

Metropolitan Trading Co. Vs. the D.C.i.T., Spl. Range 9

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Sep-04-2002

Reported in : (2004)89ITD662(Mum.)

Judge : G Gupta, K Boliya

Appellant : Metropolitan Trading Co.

Respondent : The D.C.i.T., Spl. Range 9

Judgement :

1. This appeal has been filed by the assessee against the order dated 6.3.96 passed Under Section 263 of the IT Act by the CIT, Mumbai City-IX, Mumbai. The relevant facts leading to passing of the impugned order, briefly stated, are that assessment for the AY 92-93 was completed Under Section 143(3) of the IT Act on 29.3.94 at a total income of Rs. 87,31,050/-, after allowing deduction of Rs. 1,18,25,582 Under Section 80 HHC of the IT Act. On a perusal of records, the CIT observed that while computing the deduction Under Section HHC, the AO did not deduct supervision charges of Rs. 1,45,38,373/- received by the assessee, from the business profits before computing deduction Under Section 80 HHC. The CIT was of the view that as per Clause (baa) of the explanation to Section 80 HHC, supervision charges were required to be reduced from the business profits. But, the AO did not consider this issue at all. The learned CIT observed that as per the mandatory provisions of Section 80 HHC, 90% of the said supervision charges amounting to Rs. 1,46,38,373/- should have been excluded from the business profits. The learned CIT, therefore, issued a show-cause notice to the assessee

Under Section 263 of the IT Act and after allowing opportunity and after considering the submissions made before him, he held that the assessment order was erroneous and prejudicial to the interest of the Revenue on the ground mentioned above. The learned CIT, therefore, set aside the assessment with the direction that fresh assessment should be made.

2. The learned counsel appearing on behalf of the assessee submitted that the AO had passed the assessment order Under Section 143(3) of the IT Act after due application of mind with regard to deduction Under Section 80 HHC. It is pointed out that while computing deduction Under Section 80 HHC, the AO has made certain adjustments as discussed at para 19 of the assessment order. It is pointed out that 90% insurance claim (Rs. 20,833/-) and excess provision (Rs. 5,75,342/-) were excluded from the business profits. Besides this, the AO treated various items like miscellaneous income, rent, interest, excess provision etc. as part of total turnover for the purposes of computing deduction Under Section 80 HHC. It is submitted that aggrieved by such adjustments, the assessee preferred an appeal to the CIT(A)-XXIX, Mumbai, who decided the assessee's appeal vide order dt. 28.2.95. The learned CIT(A), at para 16 of his order has mentioned that the ground of appeal relates to deduction allowed Under Section HHC. The issues raised in appeal pertaining to Section 80 HHC were decided by the learned CIT(A) in assessee's favour. In the back drop of these facts, the learned counsel for the assessee forcefully argued that the order of the AO has merged with the order of the CIT(A) with the result that the learned CIT is precluded from invoking his jurisdiction Under Section 263 of the IT Act. The learned counsel, in support of this proposition, strongly relied upon the ITAT Allahabad 'B' Bench decision in the case of Sahara India Mutual Benefit Co. Ltd. v. ACIT - 74 TTJ 67. The learned counsel invited our attention to the finding of the ITAT which may be reproduced below from the headnote: "So far as the doctrine of merger, even after the amendment of the provisions of Section 263 is concerned, once any of the 'aspects' of an 'issue' is the subject matter of appeal before the CIT(A), then, it is the 'issue' as a whole which is said to be the subject-matter of appeal and not only the 'aspect' alone. Coming to the assessee's case the 'issue' before the AO was the allowability of the liability on account of interest payable on the deposits under the two deposit schemes and the allowability issue had more than one aspect

