

INCOME TAX : Where Tribunal in impugned order had come to conclusion that issues raised in cross objection were legal issues, Tribunal should not have stopped assessee from raising issue in appeals instituted by revenue, without necessity of filing any cross objections

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[2021] 128 taxmann.com 180 (Bombay)

HIGH COURT OF BOMBAY

Peter Vaz

v.

Commissioner of Income Tax Central Circle, Bangalore*

M.S. SONAK AND SMT. M.S. JAWALKAR, JJ.

TAX APPEAL NOS. 19 TO 30 OF 2017†

APRIL 5, 2021

Section 255, read with section 153C, of the Income Tax Act, 1961 and rule 27 of the Income-tax (Appellate Tribunal) Rules, 1963 - Appellate Tribunal - Procedure of (Cross-objections) - Assessment years 2006-2007 to 2011-2012 - Assessee were partners holding 50 per cent stake respectively in a partnership firm - Pursuant to search, assessee responded to notices under section 153C, submitting inter alia that returns originally filed by them under section 139(1) may be treated as returns in response to notices under section 153C - Assessing Officer vide assessment order made additions to income of assessee - On appeal, Commissioner (Appeals) allowed appeals of assessee - Thereafter, revenue instituted appeals before Tribunal - During pendency of appeals, assessee requested Assistant Commissioner to furnish them a copy of 'satisfaction' for issuance of notice under section 153C - Tribunal prevented assessee from raising this jurisdictional issue inter alia on ground that there was a necessity of filing cross-objections expressly raising such a jurisdictional issue- Assessee filed cross-objections before Tribunal accompanied by an application seeking condonation of delay of 248 days in filing cross-objections - Tribunal allowed appeals filed by revenue but dismissed cross-objections filed by assessee by refusing to condone delay of 248 days in filing of same - Whether Tribunal should not have stopped assessee from raising issue in appeals instituted by revenue, without necessity of filing any cross objections when admittedly, Tribunal in impugned order had come to conclusion that issues raised in cross-objection were legal issues - Held, yes - Whether Tribunal had not focused on issue of whether there was sufficient cause for explaining 248 days delay in instituting cross-objections, but rather had faulted assessee for not raising issue of non-compliance with jurisdictional parameters - Held, yes - Whether these were not relevant considerations at stage of deciding whether sufficient cause was shown to explain 248 days delay in instituting cross-objections - Held, yes - Whether therefore, matter was to be remanded to Tribunal for fresh consideration of appeals instituted by revenue after permitting assessee to raise issue of non-compliance with in jurisdictional parameters of section 153C - Held, yes [Paras 38, 39 and 52] [Matter remanded]

CASE REVIEW

Order of ITAT dated 2-12-2016 (para 52) *set aside*.

CASES REFERRED TO

B.R. Bamasi v. CIT [1972] 83 ITR 223 (Bom.) (para 17), *CIT v. Edward Keventer Sucessors (P.) Ltd .* [1980] 123 ITR 200 (Delhi) (para 17), *National Thermal Power Co. Ltd. v. CIT* [1998] 97 Taxman 358/229 ITR 383 (SC) (para 17), *CST v. Sarjoo Prasad Ram Kumar* [1976] 37 STC 533 (SC) (para 17), *Mavany Brothers v. CIT* [2015] 62 taxmann.com 50 (Bom.) (para 17), *DIT (International Taxation) v. Ingram Micro India Exports (P.) Ltd .* [2015] 60 taxmann.com 57/234 Taxman 464 (Bom.) (para 17), *Dahod Shakari Kharid Vechan Sangh Ltd. v. CIT* [2005] 149 Taxman 456/[2006] 282 ITR 321 (Guj.) (para 18), *S. Nazeer Ahmed v. State Bank of Mysore* [2007] 11 SCL 75 (para 18), *Indian Bank v. Manilal Govindji Khona* [2015] 56 taxmann.com 133/130 SCL 311 (SC) (para 19), *Collector Land Acquisition v. MST. Katiji* 1987 taxmann.com 1072 (SC) (para 19), *Rathna Stores (P.) Ltd. v. CIT* [2020] 120 taxmann.com 260/274 Taxman 489 (Mad.) (para 19), *CIT v. Vijaybhai N. Chandrani* [2013] 35 taxmann.com 580/217 Taxman 138/357 ITR 713 (SC) (para 20), *Municipal Commissioner v. Sahil Kumar Banerjee* [2004] 4 SCC 108 (para 20), *CIT v. Ng Technologies Ltd.* [2015] 57 taxmann.com 389/370 ITR 7 (Delhi) (para 20) and *N. Balakrishnan v. M. Krishnamurthy* [1998] 7 SCC 123 (para 40).

