
(1981) 09 BOM CK 0041

In the Bombay High Court

Case No : Income-tax Reference No. 136 of 1972

Ugar Sugar Works Ltd.

APPELLANT

Vs

Commissioner of Income Tax, Poona

RESPONDENT

Date of Decision : 17-09-1981

Acts Referred:

Income Tax Act, 1961 — Section 131, 148, 250, 250(2), 251
Wealth Tax Act, 1957 — Section 19A

Citation : (1982) 27 CTR 174 : (1983) 141 ITR 326 : (1982) 8 TAXMAN 228

Hon'ble Judges : S.K. Desai, J;D.M. Rege, J

Bench : Division Bench

Judgement

Rege, J.—This is a reference under s. 256(1) of the I.T. Act, 1961, by the Income Tax Appellate Tribunal, Poona Bench, at the instance of the assessee.

2. The reference raises a very interesting question as to the jurisdiction of the Tribunal as regards the appeals filed before it.

3. The assessee in this case, the Ugar Sugar Works Ltd. Sangli, is a public limited company under the companies Act, 1956, and carries on the business of manufacture and sale of sugar. The assessment year involved is 1959-60, with the accounting year ending on June 30, 1958.

4. In the relevant assessment year the assessee-company had purchased new electric motors of the value of Rs. 38,629, in respect of which in its return for the relevant year it claimed development rebate. Apart from the claim for development rebate on electric motors, the assessee had also claimed in its return development rebate on various items such as machinery purchases, power house machinery, on workshop machinery, factory water supply machinery and motor-car and jeeps, etc. The ITO in his order of assessment dated February 18, 1964, amongst other things, reject the assessee's claim for development rebate in respect of all the items mentioned above, including the electric motors. For rejecting the assessee's claim for electric motors, the ITO had relied on the decision of this court in the case of Maneklal Vallabhdas Parekh Vs.

5. Against the order of the ITO the assessee filed an appeal to the AAC. However, it is not disputed that in the said appeal the assessee did not challenge the ITO's finding about the rejection of its claim for development rebate on electric motors either by making it a ground in the memo of appeal and/or by raising contentions against it even in the course of the arguments. The said disallowance of rebate on electric motors was, therefore, not the subject-matter of the appeal before the AAC, although the other findings of the ITO rejecting other claims were specifically challenged both in the memo of appeal and in the course of arguments. There was, therefore, no question of the AAC in his order dealing with and/or deciding the correctness or otherwise of the said finding of the ITO. The AAC, however, by his order dated December 16, 1964, in respect of the other findings of the ITO in some cases confirmed the order of the ITO rejecting the assessee's claim for development rebate, while in others he varied the order of the ITO.

6. Against the said order of the AAC, the assessee filed an appeal on February 22, 1965, to the Tribunal. It may be pointed out that in the memorandum of appeal to the Tribunal the assessee had also not raised any contention as regards the order of the ITO rejecting the assessee's said claim for development rebate on the price of electric motors. However, subsequently, on August 1, 1966, he filed an additional ground challenging the said finding of the ITO. The reason for doing so was apparently that in the meanwhile the Supreme Court in its decision in COMMISSIONER OF Income Tax, MADRAS Vs. MIR MOHAMMAD ALI. ARUNA MILLS LTD. : INTERVENER., , had reversed the decision of this court in Maneklal Vallabhdas Parekh Vs. Commissioner of Income Tax, Bombay North, , relying on which the ITO had rejected the assessee's said claim for development rebate. At the hearing of the appeal on October 1, 1971, the assessee sought leave of the Tribunal to raise the said additional ground and contended in support that the same involved adjudication of point of law only. The Revenue objected to the assessee being allowed to raise the ground in the appeal before the Tribunal, when it had not challenged the said finding before the AAC. The Revenue for that purpose relied on the decision of the Gujarat High Court in the case of Commissioner of Income Tax, Gujarat I Vs. Karamchand Premchand Private Ltd., . The Tribunal also, relying on the said decision of the Gujarat High Court, upheld the Revenue's objections and did not allow the assessee to raise the said additional ground about the assessee's said claim.

