AFR

Reserved on 21.08.2019

Delivered on 03.09.2019

Court No. - 35
Case :- INCOME TAX APPEAL No. - 159 of 2016
Appellant :- M/S S.D. Traders
Respondent :- Commissioner Of Income Tax And Anr.
Counsel for Appellant :- Suyash Agarwal
Counsel for Respondent :- C.S.C. I.T.,Krishna Agarawal,Pravin Kumar

Hon'ble Bharati Sapru,J.
Hon'ble Rohit Ranjan Agarwal,J.

(Delivered by Hon'ble Rohit Ranjan Agarwal,J.)

1. This is an assessee's appeal under Section 260-A of the Income Tax Act, 1961 (hereinafter called as 'Act') assailing the order of the Income Tax Appellate Tribunal, Lucknow Bench, 'A' Lucknow (hereinafter called as 'Tribunal') dated 24.02.2016, affirming the order of the CIT (A) as far as regarding addition out of sundry creditors to the extent of Rs.15 lacs and disallowance of 25% of the labour charges. The appeal was admitted on 05.07.2016 on the following question of law:-

> *"(i) Whether the Appellate Tribunal was legally justified in holding that CIT(A) in exercise of power of enhancement u/s 251 has power to consider new source of income which was not dealt by A.O. in assessment order ignoring the Full Bench decision of CIT vs. Sardari Lal & Co. 251 ITR 864 (Del) (FB)?*
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> *(v) Whether the Appellate Tribunal was justified in not considering that after set-aside proceedings by Hon'ble high Court, the CIT(A) has not issued fresh notice of enhancement (although time barred) and followed the its earlier order without application of mind?"*

2. However, vide order dated 02.05.2019, this Court allowed

the application filed by the appellant for additional question of law proposed by him which are as under:-

> *"(iii) whether the ITAT was correct to disallow Rs.5.95 lacs, being 25% of labour charges ignoring the increasing trend in the G.P rate of 17.79% in this year as compared to 13.79% in A.y 2005-06, specially when all the expenses were vouched and verifiable being the books of accounts are duly audited u/s 44AB of the Act, in the absence of its rejection and the books have not been rejected.*
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> *(iv) whether the ITAT has rightly sustained the addition of Rs.15 lacs out of Sundry Creditors for onus of discharge of verification after 7 years, on appellant while legal observation to preserve the books of Accounts and other documents, for 6 years from the relevant assessment years and third party is under no obligation to provide confirmation or verification beyond 6 years from the relevant assessment years."*

3. On 03.05.2019, the above mentioned question of laws were incorporated by the appellant in the paper-book as question nos. III and IV. Assessee/ appellant is in business of civil contract, and for assessment year 2006-07 disclosed his job work receipts amounting to Rs.90,35,009/- and declared gross profit of Rs.16,07,474/- whereas net profit was shown as Rs.3,62,113/-. Return of income was filed on 31.10.2006 and the same was processed under Section 143(1) of the Act on 14.09.2007. Case of the assessee was selected for scrutiny and notice under Section 143(2) was issued on 19.10.2007, as well as notice under Section 142(1) along with questionnaire was issued on 08.08.2008. According to assessee, he replied the queries raised by Assessing Officer. AO completed assessment and made three additions.

4. The order of assessment was challenged by assessee

before Commissioner of Income Tax (Appeals), who on 13.09.2013 issued notice requiring appellant to produce labour register including bills, vouchers and ledger accounts as well as details of sundry creditors. On 14.11.2013, CIT (A) passed an order enhancing income of appellant by Rs.26.50 lacs which includes disallowances to the extent of 50% of wage expenses claimed by appellant in profit and loss account and 50% of sundry creditors appearing in balance sheet of the assessee.