such as liability on account interest payable could be allowed only if the deposits were found or considered to be as of capital nature, i.e., were found or considered as of Revenue nature, then there was no question of allowance of deduction on this account. Similarly, if any of the deposits was found to be ungenuine in terms of provisions of Section 68, then there was no question of allowance of liability on account of interest on such deposits. The liability on account of interest payable could be allowed on accrual basis only if it was found that the liability to pay interest had accrued or had materialized or was ascertained one and for that purpose the terms and conditions of the schemes, i.e., assessee's obligation under the scheme, and the system of accounting followed by the assessee were to be investigated. It was also necessary to verify the quantum of deposit which, inter alia, included verification of lapsed or unclaimed natured account. While considering an issue which is comprised of various aspects, the AO is supposed to consider the issue from all angles, i.e., to consider all the aspects and if the issue relates to allowability of a deduction, then the AO is supposed to have considered the allowability from all angles/aspects involved for allowability of the deduction under that issue. If the officer allows the whole of the claim or disallows the claim as a whole or any part by considering one or more or all aspects involved in that issue, it cannot be said that AO had not considered the issue or has considered only a few aspects. That being the case, if such an action of the AO is brought before CIT(A) by way of appeal - even with respect to those very few aspects which have been considered by the AO, it cannot be said that the subject-matter of appeal were only those issues. On the contrary, it is the issue as a whole which will be said to be the subject-matter of appeal and consequently by virtue of application of the doctrine of merger, the order of the AO with respect to that issue as a whole will be said to have merged with the order of the CIT(A). So far as, the assessee's case is concerned, the issue before the AO was the allowability of assessee's claim of deduction on account of liability for interest payable on deposits under the two schemes, the facts that AO had dealt only with one or few aspects of the issue and the fact that those aspects were only in appeal before the CIT(A) will not be hindrance for the applicability of doctrine of merger because it is the issue as a whole which has to be said to be subject-matter of appeal before the CIT(A) and not the aspects alone. So far as the assessee's claim of deduction

of liability on account of interest payable on deposits under the two schemes was concerned, it was, as a whole-including all aspects, such as accrual of the liability, quantum of claim etc., subject matter of appeal before the CIT(A) and since the CIT(A) also has dealt with those aspects, the assessment order, so far as this issue is concerned, had merged in the order of the CIT(A). That being the position, the CIT, had no jurisdiction to revise the impugned assessment order by exercising the powers available under the provisions of Section 263 and consequently, the order under Section 263 was bad in law and void ab initio for want of lawful jurisdiction - Oil India Ltd. v. CIT (1982) 138 ITR 836 (Cal), Remex Constructions/Remex Electricals v. ITO and Ors. (1987) 166 ITR 18 (Bom) and CIT v. Goodricke Group Ltd. relied on." The learned counsel has also placed reliance on the following ITAT orders: 3. M/s. Siemens Ltd. - ITAT Mumbai Order dt. 21.6.99 in ITA No. 4393/Bom/92 (copy filed).

Referring to the ITAT Delhi Bench decision in the case of Sujatha Grower (supra), the learned counsel invited our attention to the following observations of the ITAT from the headnote: "A perusal of Section 263(1), Expln. (c) reveals that the power of the CIT under Section 263 extends to all the matters which have not been considered and decided in the appeal. The word used in this expression is 'matters'. A 'matter' may involve one or more aspects.

Where there is only one aspect of the matter and that was the subject of appeal before the first appellate authority, the CIT cannot invoke revisionary power on that matter. Section 251 states the powers of the CIT(A) which include confirming, reducing, enhancing or annulling the assessment. Explanation to this section provides that in disposing of an appeal the CIT(A) 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 him. This shows that any matter arising out of the proceedings before the AO is open before the CIT(A) and he is competent to consider all such matters. Powers of CIT(A) are co-terminus with that of the AO and he can do all that which AO is competent to do and can also direct him to do what he has failed to do. The CIT(A) is competent to consider all the aspects of the matter which is agitated before him. It is not only the right but the duty of the CIT(A) to examine various aspects of the issue which is

