales worth Rs.11,40,355/- and 'C' forms received from M/s. Dynacraft Air Controls for the corresponding sales worth Rs.33,02,712/-. The Appellate Authority partly allowed the Appeal of the Respondent-Dealer i.e. considered the 'C' forms issued by M/s. Dynacraft Air Controls for concessional rate of tax, but rejected the 'C' forms issued by M/s. Varsha Controls Gear on the ground that those transactions were not covered under the Assessment Order passed under Section 23(5) of the MVAT Act, 2002.

5. Aggrieved by the same, the Respondent-Dealer filed an Appeal before the Maharashtra Sales Tax Tribunal contending that the 'C' forms issued by M/s. Varsha Controls Gear be taken into consideration and the same be accepted and a refund of Rs.1,59,934/- be issued. The Tribunal affirmatively answering the question that the Appellate Authority had erred in disallowing the Respondent-Dealer's claim for concessional rate of tax regarding the 'C' forms issued by M/s. Varsha Controls Gear, allowed the Appeal of the Respondent-Dealer and remanded the matter back to the Appellate Authority for giving a decision on merits after taking into consideration the legal aspects discussed in the said order.

6. The Tribunal referred to various decisions with regard to the scope of the powers of the Appellate Authority observing that the same were very wide and not just confined to consider only the points raised by the assessee in the grounds of Appeal or urged at the time of hearing of the Appeal. It observed that the assessee is entitled to move the Appellate Authority for permission to raise the additional grounds of Appeal and when so moved the Appellate Authority has to consider the same on merits. The Sales Tax Tribunal held that the Appellate Authority was therefore not

justified in rejecting the Appellant's claim in respect of the 'C' forms issued by M/s. Varsha Controls Gear merely on the ground of not being covered under the Assessment Order passed under Section 23(5) of the MVAT Act, 2002. It observed that the Appellate Authority ought to have taken into consideration the said 'C' forms issued by M/s. Varsha Controls Gear.

7. Aggrieved by the said order the Appellant-State of Maharashtra is in Appeal before us under Section 27 of the MVAT Act, 2002 proposing the questions of law as stated above.

8. Mr. Takke, learned AGP for the Appellant-State, refers to the Assessment Order and submits that only 'C' forms issued by M/s. Dynacraft Air Controls were before the Assessing Officer and considered by him and, therefore, the Tribunal could only have considered the same. He submits that since the said order passed under Section 9 of the Central Sales Tax Act, 1956 read with Section 23(5) of the MVAT Act, 2002, is concerned only with transactions covered by 'C' forms issued by M/s. Dynacraft Air Controls, the scope of the Appeal is limited to the extent of transactions covered by the Assessment Order under Section 23(5)

of the MVAT Act, 2002. He submits that therefore 'C' forms issued by M/s. Varsha Controls Gear cannot be considered in the Appeal as those transactions were not covered under the said Assessment Order. He draws the attention of this Court to Section 23(5) of the MVAT Act, 2002 in support of his contentions and submits that the Appeal be admitted on the substantial questions of law as proposed in the Appeal.

9. Per contra, Mr. Ratan Samalo, learned Counsel for the Respondent-Dealer submits that as per the law settled by a plethora of decisions, the Appellate Authority has the power to confirm, reduce, enhance or annul the assessment. He submits that it 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 order which the Appellate Authority may think fit. He submits that whatever discretion is conferred on the Assessing Authority for the purposes of assessment must also be considered to have been conferred on the Appellate Authority. The appellate proceedings are an extension of assessment proceedings or a continuation of the assessment and it does not matter that a power is or is not conferred by any provision in the taxing statute. He

refers to the following decisions in support of his contentions :-

- (i) *Santoshi Tel Utpadak Kendra Vs. Deputy Commissioner of Sales Tax And Another, (1981) 3 Supreme Court Cases 466.*
- (ii) *State of Tamil Nadu Vs. Arulmurugan and Company (And Another Case), 1982 SCC OnLine Mad 367.*
- (iii) *Commissioner of Income Tax, U.P., Lucknow Vs. Kanpur Coal Syndicate, Kanpur, AIR 1965 SC 325.*

Learned Counsel submits that therefore the Tribunal has correctly allowed the Appeal of the Respondent-Dealer and, therefore the present Appeal ought to be dismissed.

10. We have heard Mr. Himanshu Takke, learned AGP for the Appellant-State and Mr. Ratan Samalo, learned Counsel for the Respondent-Dealer and with their able assistance, we have perused the papers and proceedings in the matter.

11. There is no dispute with respect to the facts in this matter. The issue that arises for our consideration is whether an Appellate Authority has the power to consider a claim made by an assessee which is not before the Assessing Officer. Consequently, the next question would be that whether the Tribunal committed an error in allowing the Respondent-Dealer's claim for concessional rate of tax

with respect to the transactions stated in the 'C' forms issued by M/s. Varsha Controls Gear.

