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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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\+ **ITA 771/2014**

COMMISSIONER OF INCOME TAX CENTRAL-II ..... Appellant

Through : Suruchi Aggarwal, Senior Standing Counsel with Ms Lakshmi Gurung, Junior Standing Counsel.

versus

DIVINE INFRACON PVT. LTD. ..... Respondent

Through Mr Salil Aggarwal and Mr Ravi Pratap Mall, Advocates.

AND

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\+ **ITA 185/2015**

DIVINE INFRACON PVT LTD ..... Appellant

Through Mr Salil Aggarwal and Mr Ravi Pratap Mall, Advocates.

versus

COMMISSIONER OF INCOME TAX, CENTRAL II ..... Respondent

Through Suruchi Aggarwal, Senior Standing Counsel with Ms Lakshmi Gurung, Junior Standing Counsel.

CORAM:
HON'BLE DR. JUSTICE S.MURALIDHAR

HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% 13.08.2015

Vibhu Bakhru, J.

1. These appeals have been preferred against an order dated 12th June, 2014 passed by the Income Tax Appellate Tribunal ('ITAT') (hereafter referred to as 'Tribunal') in ITA No.2393/Del/2014, being the Assessee's appeal against the decision of the Commissioner Income Tax (Appeals) [hereafter 'CIT(A)'] sustaining the addition of a sum of Rs. 20,25,00,000/- on account of unexplained credit under Section 68 of the Act, on merits. The Revenue has filed the present appeal (ITA 771/2014) being aggrieved by the decision of the Tribunal insofar as it has upheld the CIT(A)'s view that the aforesaid addition made by the Assessing Officer (hereafter 'AO') was beyond the scope of assessment under Section 153A of the Act. The Assessee states that it has filed the present appeal (ITA 185/2015) only for the reason that the Revenue has preferred an appeal against the order of the Tribunal.

2. The principal controversy involved in the present appeals relates to the issue whether the Revenue could assail the finding returned by the CIT(A) in favour of the Assessee in an appeal preferred by the Assessee before the

Tribunal, limited to the issue decided by the CIT(A) against the Assessee. Admittedly, the Revenue did not appeal against the decision of CIT(A) holding that the addition made was beyond the scope of the assessment under Section 153A of the Act. Yet, the Counsel for the Revenue sought to assail the said finding in the appeal preferred by the Assessee. The Tribunal permitted the Counsel for the Revenue to agitate the issue but finally decided the same against the Revenue. It is contended by the Assessee that it was not permissible for the Tribunal to permit the Revenue to challenge the decision of the CIT(A) in an Appeal preferred by the Assessee.

3. The aforesaid controversy arises in the backdrop of the following facts:

3.1 The Assessee filed a return for the Assessment year 2008-09 declaring a total income of Rs.3,84,027/- on 30th September, 2009. Thereafter, on 14th September, 2010 search and seizure operations were conducted at the registered office of the Assessee Company. Subsequent thereto, a notice under Section 153A of the Act was issued against the Assessee on 26th September, 2012. Pursuant to the notice issued under Section 153A, the AO passed an order dated 28th March, 2013 assessing the total income of the

Assessee for the Assessment Year 2008-09 at Rs.20,28,84,027/-. The AO made an addition of Rs.20,25,00,000/- under Section 68 of the Act as the AO was of the view that the share application money received by the Assessee Company was unexplained.

3.2 The Assessee preferred an appeal against the Assessment Order before the CIT(A), being Appeal No. 320/2013-14, *inter alia* challenging the addition on merits as well as on the ground that the addition was beyond the scope of Section 153A of the Act. According to the Assessee, the share application money was duly disclosed in its return and the addition was unrelated to any incriminating material found during the search and, thus, was beyond the scope of assessment under Section 153A of the Act.

3.3 The CIT(A) disposed of the Appeal by an order dated 24th January 2014. The CIT(A) found merit in the Assessee's contention that the addition made was beyond the scope of Section 153A of the Act as the addition was not based on any incriminating material found during the search. However, the CIT(A) upheld the conclusion of the AO that the share application money reflected in the books of the Assessee was unexplained.