7. Accordingly, the following question pertaining to the validity of the Tribunal's said finding is referred to us :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in disallowing the Ugar Sugar Works Ltd., from raising an additional ground relating to the admissibility of the development rebate on electric motors on the ground that it was neither raised before nor considered by the Appellate Assistant Commissioner, although it involved a point of law ?"

8. The learned counsel for the assessee at whose instance the said reference is made has strongly contended that the ground sought to be raised before the Tribunal, being only a question of law not involving investigation of any new facts, the Tribunal had ample power to allow the assessee to raise the said new ground in appeal before it.

9. On the other hand, the learned counsel for the Revenue contended that Tribunal had no jurisdiction to entertain the said new ground as it was not in relation to the subject-matter of the appeal before it, the assessee not having agitated the same before the AAC and thereby having accepted the finding by the ITO thereon. He further contended that the Tribunal's powers, though vast they may be, were to be exercised by it within the four corners of its jurisdiction, that is, the subject-matter of the appeal, which in this case the Tribunal did not have.

10. To understand the rival contentions it would be first convenient to refer to certain provisions of the I.T. Act, 1961, dealing with the appeals before the AAC and the Tribunal.

11. Section 250 of the I.T. Act, 1961, deals with the procedure to be followed in appeals before the AAC.

12. Section 251 deals with the powers of the AAC or the Commissioner (Appeals), as the case may be, in regard to the appeals filed before it. It provides :

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

(a) in an appeal against the order of assessment, he may confirm, reduce, enhance or annul the assessment ; or he may set aside the assessment and refer the case back to the Income Tax Officer for making a fresh assessment in accordance with the discretion given by the Appellate Assistant Commissioner...."

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

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

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

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

13. The aforesaid Explanation clearly shows that the competence or jurisdiction of the AAC in dealing with the appeal before him was not restricted only to the

matters raised or complained of by the assessee in the appeal but it extended to all matters arising out of the proceedings which might have been considered and determined by the ITO in the course of the assessment proceedings, although such matters might not have been raised before him in appeal by the assessee. In appeal, therefore, the competence of the AAC ranges over the whole assessment proceedings which are thrown open, as they were before the ITO, without any restrictions on him to consider only those matters raised before him in appeal by the assessee. His jurisdiction was, therefore, not confined to the subject-matter of the appeal but extended to the subject-matter of assessment. In exercise of such jurisdiction, the said section has given him wide powers, including even a power of enhancing the assessment subject to an opportunity of being heard given to the assessee doing so, as is required under sub-s. (2).

14. As against the said provisions regarding the jurisdiction and powers of the AAC, the corresponding provisions as to the jurisdiction and powers of the Tribunal may be considered. Section 253 of the I.T. Act, 1961, sets out different orders against which an assessee aggrieved by such orders can file an appeal. One of such orders, being an order made by the AAC under s. 250, sub-s. (2), gives a right to the Commissioner to direct the ITO to file an appeal against the order of the AAC under s. 250. Sub-section (4) provides for filing cross-objections by the other two party who had not appealed against the order of the AAC or a part thereof. Section 254 deals with the orders that the Tribunal can pass on an appeal filed before it. Section 254(1), which is relevant for our purpose, provides :

"254. Orders of Appellate Tribunal. - (1) The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit."

15. Section 255 deals with the procedure to be followed in appeals before the Tribunal. Sub-section (6) of the said s. 255 provides, inter alia, that the Tribunal shall, for the purpose of discharging its functions, have all powers which are vested in the Income Tax authorities referred to in s. 131, which are as regards discovery, production of evidence, etc. Rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963, which may also be quoted at this stage, provides :

"11. The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule :

Provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground."