P. Pardiwala, Sr. Adv. **J. Sanghavi** and **H.D. Naik**, Advs. *for the Appellant*. **Ms. S. Linhares**, Standing Counsel *for the Respondent*.

JUDGMENT

M.S. Sonak, J. - Heard Mr. Pardiwala, learned Senior Advocate along with Mr. J. Sanghavi and Mr. H. D.Naik, learned counsel for the Appellants in each of these appeals.

2. Heard Ms. S. Linhares, learned Standing Counsel for the Income-tax Department in each of these appeals.

3. The learned counsel for the parties agree that these Tax Appeals can be disposed of by a common judgment and order since the issues involved therein are virtually identical.

4. These appeals were admitted by order dated 15th June 2017 on the following substantial questions of law :

1. Whether in the facts and in the circumstances of the case and in law, the Appellate Ld Tribunal was right in invoking the provision of section 2(22)(e) of the Act and making an addition of deemed dividend in the hands of the Appellant?
2. Whether on the facts and in the circumstances of the case and in law, the Ld. Tribunal was justified in holding that the transactions which are recorded in the books of accounts of the Company and the Firm would be regarded as incriminating material in the case of the Appellant when the Appellant was not a party to the said transactions?
3. Whether on the facts and in the circumstances of the case and in law the Ld. Tribunal was justified in holding that the provision of section 2(22)(e) are applicable without considering the argument of the appellant that the account between the Company and the Firm was a running current account?
4. Whether on the facts and circumstances of the case and in law, the Appellate Ld. Tribunal was correct in rejecting the cross objections filed by the appellant solely on the ground of delay, when admittedly, the Appellate Ld. Tribunal in the impugned order has come to the conclusion that the issues raised in the cross objection are legal issues?

5. After these appeals were heard for some time, we were satisfied that these appeals involve an additional substantial question of law. Accordingly, by our order dated 30th March 2021, we framed the additional substantial question of law and adjourned the matter to enable the learned counsel for the parties to address us on such additional substantial question of law. The additional substantial question of law framed by us reads as follows:—

"Whether in the facts and circumstances of the present case, it was open to the appellant/assessee to have supported the orders of the Commissioner (Appeals), based on the ground that the jurisdictional parameters prescribed under section 153C of the I.T. Act were not fulfilled, even without the necessity of filing any cross objections ?"

6. To appreciate the setting in which the aforesaid substantial questions of law arise, it is necessary to refer to some skeletal facts.

7. Peter Vaz, (since deceased and now represented by his legal representatives) and Edgar Afonso were partners holding 50% stake respectively in the partnership firm functioning under the name and style "Models Real Estate Developers" (the said firm). They also held equal stake as shareholders of the company "Models Constructions Private Limited" (the said company). Both the firm as well as the company were engaged in the business of real estate, construction, and development.

8. On 31-1-2012, a search was held in terms of section 132 of the Income-tax Act, 1961 (IT Act) on the said firm and the said company. Pursuant to such search notices were issued on 30-7-2012 to Peter Vaz and Edgar Afonso calling upon them to file returns of income for the Assessment Years 2006-2007 to 2011-2012. For these Assessment Years, the original assessment had already been completed under section 143(1) of the IT Act.

9. Both Peter Vaz and Edgar Afonso responded to the notices under section 153C of the IT Act submitting *inter alia* the returns originally filed by them under section 139(1) of the IT Act may be treated as returns in response to the notices under section 153C of the IT Act.