3.4 The Revenue accepted the aforesaid order passed by the CIT(A) and did not prefer any appeal before the Tribunal. The Assessee, on the other hand, impugned the order of CIT(A), *inter alia*, on the following ground :-

> "That the learned CIT (Appeals) has grossly erred in law and on facts in sustaining the addition made by assessing officer under section 68 of the Act amounting to Rs.20,25,00,000/- particularly having regard to the fact that very assumption of jurisdiction to bring to tax the aforesaid sum was beyond the scope of provisions of section 153A of the Act, as was held by learned Commissioner of Income Tax (Appeals) in the impugned order."

3.5 During the course of the proceedings before the Tribunal, the representative of the Revenue sought to assail the finding of the CIT(A) that the additions made were outside the scope of Section 153A of the Act. The Tribunal entertained the aforesaid plea and permitted the representative of the Revenue to raise contentions in that regard, but finally the conclusions of the CIT(A) were sustained.

3.6. The Revenue has now preferred an appeal impugning the decision of the

ITAT insofar as the Tribunal sustained the finding of the CIT(A) that the addition made in respect of the share application money was beyond the scope of Section 153A of the Act.

4. The learned counsel for the Assessee submitted that the Tribunal erred in permitting the Revenue to challenge the finding of the CIT(A) with regard to the scope of Section 153A of the Act. He submitted that since the Revenue had not appealed against the decision of the CIT(A), it could not raise the issue before the Tribunal. He referred to the decision of this Court in ***CIT vs. Edward Keventer (Successors) Pvt. Ltd.: (1980) 123 ITR 200(Del)***, in support of his contention that it would not be open for the respondent to travel outside the scope of the subject matter of the Appeal.

5. He submitted that the scope of the subject matter of the Appeal was limited to the finding of the CIT(A) with regard to the merits of the addition made; the issue whether the same was beyond the scope of Section 153A of the Act was not the subject matter before the Tribunal and, thus, the Tribunal could not have entertained any plea in that regard.

6. The learned counsel for the Assessee also referred to the decision of the Supreme Court in ***Hindustan Coca Cola Beverages P.Ltd v. Joint Commissioner of Income Tax: (2007) 293 ITR 226.*** In that case, the Tribunal had decided to reopen an appeal decided earlier and permitted the Assessee to urge a ground, which had not been considered by the Tribunal while deciding the appeal. The decision of the Tribunal to reopen the matter was not appealed against by the Revenue but, the Revenue successfully assailed the final order passed by the Tribunal before the High Court, *inter alia,* on the ground that the matter could not be reopened by the Tribunal. In this context, the Supreme Court held that, "We have already noticed that the order passed by the Tribunal to reopen the matter for further hearing as regards ground No. 7 has attained its finality. In the circumstances, the High Court could not have interfered with the final order passed by the Income-tax Appellate Tribunal."

7. We find considerable merit in the contention advanced on behalf of the Assessee. Concededly, the issue whether the additions made by the AO were beyond the scope of Section 153A had been decided by the CIT(A) in favour of the Assessee and the decision on the said issue had attained finality as the

Revenue had not preferred any appeal with regard to the CIT(A)'s order.

8. It is also relevant to note that by virtue of Section 253(2) of the Act, the Principal Commissioner or Commissioner may, if he objects to an order passed by the CIT(A) under Section 250 of the Act, direct the AO to prefer an appeal to the Tribunal. It is not disputed that no such directions to file an appeal against the CIT(A)'s order dated 21st January, 2014 were issued by the concerned Income Tax Authority.

9. In the circumstances, there could be no dispute that the CIT(A)'s order in so far as it relates to the issue regarding the assessment being beyond the scope of Section 153A of the Act had attained finality, and thus, could not have been disturbed by the Tribunal.

10. It is also relevant to refer to the decision of the Mysore High Court in ***Pathikonda Balasubba Setty v. CIT: (1967) 65 ITR 252*** wherein the court observed as under:

> "The effect of these provisions is that the Appellate Tribunal's powers are limited to passing such orders as they may think fit on the appeal. The expression 'on the appeal', clearly and indubitably points to the conclusion that the powers of the

appellate authority, the Tribunal, are limited to the, subject-matter of the appeal.