12. The law in this regard has been well settled by the Hon'ble Supreme Court in a number of decisions. This Court in its judgment dated **21st June, 2012** in the case of **Commissioner of Income Tax Vs. M/s. Pruthvi Brokers & Shareholders Pvt. Ltd. (2012) 349 ITR 336 (Bom)** (authored by His Lordship Shri Justice S. J. Vazifdar, as His Lordship then was) has recounted the entire line of authorities which establish that an assessee is entitled to raise grounds not only in terms of legal submissions, but also additional claims not made in the return filed by it. After considering the Apex Court decisions in the cases of *Jute Corporation of India Limited Vs. Commissioner of Income Tax, 1991 (2) SCC 744*, *Additional Commissioner of Income-tax Vs. Gurjargravures P. Ltd., 1977 SCC (4) 571*; *National Thermal Power Company Limited Vs. Commissioner of Income-tax, (1997) 7 SCC 489* as well as *Goetze (India) Limited Vs. Commissioner of Income-tax, (2006) 157 Taxman 1* and a decision of the Full Bench of the Gujarat High Court in the case of *Ahmedabad Electricity Company Limited Vs. Commissioner of Income-tax, (1993) 199 ITR 351*, the decision of a

Division Bench of the Delhi High Court in the case of Commissioner of Income Tax Vs. Jai Parabolic Springs Limited (2008) 306 ITR 42, this Court has observed that the Appellate Authority including the Tribunal have the discretion to consider fresh grounds on law as well as on facts. Paragraphs 10 to 18 are relevant and are quoted as under :

*“10. A long line of authorities establish clearly that an assessee is entitled to raise additional grounds not merely in terms of legal submissions, but also additional claims to wit claims not made in the return filed by it. It is necessary for us to refer to some of these decisions only to deal with two submissions on behalf of the department. The first is with respect to an observation of the Supreme Court in *Jute Corporation of India Limited v. Commissioner of Income Tax*, 1991 Supp (2) SCC 744 = (1991) 187 ITR 688. The second submission is based on a judgment of the Supreme Court in *Goetze (India) Limited v. Commissioner of Income Tax*, (2006) 157 Taxman 1.*

*11(A). In *Jute Corporation of India Limited v. CIT*, for the assessment year 1974-75 the appellant did not claim any deduction of its liability towards purchase tax under the provisions of the Bengal Raw Jute Taxation Act, 1941, as it entertained a belief that it was not liable to pay purchase tax under that Act. Subsequently, the appellant was assessed to purchase tax and the order of assessment was received by it on 23rd November, 1973. The appellant challenged the same and obtained a stay order. The appellant also filed an appeal from the assessment order under the Income Tax Act. It was only during the hearing of the appeal that the assessee claimed an additional deduction in respect of its liability to purchase tax. The Appellate Assistant Commissioner (AAC) permitted it to raise the claim and allowed the deduction. The Tribunal held that the AAC had no jurisdiction to entertain the additional ground or to grant relief on a ground which had not been raised before the Income Tax Officer. The Tribunal also refused the appellant's application for making a reference to the High Court. The High Court upheld the decision of the Tribunal and refused to call for a statement of case. It is in these circumstances that the appellant filed the appeal before the Supreme Court.*

The Supreme Court held as under :-

*“5. In *CIT v. Kanpur Coal Syndicate*, a three Judge bench of this Court*

discussed the scope of Section 31(3)(a) of the Income Tax Act, 1922 which is almost identical to Section 251(1)(a). The court held as under: (ITR p. 229)

“If an appeal lies, Section 31 of the Act describes the powers of the Appellate Assistant Commissioner in such an appeal. Under Section 31(3)(a) in disposing of such an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment; under clause (b) thereof he may set aside the assessment and direct the Income Tax Officer to make a fresh assessment. The Appellate Assistant Commissioner has, therefore, plenary powers in disposing of an appeal. The scope of his power is co-terminus with that of the Income-tax Officer. He can do what the Income-tax Officer can do and also direct him to do what he has failed to do.” (emphasis supplied)

6. The above observations are squarely applicable to the interpretation of Section 251(1)(a) of the Act. The declaration of law is clear that the power of the Appellate Assistant Commissioner is co-terminus with that of the Income Tax Officer, if that be so, there appears to be no reason as to why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income Tax Officer. No exception could be taken to this view as the Act does not place any restriction or limitation on the exercise of appellate power. Even otherwise an Appellate Authority while hearing appeal against the order of a subordinate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations if any prescribed by the statutory provisions. In the absence of any statutory provision the Appellate Authority is vested with all the plenary powers which the subordinate authority may have in the matter. There appears to be no good reason and none was placed before us to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income Tax Officer.” [emphasis supplied]

(B) It is clear, therefore, that an assessee is entitled to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before them. The appellate authorities have the discretion whether or not to permit such additional claims to be raised. It cannot, however, be said that they have no jurisdiction to consider the same. They have the jurisdiction to entertain the new claim. That they may choose not to exercise their jurisdiction in a given case is another matter. The exercise of discretion is entirely different from the existence of jurisdiction.

12. At page 694, after referring to certain observations of the Supreme Court in Additional Commissioner of Income-tax v.