16. The said s. 254(1) of the I.T. Act, 1961, quoted above shows that the powers of the Tribunal in an appeal before it extends to passing such orders thereon, that is, the appeal before it. The word "thereon" appearing in s. 33(4) of the

Indian I.T. Act, 1922 (same as the present s. 254(1)), came to be considered by the Supreme Court in the case of *Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others*, . In that case, the court was concerned with the order of remand by the Tribunal. The court held that the Tribunal had powers under the said s. 33(4) to remand the matter. In that case, as the judgment shows, the question was as regards the proper written down value of the assets of the assessee for calculating depreciation under s. 10(2)(vi) of the Indian I.T. Act, 1922. The question was agitated before the ITO and the AAC who had rejected the contentions of the assessee thereon. In the course of the hearing of the appeal the Tribunal had allowed the Department to raise a new ground in support of the AAC's order which was connected with the subject-matter of the appeal before the Tribunal. The order of the Tribunal in allowing the Department to raise such new ground was challenged before the court. The court held that the Tribunal had jurisdiction to entertain arguments of the Department and remand the case to the ITO for consideration of the point raised. The court did so on the basis of the provisions of the said Act dealing with the jurisdiction and power of the Tribunal. The court held (headnote) :

"The powers of the Appellate Tribunal in dealing with appeals are expressed in section 33(4) of the Income Tax Act in the widest possible terms. The word "thereon" in section 33(4) restricts the jurisdiction of the Tribunal to the subject-matter of the appeal. The words "pass such order as the Tribunal thinks fit" include all the powers (except possibly the power of enhancement) which are conferred on the Appellate Assistant Commissioner by section 31. The Tribunal has authority u/s 33 to direct the Appellate Assistant Commissioner or the Income Tax Officer to hold a further enquiry and dispose of the case on the basis of such enquiry."

17. If, therefore, the use of the word "thereon" in s. 254(1) of the I.T. Act, 1961, restricts the jurisdiction of the Tribunal to the subject-matter of appeal, then, as the said decision shows, the powers of the Tribunal, vast as they may be, on the same lines as those of the AAC, were to be exercised by the Tribunal within the four corners of such jurisdiction. A comparison of the aforesaid provisions concerning the jurisdiction and powers of the Tribunal with those of the AAC in s. 251, with particular reference to the Explanation thereto, would make it distinctly clear that the jurisdiction of the AAC, while dealing with the assessee's appeal against the ITO's order before him, extends to all matters arising in the proceedings, though not raised before him by the assessee, while the Tribunal's jurisdiction in an appeal before it is restricted only to passing orders on the subject-matter of the appeal. However, within the four corners of that jurisdiction, the Tribunal has been clothed with almost the same powers as those of the AAC except that of enhancement.

18. In this case, therefore, the main question was whether, on the facts and in the circumstances of the case, the said finding of the ITO, disallowing the assessee's claim of appeal before the Tribunal on electric motors, could at all be

a subject-matter of appeal before it. For determining the said question the distinction between the jurisdiction and the powers of the Tribunal as stated above has got to be kept in mind. It may also be pointed out that if initially the Tribunal did not have such jurisdiction to adjudicate on the said finding of the ITO, as it could not be the subject-matter of the appeal before it, then it would not get that jurisdiction merely because such a contention was taken in the memorandum of appeal or sought to be taken in an additional ground of appeal with its leave or otherwise argued before it.

19. As pointed out above, in this case the assessee had not appealed to the AAC against the said finding of the ITO rejecting the assessee's claim for development rebate on electric motors, although at the same time it had appealed to the AAC against other disallowances by the ITO. The said finding of the ITO not having been appealed against in appeal to the AAC, it must be assumed that the assessee was not aggrieved by the said finding of the ITO and had accepted the same. Further, the said finding of the ITO not being the subject-matter of appeal before the AAC, and he not being called upon to adjudicate on the same and in fact not having adjudicated upon the correctness or otherwise of the same, there could not be any decision of the AAC on the said finding of the ITO, and, therefore, it could not be said that the assessee was aggrieved by the decision of the AAC in respect of the said matter so as to entitle him to file an appeal to the Tribunal against the order of the AAC on the said finding. The assessee once having accepted the said finding of the ITO by not having against the same to the AAC, the assessee's grievance, if any, against the said finding of the ITO cannot form the subject-matter of an appeal before the Tribunal so as to give it jurisdiction in exercise of its powers to pass such order in appeal as it may deem fit.

20. This view that we are taking direct support from certain decisions of the High Courts of Gujarat, Andhra Pradesh and Madhya Pradesh.

