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

Reserved on: 25.09.2019
Pronounced on: 18.05.2020

\+ ITA 834/2019

SANJAY SAWHNEY ..... Appellant

Through: Mr. S. Krishnan, Advocate.

versus

PRINCIPAL COMMISSIONER OF INCOME TAX ..... Respondent

Through: Mr. Zoheb Hossain, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J

1. The present appeal under Section 260A of the Income Tax Act, 1961 ('the Act') is directed against the order dated 25.03.2019 passed by the Income Tax Appellate Tribunal ('ITAT'), Delhi Bench 'F' allowing Revenue's appeal [ITA No. 4856/2015 for the Assessment Year 2008-09] and further remanding the matter to the file of the Assessing Officer ('AO') for fresh adjudication. Vide the aforesaid impugned order, the ITAT has *inter alia* rejected additional jurisdictional grounds urged by the Appellant- Assessee under Rule 27 of the Income-tax (Appellate Tribunal) Rules, 1963 ('ITAT Rules') to assail the findings of Commissioner of Income Tax (Appeals) ['CIT (A)']. By way of this appeal, the Appellant challenges correctness of the reasoning of the ITAT for declining to consider pertinent issues that go into the root of the matter and relate to assumption of jurisdiction and

validity of the reassessment proceedings undertaken by the revenu
Section 153C of the Act.

The Controversy- In brief

2. The revenue-initiated search action under Section 132 of the Act on Kouton Group on 19.02.2009 and during the search proceedings, it *inter-alia* seized a document described as 'Memorandum of Understanding' ('MOU') relating to transaction of sale and purchase of share capital of M/s S.R. Resorts Private Limited. Consequent upon the seizure of the aforesaid document, a notice was issued to the appellant under Section 153C of the Act, calling for filing of return of income. Since there was no compliance to the said notice, another notice was issued under Section 142(1)(ii) of the Act. In response thereto, the appellant filed the original return of income declaring total income of Rs.8,90,760/- and submitted that the same be treated as a return in compliance to notice under Section 153C of the Act. The assessment proceedings culminated in framing of an assessment order dated 28.12.2010 whereby the return of income of the appellant stood assessed at Rs.1,46,15,445/-. In the appeal before CIT(A), besides challenging the additions made by the AO on merits, assessee also raised legal grounds qua the validity of the reassessment proceedings undertaken by the revenue under Section 153C of the Act. The jurisdictional challenge to reassessment proceedings was principally premised on two fundamental legal grounds, viz. (i) the AO failed to record a satisfaction note for initiating proceedings under Section 153C of the Act and, (ii) there was no nexus between the issues in the assessment proceedings and the incriminating material seized during the search. The CIT(A) rejected the aforesaid pleas and *inter-alia* held that there was no need for recording the satisfaction and

that further the law postulated no requirement for existence of between the assessment framed and the incriminating material as a precondition for reassessment proceedings. On merits, CIT(A) allowed the appeal in favor of the assessee and deleted all the additions/disallowances made by the AO.

3. Revenue contested the order passed by the CIT(A) by filing an appeal under Section 253(2) of the Act before the ITAT, contending that the CIT (A) had erred in deleting the additions. In the said proceedings, appellant-assessee made an oral application under Rule 27 of ITAT Rules and urged additional grounds against the findings of the CIT(A) pertaining to the issue of recording of satisfaction note, and the necessary condition of existence of nexus between assessment and incriminating material by contending that these findings were in the teeth of the law as settled by various courts in respect of the said issues. The ITAT disagreed with Assessee and on a technical ground refused to consider the legal issues that were premised on Rule 27 of the ITAT Rules. However, at the same time, on merit, the ITAT overturned the decision of the CIT(A) and allowed the appeal in favour of the Revenue and restored the issues to the file of the AO for deciding afresh with further direction to the Assessee to produce all the necessary documentary evidence in support of its claim. The relevant extract of the impugned order reads as follows:

> *"5. We have heard the parties on the issue of additional ground raised by way of referring Rule 27 of the ITAT Rules.* ***We find that no application has been filed by the assessee under Rule 27 of the ITAT Rules for raising the legal ground challenging the validity of the proceedings under section 153C of the Act. In our opinion, the parties to the appeal are required***

to follow due procedure laid down in this regard under Rule 2 of the ITAT rules*, which reads as under:*

> *"Respondent may support order on grounds decided against him.*
>
> *27.The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him."*

*6****. Since the assessee has not filed any such application, the appellant, i.e., the revenue cannot be put to surprise by the respondent. Accordingly, the parties were requested to address on the grounds raised in the appeal before us****. Since, we have not admitted additional grounds raised by the assessee, we are not adjudicating the issue raised in those additional grounds."*

4. The operative portion of the order directing remand reads as under:-

10.3 We have heard the rival submissions and perused the relevant material on record. The issue in dispute in the ground raised is whether the land which was sold by the assessee, was agricultural land in terms of the provisions of the Act. The assessee was required to prove that land was situated beyond 8 kms, from the municipal limit and agricultural activity was carried out by the assessee on the said land. Before us, the assessee has referred pages 43 to 45 of the paperbook, which are handwritten certificate issued by the Patwari (Land Revenue Authority). We agree with the observation of the learned DR that the handwritten certificate is not bearing any seal or name of the Patwari or the person who has issued the certificate. The learned counsel has also not produced the original return of income filed for the earlier years to establish that agricultural income was offered for rate purpose un those returns. The Assessing Officer objected admitting of the additional evidences, however, the Ld. CIT (A) admitted the evidence after giving his reasoning. But the Ld. CIT (A) was required to make compliance of the Rule 46A(3) of the Income Tax Rules,1962 and provide opportunity to the Assessing Officer to rebut those evidences as held by the Hon'ble Delhi High Court in the case of Manish Buildwell Private Limited (supra). ***In view of the above facts and circumstances,***

> ***we feel it appropriate to restore this issue to the file of Assessing Officer deciding afresh; with the direction to the assessee to produce all the necessary documentary evidence in support of its claim. The assessee shall be afforded adequate opportunity of being heard.*** *The ground of the appeal is, accordingly, allowed for statistical purposes.*
>
> (emphasis supplied)

Question of Law

5. Although on merits, the controversy is still in the balance, the appellant-Assessee has approached this court aggrieved with the findings of the ITAT pertaining to Rule 27. The Appeal was admitted vide order dated 16.09.2019 and the following question of law was framed:

> *"What is the scope of Rule 27 of the Appellate Tribunal Rules, 1964 in the context of Section 253 (4) of the Income Tax Act,1995?"*

6. With consent, we extensively heard arguments of learned counsels for both the parties for final disposal of the appeal. Mr. S. Krishnan, learned counsel for the appellant contended that the understanding of the ITAT is flawed and contrary to the settled legal position. He submitted that the assessee had relied upon Rule 27 of the ITAT Rules, however, for some strange reasoning, ignoring the basic tenet of law on the applicability of the said provision, the ITAT did not accept Appellant's contentions. He argued that the ITAT Rules provide for three distinct and coordinate methods whereby a respondent before the ITAT can raise an issue decided against him/her by the Commissioner (Appeals). The said procedure in his words is interpreted as (i) *On receipt of the Commissioner's order, an appeal can be filed in terms of Rule 6, on issues decided against such party. Form 36 is notified for this purpose;* (*ii). On receipt of a copy of Ground of Appeal from the other contesting party, a cross-objection can be moved on such issues in*

terms of Rule 22. Form 36-A is notified for this purpose; (***iii). At the hearing of the appeal, the Respondent therein may take up issues decided against him/it, and seek to support confirmation of the Commissioner's order in this way. Rule 27 of the Rule provides for this***.

7. He submitted that all the three above-stated remedies and mechanisms exist concurrently and demonstrated that all of them are bound by their own due process. Rule 27 of the ITAT Rules does not require an application to be structured in any particular manner, unlike in the case of cross-appeal or cross objection. He also submitted that the ITAT has applied the new ITAT Rules, 2017 which are yet to be notified and, therefore, have no mandate in law. Therefore, the ITAT has erred in mis-reading a requirement into the rules which does not exist in reality. Mr. Krishnan further argued that by shutting the doors on legal defenses that were available to the appellant and stood concluded in his favour by several precedents, the ITAT has failed to exercise its power and has caused extreme prejudice to the appellant. On both the legal issues *viz*. non recording of satisfaction note, as well as absence of nexus between reassessment and the material stated to be the basis of framing such assessment, the law stands settled in favour of the assessee. The ITAT has grossly erred by remitting the issues on merit to the file of the AO, without giving similar directions in respect of the legal grounds raised by the appellant by way of application under Rule 27 of the ITAT Rules. In support of his submissions, Mr.Krishnan relied upon ***Tranvancore Chemical & Manufacturing Company Ltd. v. CIT (1997) 226 ITR 429, PCIT, Vadodara-2 v. Sun Pharmaceuticals Industries Ltd. (2017) 86 taxmann.com 148 Guj. Dahod Sahakari Kharid Vechan Sangh Ltd. v. CIT (2005) 149 TAXMAN 456 (Guj.), CIT, Meerut v. Jindal Polyester Ltd.***

(2017) 82 taxmann.com 302 (All.) and ***PCIT v. M/s Dhara Vegeta and Food Company Ltd. ITA no. 454/2019 (DHC)***.