the subject matter of controversy before him. When a particular matter is disputed by the assessee before the first appellate authority and he gives his findings on some aspects of the matter, it is implied that he has examined all aspects of that matter before adjudicating upon the matter and is satisfied as regards the correctness of the findings of the AO on all other aspects of that matter. This is obvious from the power of enhancement, which has the effect of increasing the income by setting right the lacunas left over by the AO while framing the assessment." The learned counsel submitted that the ITAT Calcutta Bench and ITAT Mumbai Bench have also adopted similar view in the cases cited. The learned counsel argued that in the present case the matter of deduction Under Section 80 HHC of the IT Act has been the subject matter of appeal before the CIT(A). Even though one of the aspects relating to such deduction was not considered by the AO, it is to assumed that when the matter came up before the CIT(A), he must have considered and applied his mind to the entire gamut of Section 80 HHC. It is argued that the powers of the first appellate authority are co-terminus with the powers of the AO and he also has the power of enhancement.

Therefore, when the question of deduction Under Section 80 HHC has been considered and adjudicated by the learned CIT(A), the AO's order on this issue merges with the order of the CIT(A). It is, therefore, contended that in view of the direct decisions of four different benches of ITAT, in this case, the learned CIT(A) had no jurisdiction to exercise his powers Under Section 263 of the IT Act. The learned counsel, therefore, urged forcefully that the order passed Under Section 263 of the IT Act deserves to be vacated and quashed.

3. The learned DR submitted before us that as per the relevant provisions of Section 263 of the IT Act, the CIT can exercise his revisionary powers in respect of such issues of the Assessment order which have not been considered and decided in appeal. It is pointed out that a very crucial and material question as to whether the supervision charges of Rs. 1,46,38,373/- are to be excluded from the business profits having regard to the mandatory provisions of Clause (baa) of the Explanation to Section 80 HHC of the IT Act, has not been considered by the AO at all while computing deductions Under Section 80 HHC. It is argued that there was no application of mind on the part of the AO with regard to his important issue.

It is pointed out that since the AO had allowed the claim of the assessee, there was no question of assessee's filing any appeal on this issue with the result that the learned CIT(A) had no occasion to deal with this issue. It is argued that in these circumstances, the CIT was fully justified in passing the order Under Section 263 of the IT Act. The learned DR relied on the following cases: CIT v. South India Shipping Corporation Ltd. 4. We have given a very careful consideration to the rival submissions, relevant facts and circumstances and have gone through the precedents cited. It may be mentioned that upto 31.5.88, there was a conflict in judicial opinion as to whether, after an order has been subjected to first appeal, the points that were neither raised in appeal nor dealt with by the first appellate authority, do or do not merge in the appellate order and this may, or may not be subjected to the CIT's jurisdiction Under Section 263 of the IT Act. One view was that the doctrine of merger would operate only on matters which were the subject matter of the decision by the first appellate authority and has no application to matters which have not been touched by that authority.

This view was held by a number of High Courts. On the other hand, there was another view that the entire order passed by the AO merges in the first appellate order and no part of it can be subjected to an order Under Section 263. This view was also approved by several High Courts including Hon'ble Bombay High Court in the case of Remex Constructions v. The First ITO - 166 ITR 18. This decision has also been referred to in the orders passed by the various benches of ITAT which have been relied upon by the learned counsel. In view of this conflict in judicial opinion, the Explanation to Section 263 was amended by the Finance Act 1988 and the following Clause (c) was inserted w.e.f.

1.6.88.