21. The first of such decisions was of the Gujarat High Court in the case of Commissioner of Income Tax, Gujarat I Vs. Karamchand Premchand Private Ltd., . In that case, the facts were similar to the facts of this case, and the question that arose before the court was the same as before us. There the ITO had disallowed two of the three items claimed by the assessee while partially allowing the third one. The assessee, in the appeal to the AAC, did not challenge the finding of the ITO as regards the disallowance of one of such items, while it had challenged the ITO's finding as to the other disallowances. There was, therefore, no question of the AAC adjudicating upon the finding of the ITO not challenged before him. In an appeal to the Tribunal against the order of the AAC on the other two findings also, initially no ground was taken challenging the finding of the ITO not challenged before the AAC. However, in the course of the hearing, in view of the subsequent Supreme Court, decision taking a contrary view, a ground was sought to be raised, with the leave of the Tribunal, challenging the said finding of the ITO. The court, after analysing the various

provisions of the I.T. Act, 1961, mentioned above, held (headnote) :

"Where, in an appeal to the Appellate Assistant Commissioner by the assessee against an order of assessment, the assessee has not questioned the decision of the officer on the point decided and the Appellate Assistant Commissioner has not in his order considered that point, the assessee is not entitled to question the decision of the officer on the point in an appeal to the Appellate Tribunal against the order of the Appellate Assistant Commissioner and the Tribunal is not entitled to allow the assessee to agitate the question under the guise of granting leave under rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963."

22. In its subsequent decision in the case of Commissioner of Income Tax, Gujarat-III Vs. Steel Cast Corporation, , the Gujarat High Court had again an occasion to deal with the said question. The court, thereafter, again analysing the said provisions of the I.T. Act, 1961, and following its earlier decision in Karamchand's case [1969] 74 ITR , cited above, by quoting observations therefrom in extenso, held (headnote) :

"Accordingly, it must be found what is the subject-matter of appeal and that can be determined only by finding out what the Appellate Assistant Commissioner expressly or impliedly decided. What is meant by implied decision is that though a point might have been raised before the Appellate Assistant Commissioner, in his final order the Appellate Assistant Commissioner might not have dealt with that point and thereby impliedly rejected it. A party may be aggrieved by an express decision of Appellate Assistant Commissioner. The subject-matter of the appeal before the Tribunal can only be the decision, express or implied, of the Appellate Assistant Commissioner and the jurisdiction of the Tribunal is restricted to the subject-matter of the appeal. Once the subject-matter of the appeal is determined, the Tribunal has very wide powers to deal with all questions of fact and law pertaining to that subject-matter of appeal and it can allow a new question of law to be raised in support of the same claim for relief. On the facts found, if a new aspect of law can be applied, it can be before the Income Tax Officer or the Appellate Assistant Commissioner. The Tribunal is not restricted to the very grounds of appeal on which originally the decision of the Appellate Assistant Commissioner was sought to be challenged when the appeal was filed. It has wide powers to allow the party to add to or alter the grounds of appeal, subject, of course, to the opportunity being given to the other side of being heard on this new ground of appeal. The jurisdiction of the Tribunal which is restricted to the subject-matter of the appeal must not be confused with the powers of the Tribunal to deal with an appeal within the four corners of its jurisdiction. The Tribunal cannot transgress its powers which are plenary and very wide."

23. The next decision was of the Andhra Pradesh High Court in the case of Commissioner of Income Tax Vs. Krishna Mining Co., annexed as an appendix to the Gujarat High Court decision in Commissioner of Income Tax, Gujarat-III Vs. Steel Cast Corporation, , cited above. There the court, relying on the earlier decision of the Gujarat High Court in Commissioner of Income Tax, Gujarat I Vs.

Karamchand Premchand Private Ltd., , came to the same conclusion.

24. The next decision was of the Madhya Pradesh High Court in the case of Hukumchand and Mannalal Co. Vs. Commissioner of Income Tax, . There also the court, following the aforesaid decision of the Gujarat High Court, held (headnote) :

"When in an appeal to the AAC against an order of assessment, the assessee has not questioned the decision of the ITO rejecting a claim for deduction made by the assessee, and the AAC in his order has also not considered that point, the assessee is not entitled to allow the assessee to agitate that question."