5. Order of CIT(A) was challenged before the Tribunal by assessee, and on 14.04.2014, Tribunal dismissed the appeal of assessee. Aggrieved by this order assessee preferred an Income Tax Appeal Defective No. 145 of 2014 before this Court. On 10.12.2014, this Court set aside the order of CIT (A) and of the Tribunal, and restored the proceedings for reconsideration before CIT (A), with a direction that appellant shall file all required information and documentary material before CIT (A) by 31st December, 2014 and shall appear before CIT (A) for receiving directions as to hearing on 5th January, 2015. It was further held that in case assessee fails to file required information and documentary material, CIT (A) would be at liberty to pass orders on basis of available records after furnishing an opportunity of being heard to the assessee.

6. In compliance of the order of this Court, it appears that assessee filed an application along with copy of order before CIT (A) along with certain documents which have been enclosed along with this appeal and are part of record as

Annexure-6. Further, notice under Section 250 was issued by the CIT (A) for hearing on 05.01.2015. Thereafter, appellant was given several opportunities on 31.12.2014, 18.02.2015, 27.02.2015, 09.03.2015, 17.03.2015 and 25.03.2015. From the order of the CIT (A), it appears that the authorised representative of the appellant appeared from time to time and furnished replies/ documents. On 31.03.2015, CIT (A) partly allowed appeal of the assessee and disallowance of Rs.36,019/- and Rs.20,000/- were deleted, while additions of Rs.11.50 lacs and Rs.15.00 lacs were confirmed. Against this order an appeal was filed by the assessee/ appellant before the Tribunal which was also partly allowed on 24.02.2016 confirming the addition of amount of sundry creditors to extent of Rs.15.00 lacs, while disallowance on labour charges of Rs.5.95 lacs being made. It is against this order that the present appeal has been filed by the assessee.

7. Learned senior counsel appearing for the assessee submitted that Assessing Officer had made three additions which were deleted by the CIT (A) but had wrongly made addition of Rs.11.50 lacs and Rs.15.00 lacs towards labour expenditure and sundry creditors, as he did not had the jurisdiction to introduce a new source of income and assessment was to be confined to those items of income which was subject matter of original assessment, that is the three additions made by AO of Rs.76,019/-, Rs.20,000/- and Rs.54,375/- only.

8. It was submitted that Section 251(1)(a) of the Act only envisages for the appellate authority that is CIT (Appeal) to

confine its assessment to the original assessment order and not to include the power to discover a new source of income. Reliance has been placed upon the decision in case of ***CIT v. Shapoorji Pallonji Mistry [1962] 44 ITR 891 (SC)***. Relevant portion relied upon is extracted hereasunder:-

> *"In our opinion, this Court must be held not to have expressed its final opinion on the point arising here, in view of what was stated at pages 709 and 710 of the report. This Court, however, gave approval to the opinion of the learned Chief Justice of the Bombay High Court that section 31 of the Income-tax Act confers not only appellate powers upon the Appellate Assistant Commissioner in so far as he is moved by an assessee but also a revisional jurisdiction to revise the assessment with a power to enhance the assessment. So much, of course, follows from the language of the section itself. The only question is whether in enhancing the assessment for any year he can travel outside the record that is to say, the return made by the assessee and the assessment order passed by the Income-tax Officer with a view to finding out new sources of income not disclosed in either. It is contended by the Commissioner of Income-tax that the word '"assessment" here means the ultimate amount which an assessee must pay, regard being had to the charging section and his total income. In this view, it is said that the words "enhance the assessments" are not confined to the assessment reached through a particular process but the amount which ought to have been computed if the true total income had been found. There is no doubt that this view is also possible. On the other hand, it must not be overlooked that there are other provisions like sections 34 and 33B, which enable escaped income from new sources to be brought to tax after following a special procedure. The assessee contends that the powers of the Appellate Assistant Commissioner extend to matters considered by the Income-tax Officer, and if a new source is to be considered, then the power of remand should be exercised. By the exercise of the power to assess fresh sources of income, the assessee is deprived of a finding by two tribunals and one right of appeal."*