Gurjargravures P. Ltd., (1978) 111 ITR 1, the Supreme Court observed at Page 694 as under :-

“The above observations do not rule out a case for raising an additional ground before the Appellate Assistant Commissioner if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made, or that the ground became available on account of change of circumstances or law. There may be several factors justifying raising of such new plea in appeal, and each case has to be considered on its own facts. If the Appellate Assistant Commissioner is satisfied he would be acting within his jurisdiction in considering the question so raised in all its aspects. Of course, while permitting the assessee to raise an additional ground, the Appellate Assistant Commissioner should exercise his discretion in accordance with law and reason. He must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The satisfaction of the Appellate Assistant Commissioner depends upon the facts and circumstances of each case and no rigid principles or any hard and fast rule can be laid down for this purpose.” [emphasis supplied]

13. *The underlined observations in the above passage do not curtail the ambit of the jurisdiction of the appellate authorities stipulated earlier. They do not restrict the new/additional grounds that may be taken by the assessee before the the appellate authorities to those that were not available when the return was filed or even when the assessment order was made. The sentence read as a whole entitles an assessee to raise new grounds/make additional claims :- “if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made....”*

“or”

if “the ground became available on account of change of circumstances or law”

The appellate authorities, therefore, have jurisdiction to deal not merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. The first part viz. “if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made...” clearly relate to cases where the ground was available when the return was filed and the assessment order was made but “could not have been raised” at that stage. The words are “could not have been raised ” and not “were not in existence”. Grounds which were not in existence when the return was filed or when the assessment order was made fall within the second category viz. where “the ground became available on account of change of circumstances or law.”

14. *The facts in Jute Corporation of India Ltd., various judgments referred to therein as well as in subsequent cases, which we will refer to, establishes this beyond doubt. In many of the cases, the grounds were, in fact, available when the return was filed and/or the assessment order was made. In Jute Corporation of India Ltd., the ground was available when the return was filed. The assessee did not claim any deduction of its liability to pay purchase tax as "it entertained a belief that it was not liable to pay purchase tax under the Bengal Raw Jute Taxation Act, 1941". Thus, the ground existed when the return was filed. The assessment order was even made and received by the assessee. It is only after the appeal was filed that the assessee claimed a deduction in respect of the amount paid towards the purchase tax under the said Act. It is also significant to note that the assessee's entitlement to claim deduction had been held to be valid in view of an earlier judgment of the Supreme Court in Kedarnath Jute Manufacturing Company Limited v. Commissioner of Income-tax, (1971) 82 ITR 363. This was, therefore, a case of error in perception/judgment. Despite the same, the Supreme Court upheld the decision of the Appellate Assistant Commissioner in allowing the deduction. The words "could not have been raised" must, therefore, be construed liberally and not strictly.*

15. *It is indeed a question of exercise of discretion whether or not to allow an assessee to raise a claim which was not raised when the return was filed or the assessment order was made. As held by the Supreme Court there may be several factors justifying the raising of a new plea in appeal and each case must be considered on its own facts.* However, such cases include those, where the ground though available when the return was filed or the assessment order was made, was not taken or raised for reasons which the appellate authorities may consider valid. *In other words, the jurisdiction of the appellate authorities to consider a fresh or new ground or claim is not restricted to cases where such a ground did not exist when the return was filed and the assessment order was made.*

16(A). A Full Bench of this Court in Ahmedabad Electricity Limited v. Commissioner of Income-tax, (1993) 199 ITR 351 considered a similar situation. In that case, the appellant/assessee did not claim a deduction in respect of the amounts it was required to transfer to contingencies reserve and dividend and tariff reserve either before the Income Tax Officer or before the Appellate Assistant Commissioner in appeal. Subsequently, this Court had, in Amalgamated Electricity Company Limited v. Commissioner of Income-tax, (1974) 97 ITR 334, held that such amounts represented allowable deductions on revenue account. The appellant, therefore, raised a new claim and additional grounds before the Tribunal in that connection. The Tribunal rejected the same. The second question which was raised in the reference before the Division Bench was as

under :-

“(2) Whether, on the facts and in the circumstances of the case, the Tribunal erred in not allowing the assessee leave to raise in its own appeals additional grounds and in the departmental appeals cross objections regarding the deductibility of the sums transferred to contingency reserve and tariff and dividend control reserve?”

(B) The Division Bench which heard the reference, finding that there was a conflict of decisions, placed the papers before the Hon'ble Chief Justice for constituting a larger bench to resolve the controversy. The Full Bench answered the reference in the affirmative and in favour of the assessee. The Full Bench held :-

“Thus, the Appellate Assistant Commissioner has very wide powers while considering an appeal which may be filed by the assessee. He may confirm, reduce, enhance or annul the assessment or remand the case to the Assessing Officer. This is because, unlike an ordinary appeal, the basic purpose of a tax appeal is to ascertain the correct tax liability of an assessee in accordance with law. Hence an Appellate Assistant Commissioner also has the power to enhance the tax liability of the assessee although the Department does not have a right of appeal before the Appellate Assistant Commissioner. The Explanation to sub-section (2), however, makes it clear that for the purpose of enhancement, the Appellate Assistant Commissioner cannot travel beyond the proceedings which were originally before the Income-tax Officer or refer to new sources of income which were not before the Income-tax Officer at all. For this purpose, there are other separate remedies provided under the Income-tax Act.”