25. As against the said decisions, we may now refer to certain other decisions relief upon by the learned counsel for the assessee in support of his contention that the Tribunal had jurisdiction and power to allow the assessee to raise in an appeal before it any contention challenging the finding of the ITO, though the same was not before the AAC.

26. Before dealing with the said decisions, we may point out that in none of the said decisions the question as to the jurisdiction of the Tribunal as against its power, in the manner as to the arisen on the facts of this case, had arisen for consideration and/or was considered by the courts. While dealing with the question as to the jurisdiction of the Tribunal which is restricted to the subject-matter of an appeal, one can visualise the existence of a various situations other than a plain and straightforward situation as arising in this case. Some of such case as one can visualise would be, where the validity of the order is challenged on the ground of total lack of jurisdiction of the ITO, or where the order being non est, as going to the root of the jurisdiction of the ITO, or where the order of the ITO was challenged on the grounds of appeal before the AAC but was not either passed, or, though challenged on the grounds of appeal before the AAC but was not either passed, or, though taken in the grounds and argued, the order of the AAC might have remained silent about it indicating an implied rejection, or where the finding of the ITO, though challenged before the AAC on one ground, was sought to be challenged before the Tribunal on a different ground. We, therefore, make it clear that we propose to determine the question of the Tribunal's jurisdiction with reference only to the facts and circumstances of the case, namely, where the finding of the ITO, without being challenged either expressly or impliedly before the AAC, was sought to be challenged before the Tribunal, and we do not wish to consider the said question as arising under other situations visualised above.

27. Initially, the learned counsel for the assessee relied upon the decision of the Supreme Court in the case of Commissioner of Income Tax, Madras Vs. Mahalakshmi Textile Mills Ltd., to show that by reason of the court's observations in this case, the observations of the Supreme Court in Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others, , cited above, namely, that the Tribunal's jurisdiction being restricted to the subject-matter of the

appeal, would not hold good.

28. The observations of the court in that case Commissioner of Income Tax, Madras Vs. Mahalakshmi Textile Mills Ltd., , on which the learned counsel for the assessee has relied, were as follows (headnote) :

"Under section 33(4) the Appellate Tribunal is competent to pass such orders on appeal "as it thinks fit". There is nothing in the Income Tax Act, which restricts the Tribunal to the determination of questions raised before the departmental authorities. All questions, whether of law or of facts, which relate to the assessment of the assessee may be raised before the Tribunal. If for reasons recorded by the departmental authorities in respect of a contention raised by the assessee grant of relief to him on another ground is justified, it would be open to the departmental authorities and the Tribunal, and indeed they would be under a duty, to grant that relief. The right of the assessee to relief is not restricted to the plea right by him."

29. The said observations of the Supreme Court read in their proper context cannot support the learned counsel for the assessee. Firstly, before the Supreme Court, in this case, its earlier decision in Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others, , was not cited, possibly because, as is apparent from the later part of the judgment, the court was making the aforequoted observations on the basis that the powers of the Tribunal referred to by it were always subject to its jurisdiction only to deal with the subject-matter of the appeal. That is made clear by the court in its following observations at p. 713 of the report :

"The subject-matter of the appeal in the present case was the right of the assessee to claim allowance for Rs. 93,215. Whether the allowance was admissible under one head or the other of sub-section (2) of section 10, the subject-matter for the appeal remained the same, and the Tribunal having held that the expenditure incurred fell within the terms of section 10(2)(v), though not u/s 10(2)(vib), it had jurisdiction to admit that expenditure as a permissible allowance in the computation of the taxable income of the assessee."

30. It is clear that in that case the court was not concerned with the jurisdiction of the Tribunal but was concerned only with its powers. On the facts of that case, it was clear that the subject-matter, namely, admissibility of the allowance, was the same all throughout, but what varied was the contention as to the head under which it was admissible. There is, therefore, nothing in the said decision of the Supreme Court to hold that the court's observations in Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others, , as to the Tribunal's jurisdiction did not hold good.