This is necessarily so because every point dealt with by the lower appellate court, the Appellate Assistant Commissioner, need not be the subject of attack before the Appellate Tribunal. The interests of the revenue are sufficiently protected by the extensive powers given to the first appellate authority, the Appellate Assistant Commissioner. At that stage, the only appellant would be the assessee, not the department although it is entitled to be represented by an officer of the department in support of the order of the original court. A mistake, if an committed by, the original authority, which is adverse to the interests of the assessee, will be canvassed by the assessee before the Appellate Assistant Commissioner. A mistake, if any, committed by the original assessing authority which is detrimental to the interests of the revenue is capable of being corrected by the Appellate Assistant Commissioner even without an appeal having been presented by the department. At the next stage of second appeal to the Appellate Tribunal, the liberty is given to both the sides to go up in appeal to the Appellate Tribunal and when the Appellate Tribunal comes to deal with the matter, the law regards it sufficient to leave it to the parties going up as appellants before the Tribunal to limit their attack on the order of the first appellate authority and to seek the intervention of the Tribunal only to the extent necessary to correct the errors in the order of the Appellate Assistant Commissioner according to the case of the appellant.

It should be noted that in comparison to the sections describing the power of the Appellate Assistant Commissioner, the sections which describe the appellate powers of the Tribunal do not make any reference to a power to enhance the assessment or to enhance the tax in the same way as the Appellate Assistant Commissioner is empowered to do while dealing with an appeal against the order of the assessing authority.

As the appellate power is a power which is conferred by statute, both its existence as well as its extent has to be gathered from

> the relevant statutory provision. The fundamental idea is that an appellant seeks a relief from an appellate court, and not determinate to himself. Even under the general provisions of the law of procedure, the worst determinate which an appellate court may visit on an appellant is to dismiss the appeal with a direction in an appropriate case to pay costs to the opposite side. An order adverse to the interests of the appellant-adverse in the sense that it takes away from him a benefit which he has already acquired under the order appealed from-is possible only by means of an order made either upon a cross-appeal filed by the other side or on the basis of a memorandum of cross-objections presented by him wherever the law permits him to do so."

11. The aforesaid passages were referred to by a Division bench of this Court in ***CIT vs. Edward Keventer (Successors) Pvt. Ltd*** (*supra*) and the Court further reiterated the principle that a party who has not appealed cannot be permitted to raise a ground, which will work adversely to the appellant.

12. Indisputably, the Revenue could also not take recourse to Rule 27 of the Income Tax (Appellate Tribunal) Rules, 1963. By virtue of the said Rule, a respondent before the Tribunal can support the decision appealed against not only on the grounds decided in favour of the respondent but also on grounds decided against it. However, Rule 27 of the said Rules would not extend to permitting the respondent to expand the scope of an appeal and

assail the decision on issues, which are not subject matter of the appeal. In ***CIT vs. Edward Keventer (Successors) Pvt. Ltd*** (*supra*), this court had reiterated that *"*it would not be open to a respondent to travel outside the scope of the subject matter of the appeal under the guise of invoking r 27*"*

13. The learned counsel for the Revenue has referred to the decision of the Supreme Court in ***National Thermal Power Corporation Ltd. vs. Commissioner of Income Tax: 229 ITR 383 (SC)*** in support of the contention that it is open for the Tribunal to consider all questions of law where no investigation into facts are necessary. We find that the aforesaid decision is wholly inapplicable to the facts of the present case. It is trite law that the Tribunal may, under Section 254(1) of the Act, pass such orders as it thinks fit; nonetheless, the decision must be in respect of the subject matter of the dispute. Indisputably, the Tribunal can examine all questions which relate to the subject matter of an appeal but, once an issue has attained finality and is not a subject matter of the dispute before the Tribunal, it would not be open for the Tribunal to reopen the issue on the pretext of examining a question of law.

14. In view of the aforesaid, the Appeal preferred by the Revenue (being ITA No. 771/2014) is rejected. As indicated above, the Appeal preferred by the Assessee (ITA No. 185/2015) is only consequential to the Appeal filed by the Revenue and is, accordingly, also disposed of.

15. It is clarified that the question whether an assessment could be framed under Section 153A of the Act, even where no incriminating documents have been found during the search is left open.

VIBHU BAKHRU, J

S.MURALIDHAR, J

AUGUST 13, 2015
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