9. Counsel for the assessee also relied upon a decision of

the Apex Court in case of ***ITO v. Rai Bahadur Hardutroy Motilal Chamaria [1967] 66 ITR 443 (SC)*** which had followed the earlier decision of the Apex Court cited above. Reliance has also been placed on the decision of the Supreme Court in case of ***Additional Commissioner of Income Tax v. M/s. Gurjargravures (P.) Ltd. [1978] 111 ITR 1 (SC),*** following the earlier two decisions of the Apex Court. Counsel for the assessee vehemently argued that the power of the first appellate authority does not go beyond what has been considered by the Assessing Officer in appeal and reliance upon the decision of a Full Bench in case of ***CIT v. Sardari Lal and Co. [2001] 251 ITR 864 (Delhi)*** has been placed wherein it has been held as under:-

> *"**7.** The learned counsel for the revenue also submitted that this conclusion of the Division Bench needs a fresh look. We have considered this submission in the background of what had been stated by the Apex Court in **Jute Corporation of India Ltd. v. CIT [1991] 187 ITR 688** and **CIT v. Nirbheram Daluram [1997] 224 ITR 610**. In **Jute Corporation of India Ltd.'s** case (supra), the Apex Court while considering the question whether AAC has jurisdiction to allow the assessee to raise an additional ground in assailing the order of assessment before it, referred to **Shapoorji Pallonji Mistry's** case (supra), and draw a distinction between the power to enhance tax on discovery of a new source of income and granting a deduction on the admitted facts supported by the decision of the Apex Court. Relying on certain observations made by the Apex Court in **CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225**, the Apex Court held that powers of the first appellate authority are coterminous with those of the Assessing Officer and the first appellate authority is vested with all the wide powers, which the subordinate authority may have in the matter. In **Nirbheram Daluram's** case (supra), the decisions of **Kanpur Coal Syndicate's** case (supra) and **Jute Corporation of India Ltd.'s** case (supra) were also considered and it was observed by the Apex Court that the appellate*

powers conferred on the first appellate authority under section 251 were not confined to the matter, which had been considered by the ITO, as the first appellate authority is vested with all the wide powers of the Assessing Officer may have while making the assessment, but the issue whether these wide powers also include the power to discover a new source of income was not commented upon. Consequently, the view expressed in ***Shapoorji Pallonji Mistry's*** *case (supra) and* ***Rai Bahadur Hardutroy Motilal Chamaria's*** *case (supra) still holds feet. It may be noted that the issue was considered in* ***CIT v. Mc. Millan and Co. [1958] 33 ITR 183 (SC)****. Referring to a decision of the Bombay High Court in* ***Narrondas Manordass v. CIT [1957] 31 ITR 909****, it was held that the language used in section 31 is wide enough to enable the first appellate authority to correct the ITO not only with regard to a matter which has been raised by the assessee but also with regard to a matter which has been considered by the Assessing Officer and determined in the course of assessment. It is also relevant to note that in the* ***Jute Corporation'of India Ltd.'s*** *case (supra), the Apex Court inter alia observed as follows:-*

> *".....The AAC, on an appeal preferred by the assessee, had jurisdiction to invoke, for the first time, the provisions of rule 33 of the Indian Income-tax Rules, 1922, for the purpose of computing the income of a non-resident even if the ITO had not done so in the assessment proceedings. But, in* ***Shapoorji Pallonji Mistri [1962] 44 ITR 891****, this Court, while considering the extent of the power of the AAC, referred to a number of cases decided by various High Courts including the Bombay High Court judgment in* ***Narrondas Manordass [1957] 31 ITR 909*** *and also the decision of this Court in* ***McMillan and Co. [1958] 33 ITR 182*** *and held that, in an appeal filed by the assessee, the AAC has no power to enhance the assessment by discovering new sources of income not considered by the ITO in the order appealed against. It was urged on behalf of the revenue that the words 'enhance the assessment' occurring, in section 31 were not confined to the assessment reached through a particular process but the amount which ought to have been computed if the true total income had been found. The Court observed that there was no*