31. The next decision relied upon by the learned counsel was the decision of this court in the case of J.S. Parkar Vs. V.B. Palekar and Others, . In that case certain goods in the possession of the assessee, held to be smuggled goods, were confiscated. The assessee was prosecuted and convicted by the Magistrate, the

conviction being confirmed by the High Court as well as the Supreme Court. The assessee wanted the price of the confiscated goods to be shown as trade losses, and claimed to set off the same against the income from undisclosed sources for which he was assessed. The said point was sought to be raised by the assessee for the first time before the Tribunal. However, the Tribunal declined to entertain the plea on the ground that it was raised for the first time. It was statutory obligation to entertain the plea and decide the same, no matter at what stage it was. The court, inter alia, accepted the said contention of the assessee, holding that the Tribunal was under statutory obligation to do so.

32. The learned counsel for the assessee relied upon certain observation of Deshpande J. and Mukhi J., in their differing judgments, to support his plea.

33. Deshpande J. in that case had, in the course of his judgment, observed (p. 635) :

"..... I have no hesitation in saying that if it were a pure question of law capable of being adjudged on the material on record, the Tribunal was under a statutory obligation to entertain and decide the same."

34. Mukhi J., in his differing judgment, had observed at p. 656 of the report :

"Now, it is to be noticed that this point was raised before the Tribunal for the first time. But if it is considered to be a pure question of law, or a plea which could be considered on the evidence already on record, then the Tribunal would be under a statutory obligation to entertain plea and decide the same no matter at what stage it was taken."

35. It may be firstly pointed out that in that case the question of jurisdiction of the Tribunal vis-a-vis its powers had not arisen for the court's consideration nor was it argued before the court and considered by the court in that light. The said observations by the court are of a general nature not arising in the course of a consideration of the question of the Tribunal's jurisdiction as against its power, and the same cannot be taken as laying down any law on the question before us.

36. The next decision relied upon the learned counsel for the assessee was of this court in the case of New India Life Assurance Co. Ltd. Vs. Commissioner of Income Tax, Excess Profits Tax, Bombay City, . To understand certain observations of the court in this case relied upon by the learned counsel, this decision would require a little closer consideration.

37. The facts of the case were quite different from the one before us. In that case the assessee, who carried on non-life insurance business in the Indian State, was assessed by the ITO in the Indian State for the profits of the said business in the Indian State on the ground that these profits arose in India. In appeal to the AAC by the assessee, the Revenue supported the decision of the ITO, but the AAC held that the said income in respect of insurance business had accrued in the Indian State, therefore, was not liable to tax in India. Against the said decision of the AAC, the Commissioner filed an appeal to the Tribunal. The

Tribunal upheld the view of the AAC, but it set aside the order of the AAC and directed him to dispose of the appeal, after taking into consideration the question of apportionment, following the ratio of COMMISSIONER OF Income Tax, BOMBAY Vs. AHMEDBHAI UMARBHAI and CO., BOMBAY., . In a reference to this court at the instance of the assessee, it was contended by the assessee that the only ground of appeal raised by the Commissioner before the Tribunal was whether the income was earned in British India or the Indian State and that the question of apportionment was neither agitated either before the ITO or the AAC nor in the grounds of appeal to the Tribunal, and, therefore, it was not open for the Tribunal under s. 33(4) of the Indian I.T. Act, 1922, to decide on a question which was not a question urged by the appellant before it. The question on the ground not taken by the ITO in the grounds of appeal. The court, therefore, was concerned only with the powers of the Tribunal and not its jurisdiction. The court's observation at p. 856 of the report (31 ITR) clearly show that the court had kept in mind the distinction between the jurisdiction of the Tribunal and its powers as laid down by the Supreme Court in *Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others*, , cited above.