(C) It is unnecessary to refer to all the judgments that the Full Bench referred to while answering the reference. The Full Bench referred to the observations of the Supreme Court in Jute Corporation of India Limited v. Commissioner of Income-tax (supra) set out above. It is important to note that even in this case, therefore, the ground existed when the return was filed. The mere fact that a decision of a court is rendered subsequently does not indicate that the ground did not exist when the law was enacted. Judgments are only a declaration of the law. The assessee could have raised the ground in its return itself. It did not have to await a decision of a court in that regard. Indeed, even if a judgment is against an assessee, it is always open to the assessee to claim the deduction and carry the matter higher. The words “could not have been raised”, therefore, cannot be read strictly. Neither the Supreme Court nor the Full Bench of this Court meant them to be read strictly. They include cases where the assessee did not raise the claim for a reason found to be reasonable or valid by the appellate authorities in the facts and circumstances of a case.

17. The next judgment to which our attention was invited by Mr.

Mistri is the judgment of a Bench of three learned Judges of the Supreme Court in National Thermal Power Company Limited v. Commissioner of Income-tax, (1997) 7 SCC 489 = (1998) 229 ITR 383. In that case, the assessee had deposited its funds not immediately required by it on short term deposits with banks. The interest received on such deposits was offered by the assessee itself for tax and the assessment was completed on that basis. Even before the Commissioner of Income-tax (Appeals), the inclusion of this amount was neither challenged by the assessee nor considered by the Commissioner of Income-tax (Appeals). The assessee filed an appeal before the Tribunal. The inclusion of the amount was not objected to even in the grounds of appeal as originally filed before the Tribunal.

Subsequently, the assessee by a letter, raised additional grounds to the effect that the said sum could not be included in the total income. The assessee contended that on a erroneous admission, no income can be included in the total income. It was further contended that the ITO and the Commissioner of Income-tax (Appeals) had erred and failed in their duty in adjudicating the matter correctly and by mechanically including the amount in the total income. It is pertinent to note that the assessee contended that it was entitled to the deduction in view of two orders of the Special Benches of the Tribunal and the assessee further stated that it had raised these additional grounds on learning about the legal position subsequently.

The Tribunal declined to entertain these additional grounds.

The Supreme Court did not answer the question on merits, but framed the following question and held as under :-

“4. The Tribunal has framed as many as five questions while making a reference to us. Since the Tribunal has not examined the additional grounds raised by the assessee on merit, we do not propose to answer the questions relating to the merit of those contentions. We reframe the question which arises for our consideration in order to bring out the point which requires determination more clearly. It is as follows:

“Where on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of the assessee, whether the Tribunal has jurisdiction to examine the same.”

Under Section 254 of the Income Tax Act the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with the appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee

should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income Tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/ cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.”

18. *In the case before us, the CIT(A) and the Tribunal have held the omission to claim the deduction of Rs.40,00,000/- to be inadvertent. Both the appellate authorities held, after considering all the facts, that the assessee had inadvertently claimed a deduction of Rs.20,00,000/- paid after the end of the year in question. We see no reason to interfere with this finding. We see less reason to interfere with the exercise of discretion by the appellate authorities in permitting the respondent to raise this claim. That the respondent is entitled to the deduction in law is admitted and, in any event, clearly established. In the circumstances, the respondent ought not be prejudiced.”*

13. The Supreme Court in the case of **Commissioner of Income Tax, U.P., Lucknow Vs. Kanpur Coal Syndicate, Kanpur (supra)**, considering powers of an appellate authority under the Income Tax Act, 1961, observed that the Appellate Commissioner while disposing of an appeal against an order of an Income Tax Officer has plenary powers. The scope of his power is co-terminous with that of the Income Tax Officer. He can do all that Income Tax Officer can do and also direct him to do what he has failed to do. If the Income Tax Officer has the option to assess one or other of the entities in the alternative, the Appellate Assistant Commissioner can direct him to do what he should have done in the circumstances. The Apex Court

observed that the Appellate Commissioner in disposing of such an Appeal could confirm, reduce, enhance or annul the assessment and he may also set aside the assessment and direct the Income Tax Officer to make a fresh assessment. Paragraph 7 of the said decision is relevant and is quoted as under :-