10. In the course of assessment proceedings, Peter Vaz and Edgar Afonso were required to show cause as to why the loans given by the said company to the said firm should not be treated as 'deemed dividend' in the hands of Peter Vaz and Edgar Afonso in terms of section 2(22)(e) of the IT Act. Both of them filed detailed responses submitting how according to them, the provisions of section 2(22)(e) of the IT Act were not at all attracted in the facts and circumstances of the case.

11. Assessing Officer *vide* Assessment Order dated 31-3-2014 however held that the amounts reflected in the books of the said firm as payable to the company were like 'loans and advances' and accordingly, directed that the same be treated as 'deemed dividend' under section 2(22)(e) of the IT Act. These amounts were added to the income of the assessee's Peter Vaz and Edgar Afonso and brought to additional tax.

12. Being aggrieved by the Assessment Orders dated 31-3-2014, the assessee's Peter Vaz and Edgar Afonso appealed to the Commissioner of Income-tax (Appeals). By order dated 28-7-2015, the CIT (Appeals) allowed the appeals and held that the amounts reflected in the books of the said firm could not be treated as 'deemed dividend' under section 2(22)(e) of the IT Act. Accordingly, the Assessment Orders dated 31-3-2014 made by the Assessing Officer were set aside.

13. The Revenue aggrieved by the orders dated 28-7-2015 made by the CIT (Appeals) instituted appeals before the Income-tax Appellate Tribunal (ITAT). During the pendency of the appeals, the assessee's requested the Assistant Commissioner of Income-tax to furnish them a copy of 'satisfaction for issuance of notice under section 153C'. Such copies were furnished to the assessee's on 22-8-2016 or thereabouts. However, the documents which were relied upon by the Assistant Commissioner were not furnished to

the assessees. Therefore, the assessees, by letters dated 25-8-2016 sought the same. There was no response to these letters dated 25-8-2016.

14. The assessees filed cross-objections on 30-8-2016 before the ITAT accompanied by an application seeking condonation of delay of 248 days in filing the cross-objections.

15. The ITAT, by a common judgment and order dated 2-12-2016 allowed the appeals filed by the Revenue but dismissed the cross-objections filed by the assessees by refusing to condone the delay of 248 days in filing of the same. Aggrieved by the impugned judgment and order dated 2-12-2016, the assessees' Peter Vaz and Edgar Afonso have instituted the present appeals under section 260A of the IT Act on the aforesaid substantial questions of law.

16. Mr. Pardiwala, learned Senior Advocate for the Appellants, at the outset, referred us to the provisions of Section 153C of the IT Act as amended till the year 2013 and thereafter compared the same with the provisions of Section 153C as amended from time to time between the years 2013 and 2020. He submitted that the provisions of section 153C of the IT Act have undergone significant changes between the years 2013 and 2020. He pointed out that in terms of the provisions of section 153C as amended till 2013, the jurisdiction to proceed under section 153C was entirely dependent on the satisfaction that any money, bullion, jewelry, or other valuable article or thing or books of account or documents seized or requisitioned 'belongs or belong to a person' other than the person referred to in section 153A of the IT Act. Thereafter, the provisions of section 153A were amended and proceedings under section 153C could be initiated even where the Assessing Officer was satisfied that any books of account or documents, seized or requisitioned, 'pertains or pertain to', or any information contained therein relates to a person other than the person referred to in section 153A of the IT Act.