38. The court held that although the appellant (Commissioner) had undoubtedly travelled outside the subject-matter of the appeal in that he had pressed upon the Tribunal a point with regard to the apportionment which was not covered by the grounds of appeal, but he being an appellant, it was open for him to do so if leave was granted by the court of Appeal. Although there was nothing on record to show that any such leave was granted, the court held that such leave could be implied as the Tribunal has allowed the Commissioner to urge the said ground. In that case the court had not to consider the question of jurisdiction of the Tribunal vis-a-vis its power in a manner it has arisen for consideration in this case. In that case all throughout that is, before the ITO, the AAC and the Tribunal, the subject-matter of appeal, namely, whether the income was earned by the assessee in British India or in the Indian State and whether the same was taxable in India, had remained the same. Further, unlike in this case, in that case also, while the appeal before the AAC was by the assessee, the Revenue supporting the finding of the ITO, the appeal to the Tribunal was by the Revenue. Therefore, in that case there was no question of the assessee challenging the finding of the ITO before the Tribunal, which he had not done before the AAC. The said decision, therefore, proceeds on altogether different facts and is restricted to the powers of the Tribunal to allow a ground being raised in appeal before it with the leave of the Tribunal. This decision as well cannot take the matter any further.

39. The next decision was of the Punjab and Haryana High Court in the case of *Vijay Kumar Jain Vs. Commissioner of Income Tax*, In that case the assessee for the first time before the Tribunal sought to raise the question as to the validity of a notice under s. 148 for the non-filing of a return, he not having raised it in the appeal before the AAC. The Department objected to the assessee raising the said point for the first time before the Tribunal. The Tribunal, accepting the objection of the department, refused to allow the assessee to raise the said point. On a

reference, the court held (headnote) :

"..... that when in respect of any year a return has been submitted before assessment, the Income Tax Officer cannot ignore the return and the notice of reassessment and consequent assessment ignoring the return are invalid. If the notice issued is invalid for any reason, the entire proceedings taken by him would be void for want of jurisdiction. In this situation, the Tribunal was not justified in refusing to consider the validity of the notice u/s 148 even though the ground challenging the same had not been pressed before the Appellate Assistant Commissioner."

40. Along with this decision another decision of this court in the case of Commissioner of Wealth-tax, Bombay City-II Vs. N.A. Narielwalla, , taking the same view may also be referred to. In that case the question of the jurisdiction of the Tribunal under s. 19A of the W. T. Act, 1957 (similar to s. 254 of the I.T. Act, 1961), came up for consideration. The facts in that case were that for the assessment year 1961-62 the WTO had, acting under s. 19A, assessed the wealth of the deceased in the hands of his executor. On appeal, the AAC confirmed the order of the WTO. On appeal to the Tribunal, the Tribunal, in spite of the objection of the Department, granted leave to the assessee to raise a new ground that the order of the WTO was without any jurisdiction as there was no provision in the W.T. Act to assess the estate of the deceased in the hands of the executor to wealth-tax until s. 19A was enacted in the W.T. Act with effect from April 1, 1965. The Tribunal granted leave to the assessee to raise the new ground as it did not require any investigation into facts. The Tribunal upheld the contention of the assessee (executor), relying on the decision of this court in the case of Jamnadas and Another Vs. Commissioner of Wealth Tax, Bombay and Another, , and remanded the matter to the AAC for examination of the question as to whether any assessment could be made against the executor and whether he could be made liable to wealth-tax. On a reference to this court on the question whether the Tribunal was competent to allow the assessee to raise a fresh ground of appeal not agitated before the lower W.T. authorities and which was not related to the subject-matter of the appeal, this court held that as the contention raised before the Tribunal on behalf of the assessee was a pure question of law going to the root of the jurisdiction of the WTO and was based on a decision of the High Court. The Tribunal had properly exercised its discretion in the interest of justice in permitting the assessee to raise the point essentially related to the propriety of the exercise of discretion by the Tribunal and the order of the Tribunal out of which the reference arose was not the result of any erroneous or arbitrary exercise of jurisdiction. Both these decisions stand on an altogether different footing than the case before us. The contention raised in these cases, though for the first time before the Tribunal, was the one which went to the very root of the jurisdiction of the ITO in passing the order on the footing that the order was non est. There the question of jurisdiction of the Tribunal under the circumstances as we are concerned in this case did not directly arise for the court's consideration. Even otherwise also, the question as

to the initial jurisdiction in making the order would stand on a different footing, as in such cases the question of jurisdiction of the ITO would always be present as a part of the subject-matter of the appeal at all stages of the appeal, either before the AAC or the Tribunal, as such jurisdiction is always presumed to be existing in an authority before passing the order. The said two decisions, therefore, cannot take the matter any further so far as the question before us is concerned.