“7. The next question is whether the said option is given only to the Income Tax Officer and is denied to the Appellate Assistant Commissioner and the Appellate Tribunal. Under the Act the Income Tax Officer, after following the procedure prescribed, makes the assessment under Section 23 of the Act. Doubtless in making the assessment at the first instance he has to exercise the option whether he should assess the association of persons or the members thereof individually. It is not because that any section of the Act confers an exclusive power on him to do so, but because it is part of the process of assessment; that is to say, he has to ascertain who is the person liable to be assessed for the tax. If he seeks to assess an association of persons as an assessable entity, the said entity can object to the assessment, inter alia, on the ground that in the circumstances of the case the assessment should be made on the members of the association individually. The Income Tax Officer may reject its contention and may assess the total income of the association as such and impose the tax on it. Under Section 30 an assessee objecting to the amount of income assessed under Section 23 or the amount of tax determined under the said section or denying his liability to be assessed under the Act can prefer an appeal against the order of the Income Tax Officer to the Appellate Assistant Commissioner. It is said that an order made by the Income Tax Officer rejecting the plea of an association of persons that the members thereof shall be assessed individually does not fall under one or other of the three heads mentioned above. What is the substance of the objection of the assessee? The assessee denies his liability to be assessed under the Act in the circumstances of the case and pleads that the members of the association shall be assessed only individually. The expression "denial of liability" is comprehensive enough to take in not only the total denial of liability but also the liability to tax under particular circumstances. In either case the denial is a denial of liability to be assessed under the provisions of the Act. In one case the assessee says that he is not liable to be assessed to tax under the Act, and in the other case the assessee denies his liability to tax under the provisions of the Act if the option given to the appropriate officer under the provisions of the Act is judicially exercised. We, therefore,

hold that such an assessee has a right of appeal under Section 30 of the Act against the order of the Income Tax Officer assessing the association of members instead of the members thereof individually. If an appeal lies, Section 31 of the Act describes the powers of the Appellate Assistant Commissioner in such an appeal. Under Section 31(3)(a) in disposing of such an appeal the Appellate Assistant Commissioner may, in the, case of an order of assessment, confirm, reduce, enhance or annul the assessment; under clause (b) thereof he may set aside the assessment and direct the Income Tax Officer to make a fresh assessment. The Appellate Assistant Commissioner has, therefore, plenary powers in disposing of an appeal. The scope of his power is coterminous with that of the Income Tax Officer. He can do what the Income Tax Officer can do and also direct him to do what he has failed to do. If the Income Tax Officer has the option to assess one or other of the entities in the alternative, the Appellate Assistant Commissioner can direct him to do what he should have done in the circumstances of a case. Under Section 33 (1), an assessee objecting to an order passed by an Appellate Assistant Commissioner under Section 28 or Section 31 may appeal to the Appellate Tribunal within 60 days of the date on which such order is communicated to him. Under Section 33(4), "The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner." Under Section 33(5), "Where as the result of an appeal any change is made in the assessment of a firm or association of persons or a new assessment of a firm or association of persons is ordered to be made, the Appellate Tribunal may authorise the Income Tax Officer to amend accordingly any assessment made on any partner of the firm or any member of the association". Under this section the Appellate Tribunal has ample power to set aside the assessment made on the association of persons and direct the Income Tax Officer to assess the individuals or to direct the amendment of the assessment already made on the members. The comprehensive phraseology used both in Section 31 and Section 33 of the Act does not countenance the attempt of the Revenue to restrict the powers of the Appellate Assistant Commissioner or of the Appellate Tribunal; both of them have power to direct the appropriate authority to assess the members individually instead of the association of persons as a unit."

14. A Full Bench of Madras High Court in **State of Tamil Nadu Vs. Arulmurugan and Company (supra)** had the occasion to consider a similar issue with respect to 'C' forms declaration. It was observed

therein that though the expression ‘appeal’ and ‘assessment’ may be different, but the difference lies only in the particular stage of the proceeding and in the particular authority having jurisdiction in the two stages. The Court observed that 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 and in the absence of any statutory inhibitions or restrictions, an Appellate Authority has the same powers exercisable 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. It further went on to observe that 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 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 are the powers which are of widest amplitude, are expressly conferred both on the Appellate Authority and the Appellate Tribunal. Paragraphs 4, 19 and 20 of the said decision are apt in the context and are quoted as under :-

"4. We accept the contention of the learned Government Pleader that the assessing authority, as the prescribed authority, has the power to allow further time to file C forms under the proviso to section 8(4) of the Central Sales Tax Act. Likewise, we accept the position that under the proviso to rule 12(7) of the Central Sales Tax (Registration and Turnover) Rules, 1957, the first assessing authority is invested with the power to allow further time for filing C forms. We do not, however, accept the implication in the Government Pleader's further contention that an appellate authority cannot be brought within the meaning of the expression "assessing authority". 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 of 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.

19. We may now turn to the facts of each of the two individual references before us. In both the cases, the assessee concerned did not file C forms with the assessing authority before the completion of the assessments. Naturally, therefore, the turnovers in question were charged to tax at the rate of 10 per cent, instead of at the concessional rate of 4 per cent. Both the assessees appealed against their respective assessments. In both the cases, leave to file the relevant C forms was asked for, at the appellate stage. The Appellate Assistant Commissioner, however, declined to receive the C forms, and confirmed the assessments. On further appeal before the Tribunal, the assessees produced the C forms once again. At this stage, the Tribunal entertained them. While doing so, the Tribunal felt satisfied that there was sufficient cause for not filing the C forms before the assessments were over. The final orders of the Tribunal, however, were different in the two cases. In one case, the Tribunal set

aside the assessment and directed the assessing authority to make the assessment afresh on the basis of the C forms received at the appellate stage. In the other case, without setting aside the assessment, the Tribunal forwarded the C forms to the assessing authority, directing that authority to scrutinise the C forms and find out if they complied with the formalities.