"(c) where any order referred to in this sub-section and passed by the AO had been the subject matter of any appeal (filed on or before or after the 1st day of June, 1988), the powers of the Commissioner under this sub-section shall extend (and shall be deemed always to have extended) to such matters as had not been considered and decided in such appeal." In Clause (c) above, the words "and shall be deemed always to have extended," were inserted by the Finance Act 1989

w.e.f 1.6.88. This amendment came up for consideration before the Hon'ble Bombay High Court in the case of Ritz Ltd. v. Union of India - 184 ITR 599 and it was held that only in cases where action Under Section 263 is taken on or after 1.6.88, the merger of the assessment order in the appellate order will be treated as confined to the issues actually considered and decided in appeal in terms of Clause (c). However, the Hon'ble Supreme Court in the case of CIT v. Shri Arbuda Mills Ltd. - 231 ITR 50 held that Clause (c) of Explanation to Section 263 had retrospective operation. It is true that in the cases decided by the ITAT and relied upon by the learned counsel, the amended provisions of Section 263 have been considered. However, most of the High Court decisions, including Hon'ble Bombay High Court decision in the case of Remex Constructions (supra), were rendered in the context of the legal position existing prior to amendment in Section 263 w.e.f. 1.6.88. We have given a very careful and serious consideration to the views expressed in the four cases of ITAT relied upon by the learned counsel, while interpreting the relevant provisions of Section 263 of the IT Act. However with profound respect to the ITAT, we have not been able to persuade ourselves to agree with the view proposed in these cases, for reasons to be discussed forthwith.

5. As per Clause (c) of the Explanation to Section 263(1) of the IT Act, the CIT has been conferred with the powers to exercise jurisdiction Under Section 263 in respect of matter which have not been considered and decided in appeal. The important words are "considered and decided". In our view, the purpose and import of Clause (c) is absolutely clear and before a finding is recorded as to whether the AO's order has merged in the order of the appellate authority, it has to be examined as to whether any relevant matter has been considered and decided in appeal. Obviously if an issue is not at all raised in appeal and is also not considered suo motu by the appellate authority and decided in appeal, the powers of the CIT Under Section 263 will extend to such matter. A reference may be made to the Hon'ble Andhra Pradesh High Court decision in the case of CWT v. A. Nageshwara Rao - 231 ITR 215, which has been relied upon by the learned DR. The observations of the Andhra Pradesh High Court from the headnote are reproduced below: "The doctrine of merger applies to wealth tax proceedings but the extent to which it applies depends upon the scope and subject matter of

appeal and the decision rendered by the appellate authority. In case the order of assessment passed by the Wealth Tax Officer has been challenged by the assessee before the Appellate Assistant Commissioner in respect of only some of the items covered by the Wealth-tax Officer's assessment order and the remaining items forming part of the order of assessment have neither been raised nor decided by the appellate authority suo motu and no decision has been given by the appellate authority in respect of those items, only that portion of the order of assessment merges with the appellate order which has been considered and decided by the appellate authority. In other words, to the extent of the matters which are not covered by the appellate order of the Appellate Assistant Commissioner and are left untouched, the order of assessment survives, permitting the exercise of revisional jurisdiction by the Commissioner Under Section 25(2) of the Wealth-tax Act." In the above case, it was specifically argued before the Hon'ble High Court on behalf of the respondent assessee that the commissioner has no jurisdiction and power to go into the question of assessment of the properties in question, because, when the appeal was filed by the assessee, it was open to the Department to raise before the appellate Assistant Commissioner any matter including the alleged wrong valuation of the properties, because the AAC had got powers to consider that question also which had not been raised by the assessee. This argument was negated by the Hon'ble High Court, observing that if the appellate court has not suo motu considered and decided the issue, provisions of Section 263 can be invoked by the CIT. The Hon'ble High Court referred to the Hon'ble Supreme Court decision in the case of *State of Madras v. Madurai Mills Co. Ltd.* (1967) 19 STC 144, and reproduced as below the extract from the headnote, at page 221: "The doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior authority and the other by a superior authority, passed in an appeal or revision, there is a fusion or merger of the two orders irrespective of the subject matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction." The observations of the Hon'ble Andhra Pradesh High court