8. Mr. Zoheb Hossain, learned senior standing counsel for revenue, on the other hand, defended the order of the ITAT by relying upon several case laws. He urged that since that the appellant did not file any cross-appeal or cross-objection under Section 253(4) of the Act, he cannot invoke Rule 27 of the ITAT Rules to question the validity of the proceedings under Section 153C of the Act. He further submitted that the issue qua the validity of the proceedings under Section 153C had attained finality and because the appellant chose not to challenge the same in appeal by way of cross-objections before the ITAT, Rule 27 cannot be brought into play to reopen the same. Permitting the appellant to do so would leave the revenue worse off in its own appeal. He further argued that Rule 27 cannot be invoked to expand the scope of the appeal and assail the decision on issues which are beyond the subject matter of appeal. In support of his submissions, Mr. Hossain relied upon the decisions in ***CIT vs. Divine Infracon Pvt. Ltd. 2015 SCC OnLine Del 10952; CIT vs. Edward Keventor Successive Pvt. Ltd. 1980 123 ITR 200 (Delhi) and CIT vs. Anil Kumar Bhatia 2013 352 ITR 493 (Delhi)***.

9. In rejoinder, Mr. Krishnan while reiterating his submissions, distinguished and clarified the import of the judgments relied upon by Revenue and in particular, the decisions in the case of ***CIT vs. Divine Infra Pvt. Ltd*** *(supra)*and ***CIT vs. Edward Keventor Successive Pvt. Ltd*** *(supra).*

Analysis

10. The facts of the case reveal that the Revenue challenged the order of the CIT (A) dated 20.03.2015 before the ITAT on the grounds pertaining to deletion of additions on account of unexplained cash credits, unexplained investments, interest paid on cash borrowings, personal expenses, long term capital gains etc. The assessee [Respondent before ITAT], admittedly did not file a cross appeal or cross objections under section 253(4) of the Act and sought to invoke Rule 27 to question the validity of the proceedings under Section 153C. Thus, in the above noted factual background, we have to consider whether the approach adopted by ITAT in declining the Appellant-assessee [Respondent before ITAT] the right to question the findings of the CIT(A) is correct or not?

11. The Tribunal has taken a pedantic view on the interpretation of Rule 27 by holding that for availing the remedy under the said provision, an application in writing is necessary. In our opinion, this surmise is fallacious and we cannot countenance the same. We agree with Mr. Krishnan that Rule 27, as it stands today, does not mandate for the application to be made in writing. Revenue has not brought to our notice any particular Form notified for filing such an application. Revenue also does not controvert the contention of the Appellant that the draft Appellate Tribunal Rules 2017 proposing to insert a proviso to Rule 27, providing for an application to be made in writing, have not been notified, as yet. Therefore, the reasoning of the Tribunal for rejecting Appellant's contentions is palpably wrong. If the provision does not specify any defined structure for making an application in a particular manner, the Tribunal ought not to have deprived the Appellant of an opportunity to raise a fundamental question of jurisdiction, taking a

hyper technical viewpoint. The Tribunal has plainly refused to cons additional grounds on an erroneous premise which is contrary to the statutory scheme of the Act, that permits the Respondent to urge all grounds in support of the order appealed, as provided under Rule 27. The appeal deserves to be allowed on this short ground and we would have no hesitation in doing so with a consequential direction to ITAT to reconsider the matter afresh on the additional grounds urged by the Appellant. However, that direction would not take the controversy to a logical conclusion. Mr. Hossain raises a more fundamental issue by arguing that in absence of an appeal by the Petitioner, or cross objections by it, the issue of validity had attained finality, and cannot be raked up by taking recourse to the said Rule putting them in a more disadvantageous position. He persists that irrespective of the format of the application and regardless of the reasons given in the impugned order, the appellant cannot be permitted to urge jurisdictional objections before ITAT. We feel clarity is required on this vital ground, particularly, since Mr. Hossain has attempted to substantiate his submissions by contending that this court has already taken a view that supports his line of arguments. In fact, this prompted the learned counsels for both the parties to cite plethora of case laws dealing with this jurisdictional question.

12. Before we proceed with our analysis, let us first examine the said provision and then consider the relevant case laws that deals with the interpretation of the said provision. Rule 27 of the ITAT Rules reads as under:

"*Respondent may support order on grounds decided against him.*

27. The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him."

There are certain other provisions which are also germane to the question of law framed in the present appeal *viz* Rule 6 which provides for filing of appeal, Rule 22 which provides for numbering of cross objections and sub Section 4 of Section 253 of the Act. The said provisions read as under:-

"Rule 6. Procedure for filing appeals.
(1) A memorandum of appeal to the Tribunal shall be presented by the appellant in person or by an agent to the Registrar at the headquarters of the Tribunal at Bombay, or to an officer authorised in this behalf by the Registrar, or sent by registered post addressed to the Registrar or to such officer.
(2) A memorandum of appeal sent by post under sub-rule (1) shall be deemed to have been presented to the Registrar or to the officer authorised by the Registrar, on the day on which it is received in the office of the Tribunal at Bombay, or, as the case may be, in the office of such officer.

Rule 22.Cross-objections.
A memorandum of cross-objections filed under sub-section (4) of section 253 shall be registered and numbered as an appeal and all the rules, so far as may be, shall apply to such appeal.

Section 253. Appeals to the Appellate Tribunal.
(1) xxxx
(2) xxxx
(3) xxxx
(4) The Assessing Officer or the assessee, as the case may be, on receipt of notice that an appeal against the order of the Commissioner (Appeals), has been preferred under sub-section (1) or sub-section (2) by the other party, may, notwithstanding that he may not have appealed against such order or any part thereof, within thirty days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Commissioner

(Appeals), and such memorandum shall be disposed of by th Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).”

13. The Rule 27, has been a subject matter of interpretation of several decisions of various High Courts and many of those have been relied upon by both the counsels. We do not perceive the need to elaborately advert to each and every case cited before us by the respective counsels. In-depth analysis is necessary of only those decisions that are strongly relied upon by the Revenue to support the impugned order of the ITAT on the proposition of law encapsulated in the foregoing paras. Let’s first dwell on a seminal decision rendered by Madras High Court quite some time back in ***Commissioner of Income Tax, Madras vs. Sundaram & Co. Pvt. Ltd. (1964) 52 ITR 763 (Madras)***, which is also relied upon by the Appellant. The law expounded in this judgment forms the bedrock for several other decisions on the subject. Indeed, majority of the recent judgments also refer to this decision, as the law therein has been elucidated in lucid and unequivocal terms and is still on the mark. In the said case, the High Court dealt with Rule 27 of the ITAT Rules, 1946 a provision *pari materia* with the instant Rule 27 of the ITAT Rules, and authoritatively held that although the assessee may not have preferred an independent appeal before the ITAT against the order of the Appellate Assistant Commission (AAC), it could still invoke the said provision to support the order on any of the grounds decided against him. The court interpreted the Rule and held that its invocation is not restricted to grounds decided favorably but would also include the grounds held against him by the authority whose decision is the subject matter of challenge. The relevant portion of the said judgment read as under:

*"**11.** The appellant has no right to urge any ground not set fort in the memorandum of appeal. But it would be open to the Tribunal to grant him leave to raise additional grounds. So far as the Tribunal is concerned, it would not be fettered in its decision by confining to the grounds set forth in the memorandum of appeal or even to those taken by the appellant with the leave of the Tribunal. So long as the principles of natural justice are not violated and the affected person is afforded an opportunity to be heard the Tribunal can dispose of the appeal in its own light. But of course the Tribunal should not act arbitrarily or capriciously but should adopt judicial standards. For example, questions of fact which had not been mooted or discussed or investigated by the Income-tax Officer or by the Appellate Assistant Commissioner should not be gone into at the stage of the appeal before the Tribunal, It would of course be open to the Tribunal to remand the proceedings for fresh ascertainment of facts. The substance of rule 12 is this. The appellant can only urge grounds either set forth in the memorandum of appeal or subsequently taken with the leave of the Tribunal, but the Tribunal's powers to decide the appeal are not subject to any such restrictions.* ***Turning to rule 27 which permits the respondent before the Tribunal to support the order of the Appellate Assistant Commissioner on any of the grounds decided against him, it seems to be clear that this is a right conferred upon him. The Tribunal has no discretion to deprive the respondent of the benefit of this rule. It is an enabling provision which the respondent can avail himself of in order to retain the benefit which has accrued to him from the order appealed against.***

12. The rule that a respondent before the court or Tribunal can justify and support the decision in his favor not merely on grounds favourably decided but also on other grounds held against held against him by an authority whose decision is challenged on appeal is nothing peculiar to the procedure before the Income-tax Appellate Tribunal. *A similar provision is found in the Civil Procedure Code. Order XLI, rule 22, Civil Procedure Code, states:*

"(I) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the

grounds decided against him in the court below, but take any cross-objection to the decree which he could have taken by way of appeal....."