20. Having regard to the considerations which we have set out in the foregoing paragraphs, we must uphold the decision of the Tribunal in both the cases. We hold that the Tribunal has the power to receive C forms at the time of the appeal, for sufficient cause. The Tribunal can then proceed to the next step of applying the concessional rate of tax to the turnover covered by the C forms. Or, the Tribunal may remand the case to the Appellate Assistant Commissioner. The remand may be for the specific purpose of going into the question of sufficient cause. The remand may also be loaded with a finding by the Tribunal that there has been sufficient cause, leaving the scrutiny of the C forms alone to be undertaken on remand. The Tribunal may, if satisfied, about the sufficient cause set aside even the assessment order, and direct the assessing authority to re-do the assessment, in which event there would be no occasion for the assessing authority to go into any question of "delay" in filing the C forms, for with the setting aside of the assessment the whole thing is once again at large. It is needless to add that whatever has been stated by us as respects the Tribunal's power and the modes of its exercise apply, mutatis mutandis, to the Appellate Assistant Commissioner in like situations occurring in the appeals before him."

15. When the law, as can be seen from the above discussion, with respect to the scope of powers of the Appellate Authorities, being so well settled, it would be a superfluous to restate the same. The Appellate Authority as well as the Appellate Tribunal have powers of widest amplitude. The power of an Appellate Authority in relation to an Assessment Order has got to be exercised in the same manner, which the Assessing Authority can exercise. Whatever discretion is conferred on the Assessing Authority for the purposes

of assessment must be regarded to have been conferred on the Appellate Authority as well. Under fiscal statutes, an Appellate Authority is engaged in precisely the same task as that of the Assessing Authority and it must also possess like powers. This is implicit in the very nature of the appellate jurisdiction. The appellate proceedings are an extension of the assessment proceedings or continuation thereof. It does not matter whether such power is conferred by any specific provision or statute or rules or the said statute or rules are silent about the same. All the authorities till the Tribunal are fact finding authorities and, therefore, have the same powers as that of the Assessing Officer.

16. The Appellate Authority including the Tribunal have discretion to consider fresh grounds on law as well as on facts. There is no reason why the Appellate Authority cannot modify the assessment order on an additional ground even if it is not raised before the assessing authority. The raising of an additional ground before the Appellate Authority is permissible even if the ground so raised was not raised when the return was filed or an assessment order was made or that the ground became available on account of change of circumstances or law. The Appellate Authority has

jurisdiction to deal not merely with additional grounds which became available on account of change of circumstances or law but with additional grounds which were available when the return was filed. It is indeed a question of exercise of discretion whether or not to allow an assessee to raise a claim which was not raised when the return was filed or the assessment order was made. As observed by the Apex Court, there may be several factors justifying the raising of a new plea in appeal and each case must be considered on its own facts. The jurisdiction of the Appellate authorities to consider a fresh or a new ground or a claim is not restricted to cases where such a ground did not exist when the return was filed and the assessment order was made. The Appellate Authorities have very wide powers while considering an appeal which may be filed by an assessee.

17. In the above backdrop let us examine Section 26 of the MVAT Act, 2002 with respect to the Appeal provisions under the MVAT Act, 2002, which is quoted as under :-

“26. Appeals. - (1) An appeal from every order, not being an order mentioned in sub-section (2) of this section and sub-section (2) of section 85 passed under this Act or rules or notifications, shall lie if, the order is made, -
(a) by a Sales Tax Officer or an Assistant Commissioner, or any other

officer sub-ordinate thereto, to the Deputy Commissioner;

(b) by a Deputy Commissioner or Senior Deputy Commissioner, to the Joint Commissioner;

(c) by a Joint Commissioner, Additional Commissioner, Advance Ruling Authority or the Commissioner to the Tribunal.

(2) In the case of an order passed in appeal by a Deputy Commissioner or a Joint Commissioner, a second appeal shall lie to the Tribunal.

(3) Every order passed in appeal by the Tribunal under this section shall, subject to the provisions of sections 24 and 27, be final and every order passed in appeal by any other appellate authority, shall, subject to the provisions of sections 24, 25 and 27 be final.

(4) Subject to the provisions of sections 80 and 81, no appeal including a second appeal shall be entertained unless it is filed within sixty days from the date of the communication of the order appealed against.

(5) Subject to such rules of procedure as may be prescribed, every appellate authority (both in the first appeal and the second appeal) shall have the following powers, namely :-

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

Provided that, where the appeal is filed before the Tribunal, the Tribunal may set aside the assessment and refer the case back to the assessing authority for making a fresh assessment in accordance with the direction given by it and after making such further inquiry as may be necessary; the assessing authority shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment;

Provided further that, in respect of any appeal against an order of assessment, wherein dealer was not able to attend or remain present before the assessing authority at the time of hearing when the assessment order had been passed, then the appellate authority in first appeal may set-aside the said assessment order.