41. The other decision relied upon was of the Andhra Pradesh High Court in the case of Commissioner of Income Tax Vs. Gangappa Cables Ltd., . In that case the assessee, for the first time, raised a plea in second appeal before the Tribunal that the expenditure incurred by the assessee before it went into commercial production was an admissible deduction for the purpose of s. 80J(1) of the I.T. Act, 1961. The Revenue had resisted the claim on the ground that the said claim having not been put forward by the assessee before the ITO or the AAC, it could not be raised in second appeal. The Tribunal held that the directors' report accompanied by the balance-sheet and the P/L a/c and other statements were filed by the assessee before the ITO and practically all the details for following a claim under s. 80J(1) were on record and hence it was open to the Tribunal to allow such a claim. The court held that the Tribunal was correct in allowing the claim of the assessee as there was material on record for allowing the same. The said decision of the court was based on certain observations of the Supreme Court in the case of The Additional Commissioner of Income Tax, Gujarat Vs. Gurjargravures Private Ltd., . However, the said observations of the Supreme Court on which the court relied only referred to the jurisdiction of the AAC in dealing with the appeal filed before him, which as we have pointed out above, was vastly different and much wider than that of the Tribunal. We, therefore, cannot agree with the ratio of the said decision. The said decision also does not specifically deal with the question of jurisdiction of the Tribunal as such and cannot take the matter further.

42. The next decision is the decision of the Punjab and Haryana High Court in the case of Oswal Cotton Spg. and Oswal Cotton Spinning and Weaving Mills Vs. Commissioner of Income Tax, In that case the assessee had claimed as a part of the reserves as on April 1, 1962, and even if no provision were made in the balance-sheet for the accounting period ended on March 31, 1962, for such reserves, the shareholders were competent to make such reserves in their meeting held on September 29, 1962, as they were the final authority in such matters under the Companies Act, 1956. The ITO rejected the claim and, of further appeals, the AAC and the Tribunal upheld the decision of the ITO. During the course of the appeal before the Tribunal, the assessee sought permission and raised the additional ground that an amount of Rs. 1,24,974 standing under the head "Provision for dividend" and Rs. 71,808 standing under the head "Provision for taxation" may be considered as part of the capital employed in its business under r. 1 of Sch. II to the Super Profits Tax Act, 1963. The Tribunal held that these two amounts should be treated as part of the reserves of the assessee-

company for the purpose of the said r. 1. The High Court in the reference made to it, relying on r. 11 of the I.T. (Appellate Tribunal) Rules, 1963, quoted above, dealing with the powers of the Tribunal, held that the Tribunal had the discretion to allow the assessee to raise new grounds for the first time before it. The question as to the jurisdiction of the Tribunal under s. 254 of the I.T. Act, 1961, was not considered by the court at all. The said decision also cannot be held to determine the question before us.

43. In our view, therefore, on the facts and in the circumstances of this case, the said contention of the learned counsel for the assessee based on the aforesaid decisions cannot be accepted.

44. As we have pointed out above, the jurisdiction of the Tribunal in the matter of appeals is expressly restricted, by reason of s. 254 of the I.T. Act, 1961, to the subject-matter of the appeal. In this case the assessee not having appealed to the AAC against the finding of the ITO disallowing development rebate to the assessee on the price of electric motors, had accepted the same, and the AAC and, therefore, no occasion to deal with the same. The assessee, therefore, cannot be considered to be aggrieved by any decision of the AAC on the said finding of the ITO so as to entitle it to file an appeal to the Tribunal under s. 253 of the said Act, with the result that the said finding of the ITO could never be the subject-matter of the appeal before the Tribunal, whether it was taken in the grounds of appeal initially or allowed to be raised subsequently with the leave of the Tribunal. In that case the Tribunal had no jurisdiction to deal with or pass orders in respect of the said finding of the ITO.

45. In the result, the question referred to us is answered in the affirmative and against the assessee. The assessee to pay costs of the reference.