13. The reason for such a rule is obvious. If the final outcome of a decision is favourable to a person it would not matter to him how and by what reasoning the decision is arrived at so long as it is not challenged by his adversary. But, if it is attacked he must be in a position to support it on every ground he urged before the deciding authority whether or not it found favour. If he were not given that amount of freedom he would be a victim of wrong reasons. This would be unjust in the extreme. If rule 27 had not been enacted there would still have been scope for invoking the principle underlying that rule in the name of natural justice. The true rule is that an appeal is a continuation of the original proceeding and that rights of parties cannot be defeated by the form of the order but by the actual decision.

(emphasis supplied)

14. It emerges that Rule 27 ought not to be applied narrowly and therefore we cannot agree with Mr. Hossain, that by permitting the Appellant-Assessee (respondent before the Tribunal) to invoke Rule 27 before the Tribunal, to challenge the ground decided against him, scope of the subject matter of appeal would get expanded. We must also bear in mind that jurisdictional issue sought to be urged by the appellant under Rule 27 is interlinked with the other grounds of appeal, and its adjudication would have a direct impact on the outcome of the appeal. The validity of the proceedings goes into the root of the matter and for this reason, the assessee should not be precluded from raising a challenge to that part of the order which was decided against him by the CIT(A). In this regard, it would be profitable to refer the following extract from the judgment of ***Sundaram &***

Co.*(supra),*where the court had also examined as to what con ‘subject-matter of an appeal’ and held as follows:

> ***“14. Learned counsel for the department contends 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 rule 27. This contention is unexceptionable and we do not think that the learned counsel for the assessee disputed it. But then, what is the subject-matter of an appeal? The answer is simple. The subject-matter is that which the Tribunal or the appellate court is called upon to decide and to adjudicate. The subject-matter cannot be identified with the grounds raised either by the appellant or bythe respondent****. In the present case the subject-matter of the appeal before the Tribunal was the reduction of tax rebate in respect of Rs. 3,54,716. It is impossible to contend that the subject-matter of the appeal lay within a narrower limit and that it was the question whether the Appellate Assistant Commissioner was right in not allowing reduction of rebate on the ground mentioned by him. The assessee had obtained relief before the Appellate Assistant Commissioner to a particular extent. And this was objected to by the department in the appeal before the Tribunal. The applicability of section 34 of the Act was a general question raised by the assessee even before the Appellate Assistant Commissioner. It cannot be said that it became debarred from raising the question over again before the Tribunal because of the fact that it did not choose to file an appeal against other portions of the order of the Assistant Commissioner which was unfavourable to it. The scope of section 34 was a ground which was decided against the assessee before the Appellate Assistant Commissioner and we do not see how the assessee is precluded from relying upon rule 27 and urging that ground before the Tribunal with a view to support only that portion of the Appellate Assistant Commissioner's order which was favourable to it.*
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> ***15.*** *The decision of this court in V. Ramaswamy Iyengar v. Commissioner of Income-tax [[1960] 40 I.T.R. 377, 395.] is relied upon by the learned counsel for the department in support of the contention that the subject-matter of the appeal is*

confined only to the grounds of appeal raised on behalf of th appellant. We have no doubt that this decision is not authority for the position contended. The decision in that case was that where an appeal was only against part of an order the appellate authority would have no jurisdiction to interfere with the other part which does not form the subject of the appeal. Rama-chandra Iyer J., as he then was, after referring to the provisions of the Act and the Rules framed thereunder, observed thus:

"The aforesaid rules, including the power to remand, would be governed by the provisions of section 33(4), and, therefore, the jurisdiction of the Tribunal would be circumscribed by the subject-matter of the appeal—the subject-matter of the appeal being that contained in the original grounds of appeal, together with such other grounds as may be raised by the assessee by leave of the Tribunal. As the right of the respondent is only to support the order of the Appellate Assistant Commissioner on other grounds, it would follow that the Tribunal would have no jurisdiction to pass an order, so as to permit a ground to be raised by the respondent which, if allowed, would make the position of the appellant worse than what it was before."

16. *The principle underlying this decision is that the Tribunal has no power to enlarge the scope of the appeal before it by permitting either the appellant or the respondent to urge grounds which would have the effect of destroying the finality of that portion of the order of the original authority which had not been appealed against by either of the parties. But this does not mean that the respondent should be denied the opportunity of supporting a decision in his favour which has come up on appeal on a ground decided against him by the authority whose decision is challenged.*

17. *We would like to refer to two decisions of the Bombay Hig Court on this question of the scope of appellate power of the Tribunal and the right of the respondent to support the decision on grounds decided against him. In J.B. Greaves v. Commissioner of Income-tax [[1963] 49 I.T.R. 107.] the Bombay High Court held, following two decisions of that court, New India Life Assurance Co. Ltd. v. Commissioner of Income-tax [[1957] 31 I.T.R. 844.] and Commissioner of Income-tax v. Hazarimal Nagji & Co. [[1962] 46 I.T.R. 1168.] , that the subject-matter of an appeal is confined to grounds specifically raised in the memorandum of appeal, the new grounds raised by the appellant with the previous permission of the Tribunal and the grounds urged by the respondent in support of the decree passed in his favour, even though the decision of the court, against which the appeal is filed, is against him. The learned judges of the Bombay High Court observed that this is a general rule and that the position of the Appellate Tribunal is the same as a court of appeal under the Civil Procedure Code and that its powers are identical with the powers enjoyed by the appellate court under the Code. At page 124 it is observed as follows:*

> *"Now, a respondent in an appeal is undoubtedly entitled to support the decree which is in his favour on any grounds which are available to him, even though the decision of the lower court in his favour may not have been based on those grounds. A respondent, unless he has filed an appeal himself or filed cross-objections in the appeal filed by his opponent, will not be entitled to challenge that part of the lower court's decree which is against him, and the appellate court will have no power or jurisdiction to permit him to do so……..…*

It thus follows that the subject-matter of appeal would get confined to the limits of the grounds specifically raised in the memorandum of appeal, the new grounds raised by the appellant with the previous permission of the Tribunal and the grounds urged by the respondent in support of the decree passed in his favour, even though the decision of the court, against which the appeal is filed, is against him."

18. *In Pokhraj Hirachand v. Commissioner of Income-tax [[1963] 49 I.T.R. 293.] the same principle is reiterated."*

19. We would like to disentangle the subject-matter of the appeal from the grounds upon which the appeal is raised or upon which the respondent would like to rely. As stated already the subject of an appeal is an item of dispute or controversy between the department and the assessee in regard to a particular question. Properly speaking, the subject of a tax appeal is the relief sought by the assessee and objected to by the department. The grounds are only missiles employed by the combatants to achieve their respective desired ends. It would not be possible to circumscribe the subject of the appeal by taking into account the rival contentions or the reasons or the grounds which are put forward either by the department or by the assessee. We have no doubt that in the light of the principles laid down by this court in V. Ramaswamy Iyengar v. Commissioner of Income-tax [[1960] 40 I.T.R. 377.] and also of the principle of the Bombay decision referred to above and on the principles which we have ourselves set forth, the Tribunal acted rightly in permitting the assessee to raise the question of the applicability of section 34 before it. Questions Nos. 1 and 2 raised in this reference will, therefore, be answered against the department and in favour of the assessee."