> *doubt that this view was also possible, but having regard to the provisions of sections 34 and 33-B, which made provision for assessment of escaped income from new sources, the interpretation suggested on behalf of the revenue would be against the view which had held the field for nearly 37 years....." (p. 692) [Emphasis supplied]*
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> ***8.** Looking from the aforesaid angles, the inevitable conclusion is that whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under sections 147/148 of the Act and section 263, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the first appellate authority. That being the position, decision in **CIT v. Union Tyres [1999] 240 ITR 556** of this Court expresses the correct view and does not need re-consideration. This reference is accordingly disposed of."*

10. Counsel for the assessee also relied on a decision of the Kerala High Court in case of ***Commissioner of Income Tax, Thrissur v. B.P. Sherafudin [2017] 399 ITR 524 (Kerala)***. Lastly, he submitted that the CIT (A) had issued the notice for enhancement on 13.09.2013, while the time limit expired on 31.03.2013 for assessment year 2006-07 and the said proceedings are barred by limitation in view of Section 149(1) (b) of the Act.

11. Refuting the arguments made by counsel for assessee, Sri Krishna Agarwal, learned counsel appearing for the Revenue submitted that question nos. (i) and (ii) are substantial question of law while question nos. (iii) and (iv) framed as additional questions are questions of fact. He submitted that power of enhancement provided under Section 251 of the Act, is in fact, the power of Appellate Assistant

Commissioner coterminous with that of Income Tax Officer and he can do what the Income Tax Officer do and also direct him to do what he has failed to do. It was further contended that CIT (A) had been empowered under Section 251 to enhance the assessment and he may consider and decide any matter arising out of proceedings in which the order appealed against was passed. Power of CIT(A) cannot be limited to any disallowances or additions made by Assessing Officer but it extends to whole of proceedings.

12. He further submitted that assessee filed its return of income along with balance-sheet, profit and loss account and audited books of account in the assessment proceedings, in which he claimed deduction on account of labour expenses and sundry creditors. CIT (A) has power to look into such deductions claimed by assessee in his return as well as any credits in its books of account which assessee does not claim to be its income.

13. Reliance has been placed upon the decision of the Apex Court in case of ***Commissioner of Income Tax vs. Nirbheram Deluram [1997] 91 Taxman 181 (SC), CIT vs. Kanpur Coal Syndicate [1964] 53 ITR 225 (SC)*** as well as ***Jute Corporation of India vs. CIT [1991] 187 ITR 688 (SC)***, in which the Apex Court in depth considered the power of the Appellate Assistant Commissioner while exercising power under Section 251 of the Income Tax Act. Further, the Apex Court in ***Jute Corporation of India*** (supra) distinguished the judgment passed in case of ***Gurjargravures (P.) Ltd.*** (supra) and held as under:-

*"**4.** Section 31 of the Income-tax Act, 1922 ('the Act') also conferred power on the AAC to hear appeal against the assessment order made by the ITO. Chagla, C. J. of the Bombay High Court considered the question in detail in **Narrondas Manordass v. CIT, [1957] 31 ITR 909** and held that the AAC was empowered to correct the ITO not only with regard to a matter which had been raised by the assessee but also with regard to a matter which may have been considered by the ITO and determined in the course of the assessment. The High Court observed that since the AAC had been the revising authority against the decisions of the ITO; a revising authority not in the narrow sense of revising those matters, which the assessee makes a grievance but the subject-matter of the appeal not only he had the same powers which could be exercised by the ITO. These observations were approved by this Court in **CIT v. McMillan and Co., [1958] 33 ITR 182** the AAC on an appeal preferred by the assessee had jurisdiction to invoke, for the first time provisions of rule 33 of the Income-tax Rules, 1922, for the purpose of computing the income of a nonresident even if the ITO had not done so in the assessment proceedings. But in **CIT v. Shapporji Pallonji Mistry, [1962] 44 ITR 891** this Court while considering the extent of the power of the AAC referred to a number of cases decided by various High Courts including Bombay High Court judgment in **Narrondas Manordass's** case (supra) and also the decision of this Court in McMillan and Co.'s case (supra) and held that in an appeal filed by the assessee, the AAC has no power to enhance the assessment by discovering new sources of income, not considered by the ITO in the order appealed against. It was urged on behalf of the revenue that the words 'enhance the assessment' occurring in section 31 were not confined to the assessment reached through particular process but the amount which ought to have been computed if the true total income had been found. The Court observed that there was no doubt that this view was also possible, but having regard to the provisions of sections 34 and 33B of the 1922 Act, which made provisions for assessment of escaped income from new sources, the interpretation suggested on behalf of the revenue would be against the view which had held the field for nearly 37 years. In this view the Court held that the AAC had no power to enhance the assessment by discovering new sources of income. This decision does not directly deal with the question which we are concerned. Power to enhance*