at Page 221 may also be reproduced below: In the case of CIT v. K.L. Rajput (1987) 164 ITR 197, a Full Bench consisting of five judges of the Madhya Pradesh High Court, has held that whenever a question arises as to whether the Commissioner is or is not competent to revise Under Section 263 of the Act, the order of assessment framed by the ITO which has been the subject matter of an appeal before the Appellate Assistant Commissioner, it has to be ascertained as to whether the Commissioner has set aside the entire order of assessment or only that part of the order of assessment which was not the subject matter of an appeal either because the Appellate Assistant Commissioner had no jurisdiction to consider the matter or because the Appellate Assistant Commissioner, though having jurisdiction to examine that subject matter, did not do so." From the above, it may be seen that, even though the first appellate authority has jurisdiction to examine a matter, but does not do so, the powers of the CIT with regard to such matter can be exercised Under Section 263.

6. The scope and ambit of Clause (c) of the Explanation to Section 263(1) came up for consideration before the Hon'ble Supreme court in the case of CIT v. Shri Arbuda Mills Ltd. - 231 ITR 50, relied upon by the learned DR. The ratio of the Hon'ble Apex Court may be reproduced below from the headnote: "The assessment of the assessee for the AY 1975-76 was completed Under Section 143(3) of the IT Act, 1961 read with Section 144B on March 31, 1978, in which the net business loss was computed at Rs. 3,61,086/- and the income under the head 'capital gains' at Rs. 38,874/-. The ITO made certain additions and disallowances while computing the loss and income and had also accepted, inter alia, the following three claims (i) deduction of a sum of Rs. 23,82,621/- by way of provision for gratuity; (ii) depreciation on Rs. 4,21,000/- which was paid by the assessee as consideration for transfer of installed property; and (iii) loss on account of difference in exchange rate which was referable to the purchase of machinery, etc., as revenue expenditure. On appeal to the Commissioner (Appeals), the above three items in respect of which the decision was in the assessee's favour were not the subject matter of the appeals. The CIT exercised his power Under Section 263 of the Act in respect of these three items. On a reference by the Appellate Tribunal Under Section 257 of the IT Act, 1961, to the Supreme Court, of the question whether or not the order of the ITO regarding the three items had

merged in that of the Commissioner (appeals); Held, that the Explanation to Section 263(1) which was substituted by the Finance Act, 1988, w.e.f. 1.6.88 was again amended by the Finance Act, 1989, with retrospective effect from 1.6.88 to the effect that where any order referred to in the sub-section and passed by the AO had been the subject matter of any appeal(filed on or before or after the 1st day of June, 1988), the powers of the Commissioner under the sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal. The consequence of the amendment made with retrospective effect is that the powers Under Section 263 of the Commissioner shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in an appeal. Accordingly, in respect of the aforesaid three item, the power of the Commissioner Under Section 263 shall extend and shall be deemed always to have extended to them because the same had not been considered and decided in the appeal filed by the assessee.

Therefore, the order of assessment passed by the ITO on March 31, 1978, had not merged with that of the Commissioner (Appeals), dated December 15, 1979, in respect of the three items in dispute so as to exclude the jurisdiction of the Commissioner of IT Under Section 7. The Hon'ble Gujarat High Court in the case of CIT v. Paushak Ltd. 227 ITR 216 which is relied upon by the learned DR, recorded the following finding which is reproduced from the headnote: "Held, that in the appeals which are filed by an assessee against any order that is adverse to him, the assessee would not be challenging any finding regarding deduction or depreciation, which might be in his favour. Therefore, in the appeal that was filed by the assessee before the CIT(A), the three aspects which were already decided by the ITO in his favour would not have figured. Therefore, when the Commissioner exercised his power Under Section 263 for taking up the ITO's order in revision as regards those three aspects on the ground that the decision in that regard was erroneous and prejudicial to the interests of the Revenue, he had ample authority under that provision to adjudicate upon those aspects which never arose in appeal." 8. The Hon'ble Gujarat High Court has observed that if any issue is decided in assessee's favour by the AO, the assessee will have no grievance and such issue will not be agitated by the assessee in appeal. Therefore, the CIT

can exercise his power Under Section 263 in respect of any such issue which is decided in assessee's favour by the AO. The Hon'ble Madras High Court in the case of CIT v. South India Shipping Corporation Ltd. - 233 ITR 546 made the following observations which are reproduced from the headnote: "That the order of the ITO which was the subject matter of revision before the CIT Under Section 263 of the Act did not merge with the order of the first appellate authority as the subject matter of appeal before the first appellate authority was different.