(emphasis supplied)

15. Now, we shall deliberate on the judgement of this Court in ***Commissioner of Income Tax Central – II v Divine Infracon Pvt. Ltd,***

2015 64 taxman.com 472 (Delhi) which has been strongly relied up Hossain to suggest that the court has taken a different view on Rule 27 that is in consonance with his contentions. Let's first briefly refer to the facts of the said case. Here, the assessee filed an appeal before the CIT (A) against the order of the AO challenging additions made under section 68 of the Act, on merits, as well as on the ground that the same were beyond the scope of section 153A as the share application money was duly disclosed in its return and the addition was unrelated to any incriminating material found in the search. The CIT(A) decided that the addition was beyond the scope of 153A, however at the same time, he upheld the conclusion of the AO regarding the share application money and sustained the additions made by the AO. Assessee then filed an appeal before the ITAT. In this appeal, Revenue sought to assail the finding of the CIT (A) which held that the additions were outside the scope of section 153A. Although the Tribunal permitted the revenue to raise the contentions, it however, finally upheld the conclusion of the CIT (A). Thereafter, appeals were preferred before this Court by both, Asssesee as well as Revenue. During the proceedings, Assessee contented that since Revenue has not appealed against the order of the CIT (A), it could not raise the issue before the Tribunal and the scope of the subject matter of the appeal was limited to the finding of the CIT(A) with respect to the merits of the addition and the Tribunal could not have gone beyond the subject matter. In this context, this court held as under:-

> ***"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 th decision of the Supreme Court in Hindustan Coca Cola Beverage (P.) Ltd. v. Jt. CIT [2007] 293 ITR 226/163 Taxman 355. 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.*

xxx ***xxx*** ***xxx***

> *12.* ***Indisputably, the Revenue could also not take recourse t 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 v. 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.***
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> *13. The learned counsel for the Revenue has referred to the decision of the Supreme Court in National Thermal Power Corpn Ltd. v. CIT [1998] 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."*
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> (emphasis supplied)

16. On the strength of the above reasoning, Mr. Hossain argues that in the present case as well, since the Appellant has not preferred any cross appeal or objections, it cannot now be permitted to urge jurisdictional grounds. We do not agree. The factual situation in ***Divine Infracon*** *(supra) is* entirely distinguishable from what we have in hand. We had, in fact, summoned the judicial record of the said case in order to understand the context in which

the aforenoted observations were rendered by the court. In the said c assessment was framed under section 153A of the Act making an addition in respect of share application money amounting to Rs. 20,25,000/-. The CIT (A) took into consideration detailed submissions as to validity of the proceedings under section 153A, as is evident from grounds raised therein, as well as on substantive issues. On the former, the CIT (A) held that there was 'considerable merit' in the contentions, but at the same time, the additions under section 68 of the Act were confirmed, partly allowing the appeal. The Assessee then impugned the action of the CIT(A) specifically on the point of contradictory findings *i.e* having found merit on the legal issue viz. section 153A, the additions could not have been sustained. This is evident from ground urged before the Tribunal to the effect *"That the Learned CIT (Appeals) has grossly erred in law and on facts in sustaining the addition made by Assessing Officer under sec.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 Learned CIT(Appeals) in the impugned order."* Revenue then filed an application under Rule 27 before the Tribunal which was admitted and duly adjudicated in favour of the assessee. In these circumstances, in further appeal, since the Revenue had not filed any cross appeal or objections, this Court in these peculiar facts rightly held that Revenue could not have raised the plea under Rule 27 before the Tribunal, since the issue as sought to be urged by the Revenue was subject matter of Assessee's appeal before the Tribunal [Ref: first ground of the memorandum of appeal, reproduced above]. Thus, the aforesaid observations made by the court cannot be construed to restrict the Appellant herein from invoking Rule 27 in the context of the present case. We cannot also read the aforesaid judgment as a

view contrary to the law expounded in ***Sundaram & Co.****(sup* contended by Revenue.

17. Further, Mr. Hossain has placed reliance on the judgment of this court in ***CIT, New Delhi (Central) v Edward Keventer (Successors) Pvt. Ltd,*** **(1980) 123 ITR 200,** a decision also noticed in ***Divine Infracon*** *(supra).*First, the factual controversy in this case is required to be explained. In this case, the assessee had filed a return showing loss which it had incurred via purchase and subsequent sale of shares and the payment of interest which had accrued due to the loan taken for the purpose of making the investments in the aforesaid shares. The Income Tax Officer (in short 'ITO') found that losses out of the share transactions undertaken by the assessee were fictitious and that the claim of deductions for interest on loans relatable to alleged purchase of shares as unjustified and accordingly disallowed the same. On appeal by the assessee, the AAC found that the loss claimed by the assessee in the transactions of shares was done with a collusive intent, when in fact profits were earned by the assessee and that the interest liability was anything but artificial. Finally, the AAC held the transactions to ine but enhanced the income of the assessee, while partially allowing the deduction on claim of interest with regard to loans. Aggrieved by the findings of the AAC, the assessee went in appeal before the Tribunal, seeking deletion of entire gross addition, while the department as respondent, relying on Rule 27 of the 1946 Rules, contended that in case the appeal was allowed the whole of the addition should not be deleted but only part of it to the extent disallowed by the AAC. The Tribunal while rejecting the department's contention under rule 27, set aside the whole enhancement as it found that the AAC made the enhancement based on no material evidence. Thus, a

reference was made from the said decision to the High court under 66(2) of the old act. The High Court firstly examined as to what constituted the subject matter of appeal. Furthermore, the High Court held that the appellant would not be left in a worse off position than where it was before filing of the appeal, if the said ground raised by the respondent under Rule 27 was examined and allowed by the tribunal, as the AAC had decided in favour of the respondent-assessee on merits. The relevant portion of the aforenoted judgment is extracted hereunder:

> *"**16.** How then is the subject-matter of the appeal to be determined? This is easy, for an appeal comes up before the Tribunal because one of the parties before the AAC— the assessee or the ITO is aggrieved by the order of the AAC. He comes to the Tribunal to have his grievance redressed and the subject-matter of his grievance is set out in the grounds of appeal filed by him. To start with, therefore, the subject-matter of the appeal is constituted by the grounds of appeal filed by him which will clearly identify the question in dispute in the appeal. Rule 12 of the Tribunal Rules, as they stood at the relevant time, laid down the general rule that an appellant shall not urge or be heard in support of any ground of objection, not set forth in the grounds of appeal. But this rule has also an exception for the very rule impliedly confers a power on the Tribunal to grant leave to the appellant to urge additional grounds not set forth in the memorandum of appeal. Normally speaking such additional grounds can be urged only in relation to the subject-matter already appealed against and in regard to such grounds the Tribunal has discretion to grant or refuse permission and the grant of permission may also be express or implied. But, where an appellant seeks to bring in new items which had nothing to do with the subject-matter of the appeal as originally filed, it will be as if the appeal in this regard has been filed belatedly and the Tribunal can entertain them only after considering whether there are grounds to excuse the delay in filing the appeal (See Panchura Estate Ltd. v. Government of Madras, [1973] 87 ITR 698 (Mad)). Where, however, permission is granted by the Tribunal, the scope of the original appeal will stand expanded or*

enlarged so as to cover the matters raised in the original grounds as well as those raised in the additional grounds. ***Thus, the subject-matter of the appeal is constituted by the original grounds of appeal and such additional grounds as may be raised by leave of the Tribunal. So much regarding the appellant.***

17. *Now, adverting to the rights of the respondent in an appeal, we start with the basic idea that, if a party appeals, he is the party who comes before the Appellate Tribunal to redress a grievance alleged by him. If the other side has a grievance, he has a right to file a cross-appeal (and under the Civil Procedure Code and the I.T. Act of 1961, a memorandum of objections). But, if no such thing is done, he is deemed to be satisfied with the decision. He is, therefore, entitled to support the judgment of the first officer on any ground but he is not entitled to raise a ground which will work adversely to the appellant.* ***In fact such a ground may be a totally new ground, if it is purely one of law, and does not necessitate the regarding of any evidence, even though the nature of the objection may be such that it is not only a defence to the appeal itself but goes further and may affect the validity of the entire proceedings. But the entertainment of such a ground would be subject to the restriction that even if it is accepted, it should be given effect to only for the purpose of sustaining the order in appeal and dismissing the appeal and cannot be made use of, to disturb or to set aside, the order in favour of the appellant (See Bamasi v. CIT, [1972] 83 ITR 223 (Bom)). This liberty to the respondent is reserved by r. 27 of the Tribunal Rules.***

xxx *xxx* *xxx*

23. Of course, as pointed out by the Bombay High Court in Bamasi v. CIT, [1972] 83 ITR 223, earlier referred to, the assessee could use this argument only to sustain the order of the AAC but not to get further relief and have the reassessment itself annulled and thus adversely affect the appellant and place it in a worse position than if it had not appealed at all. This decision illustrates the principle that the subject-matter of the appeal should be Understood not in a narrow and unrealistic manner but should be so comprehended as to encompass the

entire controversy between the parties which is sought to be go adjudicated upon by the Tribunal.