tax on discovery of new source of income is quite different than granting deduction on the admitted facts fully supported by the decision of this Court. If the tax liability of the assessee is admitted and if the ITO is afforded opportunity of hearing by the appellate authority in allowing the assessee's claim for deduction on the settled view of law, there appears to be no good reason to curtail the powers of the appellate authority' under section 251(1)(a) of the Act.

***6.** In **Gurjargravures (P.) Ltd.'s** case (supra) this Court has taken a different view, holding that in the absence of any claim made by the assessee before the ITO regarding relief, he is not entitled to raise the question of exemption under Section 84 of the Act before the AAC hearing appeal against the order of the ITO. In that case the assessee had made no claim before the ITO for exemption under Section 84, no such claim was made in the return nor any material was placed on record supporting such a claim before the ITO at the time of assessment. The assessee for the first time made claim for exemption under Section 84 before the AAC who rejected the claim but on further appeal the Tribunal held that since the entire assessment was open before the AAC there was no reason for his not entertaining the claim, or directing the ITO to allow appropriate relief. On a reference the High Court upheld that view taken by the Tribunal. On appeal this Court set aside the order of the High Court as it was of the view that the AAC had no power to interfere with the order of assessment made by the ITO on a new ground not raised before the ITO, and, therefore, the Tribunal committed error in directing the AAC to allow the claim of the assessee under Section 84. Apparently this view taken by two Judge Bench of this Court appears to be in conflict with the view taken by the three Judge Bench of the Court in **Kanpur Coal Syndicate's** case (supra). It appears from the report or of the decision in Gujrat High Court case the three Judge Bench decision in **Kanpur Coal Syndicate's** case (supra) was not brought to the notice of the Bench in **Gurjargravures (P.) Ltd.'s** case (supra). In the circumstances the view of the larger Bench in the **Kanpur Coal Syndicate's** case (supra) hold the field. However, we do not consider it necessary to over-rule the view taken in **Gurjargravures (P.) Ltd.'s** case (supra) as in our opinion that decision is founded on the special facts of the case, as would appear from the following observations made by the Court:-*

> *"…...As we have pointed out earlier, the statement of case drawn up by the Tribunal does not mention that there was any material on record to sustain the claim for exemption which was made for the first time before the AAC. We are not here called upon to consider a case where the assessee failed to make a claim though there was no evidence on record to support it, or a case where a claim was made but no evidence or insufficient evidence was adduced in support. In the present case, neither any claim was made before the Income-tax Officer, nor was there any material on record supporting such a claim..."(p.5)*

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

14. A division Bench of this Court in case of ***Commissioner of Income Tax v. Kashi Nath Candiwala [2005] 144 Taxman 840 (All.)*** relying upon the judgment of ***Nirbheram Deluram*** (supra) and ***Jute Corporation of India*** (supra) held that in view of Explanation to Section 251 of the Act the appellate authority is empowered to consider and decide any matter arising out of proceedings in which the order appealed against was passed.