Therefore, the Tribunal was not correct in holding that there was a merger of the order of the ITO with the order of the CIT(A) precluding the Commissioner from exercising his revisional powers." 9. Here, a reference may also be made to the Hon'ble Andhra Pradesh High Court decision in the case of CIT v. East Coast Marine Products Pvt. Ltd. and Anr. - 181 ITR 314. The ratio may be reproduced below from the headnote: "Where an appeal is preferred by the assessee to the Appellate Assistant Commissioner from an order of assessment made by the ITO in respect of only some of the items covered by the ITO's order and the remaining items, forming part of the ITO's assessment order, were not agitated and the Appellate Assistant Commissioner did not consider them suo motu and no decision of the Appellate Assistant Commissioner is, therefore, made in respect of the remaining items, the ITO's order merges with the appellate order of the Appellate Assistant Commissioner only to the extent it was considered and decided by the Appellate Assistant Commissioner. Matters which are not covered by the appellate order are left untouched and to that extent, the ITO's assessment order survives permitting exercise of revisional jurisdiction by the Commissioner Under Section 263 of the Act." 10. A reference may also be fruitfully made to the Hon'ble Calcutta High Court decision in the case of Hamilton & Co. Pvt. Ltd. v. CIT - 187 ITR 568. The relevant portion from the headnote is extracted below: "A narrow construction of the power of the Commissioner Under Section 263 of the IT Act, 1961, will defeat the purpose for which the provision was enacted. The order of the ITO will merge with the order of the Appellate Assistant Commissioner only with respect to that part of the order of the ITO which relates to the matters considered and decided by the appellate authority. Thus, there will be partial merger and not the merger of the whole order. By the Finance Act, 1988, the provisions of Section 263 have been amended to clarify that the Commissioner

would be competent to revise an order of assessment passed by an assessing officer on all matters except those that have been considered and decided in appeal." 11. The question of merger in the context of Section 263 of the IT Act also came up for consideration before the Hon'ble Madras High Court in the case of CIT v. Tube Investments of India Ltd. - 243 ITR 846. The ratio is reproduced below from the headnote: "Held, that the ITO, in the instant case, at the time of original assessment, granted depreciation on the items in question at a particular rate and as claimed by the assessee. The assessee was not aggrieved either by the grant of depreciation or by the rate at which it was granted and there was no appeal before the Commissioner (appeals) against that part of the order of the ITO granting depreciation at the rate claimed by the assessee. The only question that was raised before the first appellate authority was its claim for extra shift allowance. In the appeal preferred by the assessee before the first appellate authority there was no occasion or inquiry and there was no determination by the first appellate authority with reference to the rate of depreciation allowed by the ITO. That part of the order of the ITO granting the depreciation remained undisturbed even after the order passed by the Commissioner of IT in appeal and, hence, it could not be said that the order of the ITO granting depreciation at the particular rate had merged with the order of the CIT(A). Hence, the order of the CIT(A) did not in any way preclude the Commissioner from exercising his power of revision under Section 263." In the above case, the question pertaining to granting depreciation including extra shift allowance was considered by the AO who allowed depreciation at the rates claimed, but did not allow extra shift allowance. Thus, while there was no appeal on the question of depreciation allowed by the AO as claimed, the issue of extra shift allowance was subject to appellate proceedings. It was held by the Hon'ble Madras High Court that the order of the AO granting depreciation did not merge with the order of the CIT(A). Thus, a matter may be large enough or complicated enough to have several aspects or issues and if some of the aspects are not considered by the AO and consequently are also not considered and decided in appeal, the CIT can exercise his powers Under Section 263 with regard to such aspects or such issues which have not been considered and decided in appeal.