xxx xxx xxx

26. *Suppose the assessee prefers an appeal to the Appellate Tribunal, against the AAC's order, contending that the determination of the sale consideration is excessive and the Tribunal is inclined to accept the figure of Rs. 2 lakhs shown by the assessee. We think it would be fair to say that the subject-matter of the appeal is not merely the question of what should be the sale consideration but as to what should be the capital gain. If the department was satisfied with the determination of the capital gain at Rs. 1 lakh it could not be expected to file an appeal and it would not be correct to deprive the department of the opportunity to maintain the AAC's order by construing the subject-matter of the appeal in a narrow manner as restricted to the question of the sale consideration; We think, therefore, that the department would be entitled to support the order of the AAC, under r. 27, on the basis that the market value as on January 1, 1954, was Rs. 1 lakh as determined by the AAC and not Rs. 1½ lakhs as decided by the AAC, rejecting the ITO's contention. Therefore on the same analogy that in a case where certain grounds concerning the same matter are interlinked, they should be considered together and the scope of the subject-matter before the Tribunal should be construed accordingly. The position might be different where different grounds of appeal are dealt with by the AAC, which have no real inter-connection with each other though naturally they all bear upon particular assessment and though they may all broadly relate to the computation of income from the same head of source. But in a case where there are inter-connected grounds of appeal and they have impact on the same subject-matter, the scope of the appeal should be broadly considered in the correct perspective, While the appellant should not be made to suffer and be deprived of the benefit given to him by the lower authority where the other side has not appealed, equally the procedural rules should not be interpreted or applied so as to confer on an appellant a relief to which he cannot be entitled if the points decided in his favour on the same matter by the lower court are also considered as*

requested by the respondent. It seems to us that the position i the present case is somewhat similar. The ITO had treated certain transactions as sham and collusive, disallowed the losses claimed and consequently disallowed the interest admitted by the assessee to relate to these transactions. On appeal, the AAC treated the transactions as genuine but considered the prices to be inflated. He, therefore, computed a profit and as a logical corollary, allowed the interest substantially (except to the extent of inflation found by him). When, on appeal, the Tribunal decides to restore the ITO's finding that the transactions were bogus then the logical consequence will be a reversal of the AAC's allowance of interest also. For the reasons discussed above, we are unable to construe the subject-matter of the appeal as restricted to the ground raised, viz., deletion of Rs. 9,28,000. We think the subject-matter of the appeal was the genuineness or otherwise of the share transactions and the profit assessable in respect thereof. On this, the AAC had given two findings, one against the assessee and the other against the department. In view of the former being substantially beneficial to it, the department could not be aggrieved by the consequential finding on the latter. Unlike in Sundaram's case, [1964] 52 ITR 763 (Mad), where at least it could be said that the assessee could have filed an appeal in regard to the applicability of s. 34 as that was a separate and independent ground decided against it, here, however, as mentioned earlier, the department could not have filed an appeal on this point as it was consequential, according to it, on the finding of the AAC on the first point which was to its benefit. It could not have assailed the latter in appeal without attacking the finding on the first also. ***To say, in such circumstances, that the department cannot seek to uphold the AAC's order on this subject-matter would virtually amount to denial of natural justice to it which, as pointed out in Sundaram's case, [1964] 52 ITR 763 (Mad), is not the object of the relevant statutory provisions. Moreover, even if the department's ground ultimately succeeds on merits, the assessee will not be adversely affected and will not be in a worse position than if it had preferred no appeal at all.****"*

(emphasis supplied)

18. Mr. Hossain, relying on ***Edward Keventer****(supra)* argued, additional grounds raised by the assessee under Rule 27 were examined and allowed by the ITAT, the revenue would be left in a worse off position than it was before filing of the appeal. He submits that since the assessee had not assailed the order of CIT(A), it has attained finality qua him. Now, the assessee cannot be permitted to take away the benefit that accrued in favour of Revenue, except by way of an appeal or cross objections. He submits that an order adverse to the interest of revenue, by recourse to Rule 27 is impermissible as held in the aforesaid judgment.

19. We are of the view that Mr. Hossain's reading of the aforementioned Judgment is flawed. He is misconstruing the language employed in Section 254 (1) of the Act (corresponding to section 33(4) of the Indian Income-tax Act 1922). The word '*thereon*' used in section 254 (1) of the Act, gives power to the Appellate Tribunal to pass such orders thereon as it thinks fit, implies that the tribunal would confine itself to the subject matter of appeal only. Under Rule 11 of the ITAT Rules, an appellant can, by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, and the Tribunal, in deciding the appeal, would not be confined to the grounds set forth in the memorandum of appeal. This, however, does not mean that the Respondent is prevented from supporting the judgment on the grounds decided in his favor, or by assailing the aspect decided against him. Accepting Mr. Hossain's submission would mean that subject matter of the appeal is circumscribed and is confined only to the grounds urged by the Appellant. Firstly, the subject matter of an appeal is not be construed narrowly, as already observed above. Subject matter is "*comprehended as to encompass the entire controversy between the parties*

which is sought to be got adjudicated upon by the Tribunal". Seco jurisdictional objection under Rule 27 is gone into by the Tribunal, albeit raised by resort to Rule 27, it cannot be said that the subject matter is expanded under the guise of the said provision. It cannot be said that Respondent is taking away benefit that could be said to have accrued in favour of the Appellant before the Tribunal. The jurisdictional question is not an independent issue that can be reversed only by way of an appeal or cross objection. We do not find any merit in the submission of Mr. Hossain.

20. Having analyzed the judgments relied upon by the Revenue and not finding same to be of any assistance to the Revenue, we now proceed to examine the legal position that emerges from a plain reading of the provision in question. In fact, we feel the controversy sought to be raked up by the Revenue to deprive the Appellant [Respondent before ITAT] an option to raise jurisdictionalgrounds ofobjection is completely misplaced. If we refer to Rule 27 of ITAT Rules, 1963, a bare reading thereof manifest that a Respondent has a right to support the impugned order, without having filed any cross appeal or cross objection. This understanding emerges from the language of the said provision which begins with the words "*The Respondent, though he may not have appealed,*". This means that the provision is to enable a Respondent to effectively defend the order appealed before the Appellate forum. The expression "*though he may not have appealed"* also indicates that the provision is to be resorted to in a situation where a Respondent may otherwise have a right to file an appeal or cross objections, but has chosen not to avail of this remedy. Thus, a party who has not availed of the option of filing an appeal, in a given situation, if arrayed as a Respondent before the Appellate Tribunal, can rely upon Rule 27, to

support the order under appeal. The aforesaid expression also sugge recourse to Rule 27 would only be available in case the remedy of appeal is otherwise available with the Respondent, and he has elected not to avail the same. In other words, in case a Respondent would not have such a right [of filing a cross appeal or cross objection], then he would not have the option to invoke the said provision. This brings us to the more fundamental question regarding the scope of aforesaid rule at the instance of the Respondent who is invoking the same. The scope and ambit of the aforesaid provision can be gathered from the remaining part of the said rule to the effect "*may support the order appealed against on any of the grounds decided against him*". A plain reading of the aforesaid expression indicates that a Respondent can support an impugned order on any of the grounds which were decided against him. Now, if weapply the aforesaid provision to the situation before us, we can easily discern that the Appellant-assessee- on the basis of Rule 27, was urging before the ITAT that the initiation of reassessment may be declared as invalid. Therefore, by invoking Rule 27, the assessee sought to support the final order of the CIT(A) in his favour, by assailing that part of the said order, wherein the CIT(A) upheld the initiation of reassessment under Section 153C of the Act. We are, therefore, of the view that invocation of Rule 27 for challenging the decision of the CIT (A) on the legal ground was well within the scope of Rule 27. The Appellant – assessee, as a respondent before the Tribunal was within its right to support the order under appeal before the Tribunal by attacking the grounds decided against him. It should nevertheless be borne in mind that Rule 27 cannot be invoked by a Respondent on an issue which is independently decided against him in the order appealed by the Appellant. In other words, if there is an issue, which is separately decided against a Respondent [in appeal], and the

decision on the said issue has no bearing on the final decision of t (A), then invocation of Rule 27 to challenge the correctness of the same cannot be sustained. Rule 27 and the provisions dealing with cross objections operate in separate fields, although there is certain overlap between them. Evidently, if cross objection is not filed, the Respondent would run the risk of being faced with a situation that it cannot succeed in getting anything over and above the order in appeal being confirmed. If the Respondent wants to assail an independent issue that has been decided against him in the order appealed by the Appellant, which has no bearing on the result of order impugned in appeal before the Tribunal, the appropriate remedy would lie in of filing a cross appeal or cross objection. In that event, as explained above, Rule 27 cannot be pressed into service to have the same upset or overturned.