> *"**7.** We have heard Sri A.N. Mahajan, learned standing counsel for the revenue and nobody has appeared on behalf of the respondent-assessee. The learned counsel for the Revenue submitted that under the Explanation to section 251 of the Act, the Appellate Authority is empowered to consider and decide any matter arising out of proceedings in which the order appealed against was passed notwithstanding the fact that such matter was not raised before him by the appellant and therefore, even though the trading results were not subject-matter of the appeal before the Commissioner of Income Tax (Appeals), he was justified in going into the trading results and substituting it by his own findings. Shri Mahajan has relied upon a decision of Apex Court in the case of CIT v. Nirbheram Daluram [1997] 224 ITR 610 wherein the Apex Court has held that the Appellate Assistant Commissioner is entitled to direct additions in respect of items of income not considered by the Income Tax Officer. The Apex Court has followed its earlier decision in the case of Jute Corpn. of India Ltd. v. CIT [1991] 187 ITR 688 and has held that the power of the Appellate Assistant Commissioner is coterminous with that of the Income Tax Officer and he can do what the Income Tax Officer can do and also direct him to do what he has failed to do."*

15. Further two decisions relied upon by the counsel for the Revenue are in case of ***CIT v. K.S. Dattatreya [2011] 197 Taxman 151 (Kar.)*** and ***CIT v. McMillan & Co. [1958] 33 ITR 182 (SC).***

16. Sri Agarwal submitted that the reliance placed on the decision of ***Shapoorji Pallonji Mistry*** (supra) and ***Rai Bahadur Hardutroy Motilal Chamaria*** (supra) are completely distinguishable on facts, as in both cases the Court held that the AAC could not travel outside the record that is to say the return made by assessee with a view to finding out new source of income not disclosed.

17. Lastly the counsel for the Revenue submitted that there

was no requirement of issuance of fresh notice of enhancement once this Court restored the matter back to the CIT (A) to consider the material, giving an opportunity to assessee and fixing 31st December, 2014 as last date for submission of documents/ material and several opportunities being provided by the first appellate authority thus, question of fresh issuance of notice does not arise.

18. We have heard Sri Rakesh Ranjan Agarwal, learned Senior Advocate assisted by Sri Suyash Agarwal, learned counsel for the assessee and Sri Krishna Agarwal, learned cousel for the Revenue.

19. Before proceeding, a glance of provisions of Section 251 of the Act is necessary, which is extracted hereasunder:-

> ***"251.*** *(1) In disposing of an appeal, the Commissioner (Appeals) shall have the following powers—*
>
> > *(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment;*
> > *(aa) in an appeal against the order of assessment in respect of which the proceeding before the Settlement Commission abates under section 245HA, he may, after taking into consideration all the material and other information produced by the assessee before, or the results of the inquiry held or evidence recorded by, the Settlement Commission, in the course of the proceeding before it and such other material as may be brought on his record, confirm, reduce, enhance or annul the assessment;*
> > *(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;*
> > *(c) in any other case, he may pass such orders in the appeal as he thinks fit.*

> *(2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.*
> ***Explanation.**—In disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant."*

20. A careful reading of Section 251 reveals that power vest in Commissioner (Appeals), in an appeal against an assessment order, where he can confirm, reduce enhance or annul the assessment. Explanation to Section 251 further clarifies the position and empowers Commissioner (Appeals) to consider and decide any matter arising out of proceedings in which the order appealed against was passed, notwithstanding that said matter was not raised before him by the appellant, meaning thereby that power exercisable by CIT (Appeal) under Section 251 cannot be restricted to only the issues raised by the appellant in any appeal before him, but Commissioner can exercise his discretion in accordance with law.

21. The first argument raised by the counsel for the assessee that the CIT (A) while exercising power of enhancement under Section 251 of the Act cannot consider new source of income which was not dealt by the Assessing Officer, in the present case cannot be accepted as after the remand by this Court, the CIT (A) as well as the Tribunal in depth had recorded a finding that there was no new source of income on which the additions had been made and it was all on the records produced before the Assessing Officer that the CIT (A) had made additions of labour charges as well as addition of sundry

creditors to the extent of Rs.15.00 lacs.