12. In the present case before us, while framing the assessment Under Section 143(3), the AO was seized with the matter of computing deduction admissible to the assessee under the relevant provisions of Section 80 HHC of the IT Act. While doing so, the AO completely ignored the fact that the assessee received supervision charges of Rs. 1,46,38,373/-. There was no application of mind on the part of the AO to the nature of treatment Under Section 80 HHC of the aforesaid receipt. The AO did not consider at all as to whether or not the provisions of Clause (baa) of the Explanation to Section 80 HHC (4B) would be applicable. Adjustments were made on account of certain other items of income which caused grievance to the assessee and therefore such issues were made subject matter of appeal. Obviously, while deciding the appeal, the learned CIT(A) had no occasion to consider the implications for the purposes of Section 80 HHC of the Supervision Charges of Rs. 1,46,38,373/-. Thus, this specific aspect, issue or matter, whatever nomenclature is applied, was neither considered nor decided by the learned CIT(A) within the meaning of Clause (c) of the Explanation to Section 263(1).

13. The learned counsel for the assessee has forcefully argued that the first appellate authority has the power of enhancement and therefore if a matter has been made subject matter of appeal before him, he has the power and jurisdiction to go into all the aspects relating to that matter and it must be assumed that such matter has been considered and decided in its totality. We are unable to subscribe to this proposition advocated by the learned counsel. It is a settled position of law that powers of the first appellate authority are co-terminus with the powers of the AO and, as a matter of fact, his powers are not confined to the subject matter of appeal, but extend to the subject matter of the entire assessment which is thrown upon before the appellate authority.

This was the ratio of the Hon'ble Gujarat High Court in the case of CIT v. Ahmedabad Crucible Co. - 206 ITR 574. In the case of CIT v. Nirbheram Daluram - 224 ITR 610 the Hon'ble Supreme Court went to the extent of observing that the first appellate authority is even entitled to direct additions in respect of items of income not at all considered by the AO. Thus, even if the AO has not considered the matter or a source of income, the appellate authority has the powers to consider such new issues or new sources of income also. If the view proposed by

the learned counsel for the assessee is accepted, it may have to be held, per force, that once the assessment order has been made subject matter of appeal, entire order gets merged in the appellate order even on issues which were not subject matter of appeal. Such view does not appear to be plausible because in that case Clause (c) of the Explanation to Section 263(1) would be rendered redundant.

14. On the basis of the foregoing discussions, we hold that with regard to specific issue of supervision charges of Rs. 1,46,38,373/-, the order of the AO did not merge in the order of the learned CIT(A).

Therefore, the learned CIT had the power to exercise jurisdiction Under Section 263 with regard to the abovementioned issue.

15. The learned DR has referred to the Hon'ble Rajasthan High Court decision in the case of CIT v. Emery Stone Mfg. Co. - 213 ITR 843 and the ITAT Mumbai (TM) decision in the case of Bharath Mining & Engg. Co.

v. ECIT, for the proposition that if the AO has not considered and applied his mind to an important aspect, his order would be erroneous and prejudicial to the interests of the Revenue for the purposes of Section 263 of the IT Act. In the present case, as already mentioned above, the AO has failed to consider and apply his mind as to whether Clause (baa) of the Explanation to Section 80 HHC (4B) would be applicable to supervision charges received by the assessee. In our view, this renders the assessment order erroneous and prejudicial to the interests of the Revenue. Therefore, we hold that the learned CIT was justified in passing the impugned order Under Section 263 of the IT Act and setting aside the assessment order on the limited issue of supervision charges. We refrain from making any observations on the merits of the issue as we are informed that the re-assessment order passed by the AO is already subject matter of appeal on merits before the ITAT.