21. Therefore, arguably Rule 27 has a limited sphere of operation, but this cannot be whittled or narrowed down to the extent, the Revenue would like us to hold. We cannot read Rule 27 in a restrictive manner to hold that the said provision can only be invoked to support the order in appeal and while doing so, the subject matter of the appeal before the ITAT should be confined only to the extent of the grounds urged by the Appellant. To read Rule 27 in this manner would render the said rule redundant as the respondent before the Tribunal would, even otherwise be entitled to oppose the appeal and raise submissions in answer to the grounds raised in the appeal that are pressed at the hearing of the appeal. With this clarity, we do not find any merit in the submissions of the Revenue that the assessee had accepted order of CIT (A), or that the issue of maintainability had attained finality. We also do not find that by such an interpretation, the scope of

Rule 27 is expanded or that it would be contrary to Section 253 (4), c would render the provision relating to cross objections redundant and otiose. In ***Sundaram &Co.*** *(supra)*,the High Court observed that the reason for such a rule [Rule 27] was that when a decision is favorable to a person and comes to be challenged by his adversary, the person must be in a position to support the decision on every ground urged before the deciding authority whether or not it found favor, else such a person would be a victim of wrong reasons if no such freedom was given. In fact, the court has further held that even if Rule 27 as under the 1946 Rules had not been enacted, scope for invocation of the principle underlying the rule would still be possible based on principles of natural justice. This is the essence of the proceedings in appeal before the ITAT which unfortunately has been completely ignored and, instead, the Tribunal has engaged itself in a totally irrelevant issue of the form and structure of the application.

22. Therefore, the position of law that materialises on a reading of the aforesaid decisions is that the appellant herein, (Respondent before ITAT) could have invoked Rule 27 to assail those grounds that were decided against him if those grounds/issues had a bearing on the final decision of the CIT(A). Revenue was certainly not taken by surprise as the appeal is considered to be continuation of the original proceedings. The ITAT had no discretion to deprive the appellant the benefit of the enabling Rule provision to defend the order of the CIT(A). The question of jurisdiction -which is sought to be urged by the Respondent while supporting the order in appeal, had a bearing on the final order passed by the CIT(A), because if the said issues were to be decided in favour of the appellant herein the assessee, that

would have been an additional reason to delete the additions made by the A.O.

23. We shall now also note some other decisions, where similar issue has been considered. The decision in ***Kanpur Industrial Works v. Commissioner of Income-Tax, 1965 SCC OnLine All 480: (1966) 59 ITR 407*** is worth mentioning. In this case, certain land of the assessee was acquired by the State Government for Rs. 10,000/- and immediately he was given a part of the land on lease for 999 years on a nominal rent. He was permitted to sell the land to anybody as a freehold property. Accordingly, he sold a major part of it during the accounting year for Rs. 1,26,870/-. During his assessment, two questions arose, one, whether the net receipts from the sale of the land amounted to profits of business, example, an adventure in the nature of trade or commerce liable to tax, and the other being the quantum of the net receipts. The Income Tax Officer (ITO) held that the receipts were profits and fixed the amount at Rs. 1,16,870/-,by deducting Rs. 10,000/- paid aspremium, from the sale proceeds of Rs. 1,26,870/-. The assessee appealed before the Appellate Assistant Commissioner (AAC), who confirmed the Income Tax Officer's finding that the receipts from the sale were profits but disagreed with the finding that the amount of Rs. 1,16,870/- was the quantum of profits. The AAC was of the opinion that market price of the land should be cost to the assessee. Accordingly, on the basis of a report from the ITO, he determined the market price of the land was Rs. 1,12,056/- and on that basis determined the net receipts at Rs. 14,814/- and decided the appeal accordingly. The department preferred an appeal before the Tribunal. In the appeal, the assessee invoked Rule 27 of the Income Tax Appellate Tribunal Rules, 1946 to support the order on the ground that the

transaction was not an adventure in the nature of trade, a ground having decided against the Respondent. The Tribunal took the prayer to be of fundamental nature, destroying and not supporting the order of the AAC and disallowed it. The Tribunal held that the price paid by the assessee for purchasing the land in dispute should be taken to be the cost price and remanded the case for determining it and then arriving at the amount of net receipts. The assessee applied to the Tribunal for referring the case to the High Court under Section 66 (1) of the Act. The question on reference to the High Court was "*Whether on a proper construction of rule 27 of the Appellate Tribunal Rules, 1946, the assessee-respondent having not appealed against the order of the Appellate Assistant Commissioner was entitled to contend, in the department's appeal before the Tribunal, that the entire profit arising out of the sale of land was not liable to assessment?*" The question was answered in the negative, and it was held that the assessee could contend that the receipts were not profits of a business at all, but for the purpose of showing that the department was not entitled to succeed in the appeal i.e. to an increase in the assessed income and not for the purpose of claiming the relief of quashing of the assessment order. It was held that so long as it did not ask for the quashing of the assessment order, its plea that the receipts were not profits ought to have been entertained. It was thus held that the answer to the question referred depends upon what the assessee prayed for before the Appellant Assistant Commissioner. If it prayed that the assessment order be quashed, it was not entitled to be heard, whereas if it simply prayed that the Department's appeal be dismissed, it was entitled to be heard. This judgment thus brings out this fine distinction with respect to the interplay of Rule 27, which is the *pari materia* provision under the rules

in operation. The observations of the Court, bring out the scope of F reads as under:

> ***"7.*** *The provision in rule 27, with which we are concerned, is to be distinguished from that in Order 41, rule 22(1). While rule 22(1) gives two rights to the respondent, one in respect of part of the claim decreed in his favour, and the other in respect of the part disallowed, rule 27 deals with the order of the lower court, viz., the Appellate Assistant Commissioner in its entirety. It does not contemplate the splitting of the Appellate Assistant Commissioner's order into two parts for the simple reason that an assessment order is incapable of being treated as an order partly allowing something and partly disallowing the other thing. While in respect of a claim of a plaintiff it can be said that part of it is allowed and part disallowed the same cannot be said in respect of an assessment order and it cannot be said to involve two orders partly assessing something and partly disallowing assessment of another thing. When a person is assessed he is assessed on all the income found assessable. There are no two parties before an Income-tax Officer or an Appellate Assistant Commissioner and there is no claim by one party to be met by the other; so the analogy of a suit, part of which may be decreed and part rejected, does not apply to an assessment proceeding. A dispute may arise in an assessment proceeding about certain receipts being income or not income or the assessees being entitled to a certain deduction or being not entitled to it and the assessment order is passed after deciding this dispute. The dispute may be decided partly in favour of the assessee and partly against him. But since the assessability is indivisible the order assessing the income is treated as one indivisible order and the facts on account of which the various receipts are held to be assessable income are treated as various grounds of attack and the various facts on account of which deductions or exemptions are allowed or receipts are not treated as assessable income are treated as grounds of defence. So an assessment order is based upon allowing and disallowing grounds of attack and of defence. An appeal to the Tribunal whether by the department or by an assessee is like an appeal by a defendant or a plaintiff from a decree accepting or rejecting the entire claim of the plaintiff. There is no scope for any cross-objection and*

consequently no scope for the respondent's, e.g., the assessee's o the department's urging for reduction in the assessed income or increase in the assessed income, as the case may be. If the appellant before the Tribunal is the department claiming increase in the assessed income all that the assessee can urge is that there should be no increase; that is the only subject-matter of the appeal. If the assessee desires reduction in the assessed amount he himself must file an appeal; he has not been given the right to file a cross-objection. The only right given to him is of urging that there should be no increase, not only for the ground of defence accepted by the Appellate Assistant Commissioner but also for the other ground of defence rejected by him. This is the only right given to him by rule 27. There is only one order of the Appellate Assistant Commissioner that assessing the income at a certain figure, and the right given to him is of urging another ground, though rejected by the Appellate Assistant Commissioner, in support of it; he must support the order, i.e. must not ask for any variation (in his favour) in the order. In other words, he must not ask for any reduction in the assessed income. Asking for any reduction in the assessed income is not supporting the order assessing it.