22. It has been argued by the counsel for the Revenue that CIT (A) has not travelled beyond the books of accounts and during appeal it was found that only confirmation was available of five parties and the rest of the creditors were untraceable, hence the addition of the amount was made which were part of the books of account. Likewise, the addition made as far as the labour charges are concerned was also on the basis of the books of account submitted by the assessee as such, it cannot be accepted that the CIT (A) had made additions on the basis of new source of income.

23. The argument of the counsel for the assessee relying upon the decision of the Apex Court in case of ***Shapoorji Pallonji Mistry*** (supra), ***Rai Bahadur Hardutroy Motilal Chamaria*** (supra) and ***Sardari Lal & Co.*** (supra) cannot be accepted as the said judgments have their very basis where the Appellate Assistant Commissioner had made addition or deletion on the basis of new source of income, but present case is not of new source of income, as CIT (A) has relied upon the books of accounts submitted by the assessee along with his return and had claimed expenditure made by him in profit and loss account and claim of sundry creditors shown in balance-sheet.

24. The Apex Court while dealing with the power of the Appellate Assistant Commissioner under Section 251 of the Act had in case of ***Nirbheram Deluram*** (supra) and ***Jute Corporation of India*** (supra) had held that power of Appellate

Assistant Commissioner is coterminous with that of Income Tax Officer and he can do what the Income Tax Officer can do and also direct him to do what he has failed to do.

25. In the present case, the CIT (A) had deleted addition made by the Assessing Officer and had made two additions of the labour charges and sundry creditors on the basis of the profit and loss account, and balance-sheet filed by the assessee along with his return. Thus, there was no new source of income as claimed by the assessee. The case law relied upon by the assessee in case of ***Sardari Lal & Co.*** (supra) and ***Shapoorji Pallonji Mistry*** (supra) are all distinguishable in the facts of the present case, and the Hon'ble Courts in those cases had only dealt with the situation wherein AAC found new source of income and made additions to the income, while in the present case no such addition was made from any new source of income but from the return so submitted by the assessee himself.

26. The second question as regards the issuance of fresh notice of enhancement by the CIT (A) is concerned has no relevance, once the order of the Tribunal as well as CIT (A) was set aside by this Court on 10.12.2014 restoring the appeal back to CIT (A) for reconsideration and fixing 31th December, 2014 as last date for the appellant to file all required information and documentary material and to appear before CIT (A) on 05th January, 2015. The question of law raised by the assessee is of no consequence as he, thereafter, had filed the documents before CIT (A) and had appeared, thus, the question of issuance of fresh notice for enhancement does not

arise and the CIT(A) rightly decided the question so raised before it.

27. As far as question no. (III) and (IV), which the appellant had incorporated in his appeal with the permission of the Court are not substantial question of law and are questions of fact which have been dealt with by, both CIT (A) and the Tribunal in depth and have categorically recorded finding of fact, for which no interference is required in this appeal.

28. Thus, argument of the counsel for assessee cannot be accepted so as to restrict the power of Commissioner (Appeals) on the ground of new source of income, as Section 251 clearly envisages the power of the appellate authority for considering and deciding any material arising out of proceedings in which order appealed against was passed. In the present case, all the materials looked upon by the appellate authority was before the assessing authority, as such the Commissioner (Appeals) rightly proceeded to decide the same as it arose out of the proceedings of assessment.

29. The Apex Court has also affirmed that power of Commissioner (Appeals) cannot be restricted and in the case of ***Jute Corporation of India Ltd.*** (supra) held that the power of the Commissioner (Appeals) being coterminous with that of the Income Tax Officer, he can do what the Income Tax Officer do and further the section also empowers him to direct the Assessing Officer to do what he had failed to do. The power of the Commissioner is not bridled in any way and the language of the section is plain and simple.

30. Having considered the material on record and the law laid down by the Apex Court in regard to the power of Commissioner (Appeals) exercisable under Section 251 of the Act, we are of the considered opinion that the order of the Tribunal needs no interference and the appeal of the assessee is **dismissed**.

31. The questions of law are, therefore, answered in favour of the Revenue and against the Assessee.

Order Date :- 03.09.2019

V.S.Singh