(i) within nine months from the commencement of the Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2017, if the appeal is filed prior to the date of commencement of the said Act,

(ii) within six-months from the date on which the said appeal has

been filed, if the appeal is filed on or after the commencement of the Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2017, and refer the case back to the assessing authority for making a fresh assessment under sub-section (7) of section 23.

(b) in an appeal against an order imposing a penalty, the appellate authority may confirm or cancel such order or modify it in accordance with the provisions of this Act;

*(c) [* * *];*

(d) in any other case, the appellate authority may pass such order in the appeal as it deems just and proper:

Provided that, the appellate authority shall not enhance an assessment or a penalty or interest or sum forfeited or reduce the amount of set-off or refund of the tax, unless the appellant has been given a reasonable opportunity of showing cause against such enhancement or reduction.

Explanation.- While disposing of an appeal, the appellate authority 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 it by the appellant, or that no order was made in the said proceedings regarding such matter.

(6)

(6A)

(6B)

(6C)

(7)”

18. Sub-Section (5)(a) of Section 26 quoted above specifically empowers every appellate authority under the MVAT Act, 2002 in an appeal against the order of assessment to confirm, reduce, enhance or annul the assessment. It has been provided that the appellate authority can also set aside an assessment order passed ex-parte and refer the case back to the assessing authority for making fresh assessment. Also in any appeal before the Tribunal,

the Tribunal may set aside the assessment and refer the case back to the assessing authority for making a fresh assessment.

19. A plain reading of the Explanation to Sub-section 5 of Section 26 of the MVAT Act, 2002 quoted above clearly empowers an appellate authority to consider and decide any matter arising out of the proceedings in which the order appealed against was passed even though such matter was not raised before it by an assessee or even if no order was made in the said proceedings. In nuce, an appellate authority has been invested with wide powers to consider a claim arising in the proceedings even though no order was made.

20. Now it may well be that though a claim with respect to an assessment year in question was not raised or remained to be raised by an assessee before the assessing authority but nevertheless that would not mean that such a matter cannot be raised before or decided by an appellate authority or that the same did not arise out of the proceedings. Moreover, in view of the unanimity of judicial opinion expressed above, there is no doubt in our mind that an appellate authority as well as the Tribunal can always consider a new or additional claim with respect to an assessment year which

was not raised by the assessee before the assessing authority. The Tribunal, in our view, has rightly directed the Appellate Authority to consider the 'C' forms issued by M/s. Varsha Controls Gear.

21. The Tribunal has referred to the decision of this Court in the case of *M/s Ranchhoddas Bhaichand Vs. Commissioner of Sales Tax, Maharashtra State, Bombay [1996] 101 STC 218(Bom)*. In that case the scope and powers of the Appellate Authority under Section 55 of the Bombay Sales Tax Act, 1959 was discussed and it was observed that these powers are very wide and not confined to considering only the points raised by the assessee in the ground of appeal or urged at the time of hearing of the appeal. It is open to the Appellate Authority to correct the Sales Tax Officer not only with regard to the matter raised in the memorandum of appeal, but also with regard to the matters which have been considered by the Sales Tax Officer and decided in the course of the said order. The only limitation upon his powers is the subject matter of the order appealed against. The Appellate Authority has plenary powers in disposing an appeal under Section 55(1) of the Act. That the scope of his power is co-terminus with that of the assessing officer. That he can do what the assessing officer can do. It was held in

paragraph-14 of the said judgment, which is quoted is as under :-

“ That the assessee is entitled to move the Appellate Authority for permission to raise additional grounds of appeal and when so moved, the Appellate Authority has to consider the same on merits.”

We are in agreement with the aforesaid observations.

22. Coming back to the case at hand, it is observed from the decision of the Tribunal that on behalf of the Respondent-Company, various documents were brought to the notice of the Tribunal such as invoices, audit report, Form-704 etc. stated to be annexed to the appeal wherein the invoices issued by M/s Varsha Controls Gear containing numbers, dates, amounts, nature of forms etc. indicating that those relate to the transactions made and challans issued during the period from 6th August, 2005 to 30th October, 2005 i.e. relating to the assessment year 2005-2006 in question. These factual findings are neither disputed nor controverted by the Appellants.

23. As seen from the above discussion, the Appellate Authority has very wide powers and can exercise its discretion to consider a claim or a ground not considered by the assessing authority for a

sufficient cause. The Tribunal has accepted and considered the 'C' forms of M/s Varsha Controls Gear which could not have been furnished before the assessing authority, though the same undisputedly, pertain to the assessment year 2005-2006. There was sufficient cause to consider the 'C' forms by M/s Varsha Controls Gear as the same pertained to the transactions in relation to the business of the Respondent for the assessment period in question. It cannot therefore be said that the 'C' forms were not available when the return was filed. In our view, the Tribunal has appropriately exercised its discretion in considering the 'C' forms filed by M/s Varsha Controls Gear and in allowing the appeal of Respondent.