8. *As I said earlier the order is one assessing the income after accepting and rejecting various grounds of attack and defence. Grounds of attack and defence may be grounds of law or of fact. A ground of law may affect the assessability of the assessee or inclusion of the whole of a receipt or a part of a receipt in his assessable income. If an assessee is not liable to be assessed at all no part of his income can be assessed; if the whole of a receipt is not income no part of it can be included in his assessable income and if a part of a receipt is not income that part cannot be included in his assessable income. If an assessee is not assessable at all but is still assessed he and the department both can be aggrieved by the assessment order; he, on the ground that he was not liable to be assessed at all and other grounds, if any, and the department, on the ground that something more should have been included in his assessed income. So either of them can file an appeal. If he files an appeal, the department can urge in support of the assessed income any ground of attack that might have been rejected by the*

Appellate Assistant Commissioner but it cannot ask for a increase in the assessed income; it can ask for an increase only by appealing. If the department files an appeal, which must be for an increase in the assessed income, the subject-matter of the appeal is the increase claimed by the department and the assessee can urge any ground of defence, even though it might have been rejected by the Appellate Assistant Commissioner, for showing that there should be no increase. That he is not liable to be assessed is a ground for showing that there should be no further assessment. Whole includes part and if no receipt is assessable the particular receipt claimed by the department to be assessable also is not assessable and the department's appeal can be resisted on this ground. The Appellate Assistant Commissioner rejected this ground of defence and holding him assessable assessed his income. But since the non-liability to assessment on any income includes the non-liability to assessment on a particular receipt he can object to the inclusion of the receipt in his assessable income on the ground that he is not liable to be assessed on any receipt. This is supporting, and not demolishing, the assessment order passed against him, provided he does not ask for cancellation of the assessment order. He could have filed an appeal against his being assessed but was not bound to do so even though he believed that he was not liable to be assessed at all. If he did not mind paying the tax on the assessed amount nothing compelled him to file an appeal. But this fact that he did not file an appeal does not estop him from contending in the department's appeal for an increase in the assessed amount that there should be no increase. He is not barred either by the rule of estoppel or by the rule of res judicata on account of the fact that on that ground he should not have been assessed at all and that he has submitted to his being assessed. His submission to the assessment order does not amount to his submission to assessability. If the assessment order becomes final it may be said that he is barred by estoppel or res judicata from contending in a subsequent proceeding that he was not liable to be assessed at all. In an appeal against the assessment order itself there is no question of his being barred by estoppel or res judicata. The appeal being from the assessment order there is no question of its being final or operating as res judicata. There is no other doctrine which can be relied upon for

barring his contention that he was not assessable at all. It i irrelevant to consider that on the ground on which he urges that there should be no increase he should not have been assessed at all; there is no law that in the absence of estoppel or res judicata a ground applicable to a whole cannot be urged in respect of a part if it is not urged, or is urged but rejected, in respect of the other part. No incongruity results from applying it to a part even though it is not applied to the other part nor any shock to the conscience. There is no incongruity in maintaining the assessment order passed on the assessee and refusing to increase it on the ground that he was not liable to be assessed at all. What is irksome is incongruity in two orders and not incongruity in respect of reasons for the two orders. Two orders should not be incompatiable with each other, so that one can be enforced and the other cannot be, but if two orders can both be enforced it is immaterial that they are based upon contradictory reasons. Two orders not mutually exclusive have been maintained even though they are based on mutually exclusive reasons: vide Dunn v. United States [76 L.Ed. 356 : 284 U.S. 390.], Bartkus v. Illinois [3 L.Ed. 2d. 684 : 359 U.S. 121.], Hoag v. New Jersey [2 L.Ed. 2d. 913 : 356 U.S. 464.] and In re William Barron [10 Criminal Appeal Reports 81.] . ***It is also irrelevant to consider what relief could have been allowed to the assessee if this ground of defence is allowed to be urged by him in the department's appeal if the appellant does not ask for it. No relief can be given to an assessee unless he asks for it and is entitled in law to get it; the Tribunal has no jurisdiction to give him any relief though he may be entitled to it, if he does not ask for it in the appeal. The power conferred upon it by section 33(4) is certainly very wide but is so wide only within the subject-matter of the appeal. However wide it may be, it is limited by the scope of the appeal. It cannot travel outside its scope and pass any order even though it thinks it a fit order. It has to pass an order on the appeal, i.e., in respect of the subject-matter of the appeal. The order that it thinks fit must be in respect of the subject-matter of the appeal and so long as it is in respect of it it can be passed regardless of its nature or contents. I respectfully agree with the observation of Sir Leonard Stone C.J. and Kania J. in Motor Union Insurance Co. Ltd. v. Commissioner of Income-tax [[1945] 13 I.T.R. 272.]***

at page 283, of Chagla C.J. and Tendolkar J. in Puranmc Radhakishan v. Commissioner of Income-tax [[1957] 31 I.T.R. 294.] at page 304 and in New India Life Assurance Co. Ltd. v. Commissioner of Income-tax [[1957] 31 I.T.R. 844.] and of Jagadisan and Srinivasan JJ. in Commissioner of Income-tax v. Sundaram & Company Private Ltd. [[1964] 52 I.T.R. 763.] at pages 759 and 770, that "the word 'thereon' used in section 33(4) only means 'on the appeal', which must mean on the grounds raised in the appeal." In the last case the learned judges observed that "the subject-matter of an appeal…. is that which the Tribunal or the appellate court is called upon to decide and to adjudicate" and that "the subject-matter cannot be identified with the grounds raised either by the appellant or by the respondent." By its order an appellate court can dispose of the appeal and not something not included within its scope. In the department's appeal for an increase in the assessable income the only question for its consideration is whether the increase or part of it should be allowed or not. Whether the amount already assessed was wrongly assessed or not or whether the assessee is liable to be assessed at all or not is a question quite outside the scope of the appeal and any decision on it cannot be said to be an order on the appeal. Consequently it cannot be said that the Tribunal would have power to annul the assessment even without any prayer by the assessee to that effect, if it accepts his ground of defence that he was not liable to be assessed at all. On that ground being accepted it can only refuse to increase the assessed income; only that would be an order on the appeal by the department. Any other order such as annulling the assessment would be outside the scope of the appeal. Therefore, it would be erroneous to say that the effect of accepting the ground of defence of the assessee would be the annulment of the assessment order and that this would be quite the reverse of supporting it by the ground of defence.

xxx xxx xxx

13. In the result I hold that the assessee could contend that the recepits were not profits of a business at all, but for the purpose of showing that the department was not entitled to succeed in the appeal, i.e., to an increase in the assessed income and not for the purpose of claiming the relief of the quashing of the

assessment order. In other words, so long as it did not ask fo the quashing of the assessment order its plea that the receipts were not profits ought to have been entertained."

(emphasis supplied)

24. Similar is the view taken in the case of ***Principal Commission of Income Tax, Vadodara – II v. Sun Pharmaceuticals Industries Ltd. 2017 86 taxmann.com 148 (Gujarat)***. The brief facts of the said case are that the Respondent – assessee, a company registered under the Companies Act was engaged in various businesses including manufacturing pharmaceuticals. For relevant assessment years, the assessee had filed the returns of income computing the same in terms of Section 115 JB. The AO issued notices for reopening of the assessments and ultimately framed reassessment by making various additions. In appeal, the assessee contested the reopening of the assessments and also the addition made by AO. The Commissioner (Appeals) allowed the appeals on the additions made by the AO, however on the question of validity of reopening of the assessments, he held against the assessee. Revenue preferred an appeal before the Tribunal, where the assessee – Respondent without filing an appeal, relied upon Rule 27 of the ITAT Rules and raised the legal issue of the validity of assessments before the Tribunal. Despite objections from the Revenue, the Tribunal permitted the assessee to raise such contentions and ultimately held that the notice for reopening of assessment was bad in law. When the matter travelled to the High Court, the question arose as to whether the Tribunal was right in law by allowing Respondent – assessee to raise question of validity of notices for reopening of assessments taking the recourse of Rule 27 of the ITAT Rules without assessee having filed cross appeal or cross objection before the Tribunal against order of Commissioner (Appeals). Examining this

question, the High Court,relying upon the decision of Gujarat High C ***Dahod Sahakari Kharid Vechan Sangh Ltd. v. Commissioner of Income Tax, 2005 149 Taxman 456 (Gujarat)***, held as under:

> ***9.*** *This Rule thus provides that the respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him. This rule embodies the fundamental principle that the person, who may not have been aggrieved by an order of the lower authority or the Court and has therefore not filed any appeal against such order, is free to defend the order before the Appellate Forum on all grounds including the ground, which may have been held against him by the lower authority or the Court, whose order is otherwise in his favour.*
>
> ***xxx xxx xxx***
>
> ***11.*** *To put the controversy beyond doubt, Rule 27 of the Rules makes it clear that the respondent in appeal before the Tribunal even without filing an appeal can support the order appealed against on any of the grounds decided against him. It can be easily appreciated that all prayers in the appeal may be allowed by the Commissioner (Appeals), however, some of the contentions of the appellant may not have appealed to the Commissioner.* ***When such an order of the Commissioner is at large before the Tribunal, the respondent before the Tribunal would be entitled to defend the order of the Commissioner on all grounds including on grounds held against him by the Commissioner without filing an independent appeal or cross-objection.***
>
> ***12.*** *Rule 27 of the Rules is akin to Rule 22 Order XLI of the Civil Procedure Code. Sub-rule (1) provides that any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been decided in his favour; and may also take any cross-objection to the decree which he could have taken by way of an appeal. In case of Virdhachalam Pillai v. Chaldean Syrian Bank Ltd.AIR 1964 SC 1425 in context of the said Rule the Supreme Court observed as under:*

"32. Learned Counsel for the appellant raised a short preliminary objection that the learned Judges of the High Court having categorically found that there was an antecedent debt which was discharged by the suit-mortgage loan only to the extent of Rs. 59,000/- and odd and there being no appeal by the Bank against the finding that the balance of the Rs. 80,000/- had not gone in discharge of an antecedent debt, the respondent was precluded from putting forward a contention that the entire sum of Rs. 80,000/- covered by Exs. A and B went for the discharge of antecedent debts. We do not see any substance in this objection, because the respondent is entitled to canvass the correctness of findings against it in order to support the decree that has been passed against the appellant.

13. *Likewise, in case of S. Nazeer Ahmed v. State Bank of Mysore AIR 2007 SCW 766 it was held and observed as under:*

"7. The High Court, in our view, was clearly in error in holding that the appellant not having filed a memorandum of cross-objections in terms of Order XLI Rule 22 of the Code, could not challenge the finding of the trial court that the suit was not barred by Order II Rule 2 of the Code. The respondent in an appeal is entitled to support the decree of the trial court even by challenging any of the findings that might have been rendered by the trial court against himself. For supporting the decree passed by the trial court, it is not necessary for a respondent in the appeal, to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree itself is in his favour. A memorandum of cross-objections is needed only if the respondent claims any relief which had been negatived to him by the trial court and in addition to what he has already been given by the decree under challenge. We have therefore no hesitation in accepting the submission of the learned counsel for the appellant that the High Court was in error in proceeding on the basis that the appellant not

having filed a memorandum of cross-objections, was not entitled to canvass the correctness of the finding on the bar of Order II Rule 2 rendered by the trial court."

14. *Similar issue came-up before Division Bench of this Court in case of Dahod Sahakari Kharid Vechan Sangh Ltd. v. CIT [2006] 282 ITR 321/[2005] 149 Taxman 456 (Guj.) in which the Court observed as under:*

"17. Taking up the second issue first, the Tribunal has committed an error in law in holding that the assessee having not filed cross-objection against findings adverse to the assessee in the order of Commissioner (Appeals), the said findings had become final and remained unchallenged. The Tribunal apparently lost sight of the fact that the assessee had succeeded before the Commissioner (Appeals). The appeal had been allowed and the penalty levied by the assessing officer deleted in entirety. In fact, there was no occasion for the assessee to feel aggrieved and hence, it was not necessary for the assessee to prefer an appeal. The position in law is well settled that a cross objection, for all intents and purposes, would amount to an appeal and the cross objector would have the same rights which an appellant has before the Tribunal.

18. Section 253 of the Act provides for appeal to the Tribunal. Under sub-section (1), an assessee is granted right to file an appeal; under sub-section (2), the Commissioner is granted a right to file appeal by issuing necessary direction to the assessing officer; sub-section (3) prescribes the period of limitation within which an appeal could be preferred. Section 253(4) of the Act lays down that either the assessing officer or the assessee, on receipt of notice that an appeal against the order of Commissioner (Appeals) has been preferred under sub-section (1) or subsection (2) by the other party, may, notwithstanding that no appeal had been filed against such an order or any part thereof, within 30 days of the notice, file a memorandum of cross objections verified in the prescribed manner and such memorandum shall be

disposed of by the Tribunal as if it were an appeal presented within the period of limitation prescribed under sub-section (3). Therefore, on a plain reading of the provision, it transpires that a party has been granted an option or a discretion to file cross objection.

19. In case a party having succeeded before Commissioner (Appeals) opts not to file cross objection even when an appeal has been preferred by the other party, from that it is not possible to infer that the said party has accepted the order or the part thereof which was against the respondent. The Tribunal has, in the present case, unfortunately drawn such an inference which is not supported by the plain language employed by the provision.

20. If the inference drawn by the Tribunal is accepted as a correct proposition, it would render Rule 27 of the Tribunal Rules redundant and nugatory. It is not possible to interpret the provision in such manner. Any interpretation placed on a provision has to be in harmony with the other provisions under the Act or the connected Rules and an interpretation which makes other connected provisions otiose has to be to avoided. Rule 27 of the Tribunal Rules is clear and unambiguous. The right granted to the respondent by the said Rule cannot be taken away by the Tribunal by referring to provisions of Section 253(4) of the Act. The Tribunal was, therefore, in error in holding that the finding recorded by the Commissioner (Appeals) remained unchallenged since the assessee had not filed cross objections."

***15.** The first question is, therefore, answered against the Revenue and in favour of the assessee."*

(emphasis supplied)

25. Similar views have been expressed in, ***Commissioner of Income Tax v. M/s India Cements Ltd., Chennai in Tax Appeal Case No.117/2009***

(Madras High Court), Sir Syed Educational and Social Welfare Society, Bhopal v. Assistant Commissioner of Income Tax-I, Bhopal in ITA Nos. 102-108/2019 (MP High Court) and ***Principal Commissioner of Income Tax-6 v. M/s Dhara Vegetable Oil and Foods Company Ltd. in ITA 454/2019 (Delhi High Court)***.

26. The upshot of the above discussion is that Rule 27 embodies a fundamental principal that a Respondent who may not have been aggrieved by the final order of the Lower Authority or the Court, and therefore, has not filed an appeal against the same, is entitled to defend such an order before the Appellate forum on all grounds, including the ground which has been held against him by the Lower Authority, though the final order is in its favour. In the instant case, the Assessee was not an aggrieved party, as he had succeeded before the CIT (A) in the ultimate analysis. Not having filed a cross objection, even when the appeal was preferred by the Revenue, it does not mean that an inference can be drawn that the Respondent– assessee had accepted the findings in part of the final order, that was decided against him. Therefore, when the Revenue filed an appeal before the ITAT, the Appellant herein (Respondent before the Tribunal) was entitled under law to defend the same and support the order in appeal on any of the grounds decided against it. The Respondent – assessee had taken the ground of maintainability before Commissioner (Appeals) and, therefore, in the appeal filed by the Revenue, it could rely upon Rule 27 and advance his arguments, even though it had not filed cross objections against the findings which were against him. The ITAT, therefore, committed a mistake by not permitting the assessee to support the final order of CIT (A), by assailing the findings of the CIT(A) on the issues that had been decided against him. The

Appellant - assessee, as a Respondent before the ITAT was ent agitate the jurisdictional issue relating to the validity of the reassessment proceedings. We are, therefore, of the considered opinion that the impugned order passed by the ITAT suffers from perversity in so far as it refused to allow the Appellant – assessee (Respondent before the Tribunal) to urge the grounds by way of an oral application under Rule 27. The question of law as framed is answered in favour of the Appellant – assessee and resultantly the impugned order is set aside. The matter is remanded back before the ITAT with a direction to hear the matter afresh by allowing the Appellant- assessee to raise the additional grounds, under Rule 27 of the ITAT Rules, pertaining to issues relating to the assumption of jurisdiction and the validity of the reassessment proceedings under Section 153C of the Act.

27. The appeal is allowed in the above terms.

SANJEEV NARULA, J

VIPIN SANGHI, J

MAY 18, 2020
v/nk