24. Section 23(5) of the MVAT Act, 2002 has been cited to submit that scope of appeal is limited to the extent of transactions covered by the assessment order. Section 23 is quoted as under :-

"23. Assessment -- (1)

(2)

(3)

(4)

(5) (a) Where the prescribed authority has reason to believe that the tax has been evaded or sought to be evaded or the tax liability has not been disclosed correctly or excess set-off has been claimed by any dealer or person in respect of any period or periods by not recording or recording in an incorrect manner; any transaction of sale or purchase, or that any claim has been incorrectly made, then in such a case notwithstanding that any notice for assessment has been issued under other provisions of this section or any other section of this Act, the prescribed authority may, after giving such dealer or person a notice in the prescribed form and a reasonable opportunity of being

heard, initiate assessment of the dealer or person in respect of such transaction or claim.

Provided that, where, -

(i) a registered dealer has claimed refund in his last return or a revised return containing last day of the year; or

(ii) an auditor has mentioned about eligibility for refund in his audit report under section 61,

then the prescribed authority may, subject to the conditions, restrictions and safeguards as may be prescribed, after adjusting the refund so claimed or, as the case may be, so mentioned, against the tax liability, interest and penalty, if any, determined in the proceedings initiated under this clause, grant net refund to such dealer or, as the case may be, determine the net tax liability :

Provided further that, the amount of refund claimed in the return filed or mentioned in the audit report filed under section 61, whichever is filed later, but not later than the 31st March 2019, in any case, may only be considered for the purposes of the first proviso.

(b) During the course of any proceedings under section 64, if the prescribed authority is satisfied that the tax has been or is sought to be evaded, as provided under clause (a) by any dealer or person, the said authority may, after issuing a notice in the prescribed form and after giving a reasonable opportunity of being heard to such dealer or person, proceed to assess such dealer or person as provided in clause (a) in respect of any such transaction or claim relating to any period or periods and such authority shall, notwithstanding anything contained in section 59, be deemed to have the requisite jurisdiction and power to assess such dealer or person in respect of such transaction of sale or purchase or claim, covered by clause (a) and such assessment proceedings shall, for all purposes of this Act, be deemed to have been transferred to such authority.

(c) The assessment proceedings under this sub-section shall be without prejudice to the assessment proceedings in respect of the said period or periods under any other provisions of this Act by any authority who otherwise has the jurisdiction to assess such dealer or person in respect of other transactions of sale or purchase or any other claim which are not covered by clause (a) and clause (b).

(d) The assessment under this sub-section shall be made separately in respect of the transaction or claim relating to the said period or periods to the best of the judgment of the prescribed authority where necessary and irrespective of any assessment made under this sub-section, the dealer may be assessed separately under the other provisions of this section in respect of the said period or periods:

Provided that, once the dealer or person is assessed under this sub-section, no tax from such transaction or claim and penalty and interest, if any, consequent upon such tax shall be levied or demanded from such dealer or person, at the time of assessment to tax under the other provisions of this section in respect of the said period or periods relating to such transaction or claim.

Provided further that, in case a notice is issued under this sub-section on or after the 1st April 2015, no order of assessment under this sub-section shall be made after the expiry of six years from the end of the year, containing the transaction or, as the case may be, claim.

Explanation.- For the purposes of this sub-section, "prescribed authority", "the said authority", "such authority" and "any authority" shall mean the Commissioner or, as the case may be, the authorities appointed under section 10 and other officers or persons to whom the Commissioner has delegated his powers in this behalf.

.....
 ”

(emphasis supplied)

25. Section 23(5) (d) quoted above confirms this when it provides that the assessment shall be made separately in respect of transaction or claim relating to the concerned period(s) to the best of the judgment of the prescribed authority where necessary and irrespective of any assessment made under this said sub-section, the dealer can be assessed separately under the other provisions of this section in respect of the said period (s). Therefore, in our view, considering that the ‘C’ form pertaining to M/s Varsha Controls Gear was in respect of assessment year 2005-2006, there was no prohibition or restriction in considering the same even in accordance with Section 23 (5) (d) of the MVAT Act, 2002. Therefore, it cannot be said that the scope of appeal is limited to the extent of transactions covered by the assessment order under Section 23(5) of the MVAT Act, 2002.

26. We, therefore, agree with the decision of the Tribunal that the appellate authority was not justified in rejecting that Appellant's claim as per 'C' forms issued by M/s Varsha Controls Gear merely on the ground of not being covered under the order of assessment and that in such circumstances, the Appellate Authority ought to have taken into consideration the 'C' forms issued by M/s Varsha Controls Gear, which were available on record before the Assessing Officer and give his decision on merits, which he failed to do in the matter. The Appellate Authority has the power to consider a claim made by an assessee which is not before the assessing officer. The Tribunal has, in our view, correctly and for sufficient cause exercised its discretion and directed the Appellate Authority to take into consideration the Respondent-Debtor's claim for concessional rate of tax with respect to the transactions stated in the said 'C' forms issued by M/s Varsha Controls Gear. No fault can be found with the order of the Tribunal nor is there any perversity. The Appeal does not raise any substantial question of law and is, therefore, dismissed. No costs.

(ABHAY AHUJA, J.)

(DHIRAJ SINGH THAKUR, J.)