17. Mr. Pardiwala submitted that since these matters concern the Assessment Years 2006-2007 to 2011-2012, the provisions of section 153C as amended up to the year 2013, were attracted. He submitted that from the material available on record, including the satisfaction note submitted to the assessees, it is apparent that the books of accounts belonging to the said firm or the said company were found in the course of a search under section 132 of the IT Act. There is no material on record to hold that any books of accounts belonging to either Peter Vaz and Edgar Afonso, assessees herein were ever found in the course of a search under section 132 of the IT Act. He submits that in the absence of satisfaction on this jurisdictional aspect, no action in terms of section 153C of the IT Act was competent. He, therefore, submits that the action under section 153C of the IT Act was without jurisdiction and this ground was required to be considered by the ITAT, irrespective of whether or not any cross objections were filed by the assessees. He submitted that this was an issue of law that went to the root of the matter and there was no justification on the part of the ITAT in even refusing to consider such a significant issue. He relied on *B.R. Bamasi v. CIT* [1972] 83 ITR 223 (Bom.), *CIT v. Edward Keventer Sucessors (P.) Ltd.* [1980] 123 ITR 200 (Delhi), *National Thermal Power Co. Ltd. v. CIT* [1998] 97 Taxman 358/229 ITR 383 (SC), *CST v. Sarjoo Prasad Ram Kumar* [1976] 37 STC 533 (SC), *Mavany Brothers v. CIT* [2015] 62 taxmann.com 50 (Bom.), *DIT (International Taxation) v. Ingram Micro India Exports (P.) Ltd.* [2015] 60 taxmann.com 57/234 Taxman 464 (Bom.), in support of his submissions.

18. Mr. Pardiwala submitted that in this case there was no necessity of filing any cross-objections because the assessees were only seeking to support the orders made by the CIT (Appeals), which were already in their favour. He relied on Rule 27 of the Appellate Tribunal Rules, 1963 (the said Rules) to submit that the Respondent, though he may not have appealed may support the order appealed against on any of the grounds decided against him. He relied on *B. R. Bamasi (supra)*, *Dahod Shakari Kharid Vechan Sangh Ltd. v. CIT* [2005] 149 Taxman 456/[2006] 282 ITR 321 (Guj.), *S. Nazeer Ahmed v. State Bank of Mysore* [2007] 11 SCL 75 in support of his contentions that in the facts of the present case, there was no necessity of even filing any cross-objections before the ITAT to urge the issue of failure to

comply with jurisdictional preconditions before invoking the provisions of Section 153C of the IT Act.

19. Mr. Pardiwala finally submitted that more than sufficient cause was shown by the assesseees for condoning the delay of 248 days in filing the cross-objections. He submits that refusal to condone the delay was contrary to several decisions requiring a liberal approach in the matters of condonation of delay. He submitted that irrelevant considerations have been taken into account by ITAT to refuse the condonation of delay and to that extent, there is perversity involved. He relied on *Indian Bank v. Manilal Govindji Khona* [2015] 56 taxmann.com 133/130 SCL 311 (SC), *Collector, Land Acquisition v. MST. Katiji* 1987 taxmann.com 1072 (SC) and *Rathna Stores (P.) Ltd. v. CIT* [2020] 120 taxmann.com 260/274 Taxman 489 (Mad.) and some other decisions in support of his contentions.

20. Ms. S. Linhares, learned Standing Counsel for the Revenue defended the impugned orders made by the ITAT based upon the reasoning reflected therein. She submitted that in this case, it was necessary to file cross-objections and since no sufficient cause was shown by the assesseees, the application seeking condonation of delay was quite rightly rejected. She referred to the provisions of section 124(3) of the IT Act to point out that no objection to jurisdiction could have been raised in these matters after the conclusion of the assessment proceedings under section 153C of the IT Act. She submitted that the condonation of delay might have resulted in depriving the Revenue of resorting to an alternate remedy, assuming that the ITAT was to hold that there was no jurisdiction to proceed under section 153C of the IT Act. She submits that the assesseees were advised by several legal professionals and the plea of incorrect legal advice was rightly rejected by the ITAT in the facts and circumstances of the present case. She relied on *CIT v. Vijaybhai N. Chandrani* [2013] 35 taxmann.com 580/217 Taxman 138/357 ITR 713 (SC), *Municipal Commissioner v. Salil Kumar Banerjee* [2004] 4 SCC 108 and *CIT v. Ng. Technologies Ltd.* [2015] 57 taxmann.com 389/370 ITR 7 (Delhi) in support of her contentions.

21. Ms. Linhares further submitted that in the event this Court were to hold that the Appellants did not need to file any cross-objections to raise the issue of jurisdiction to support the CIT (Appeals) order or if this Court were to condone the delay in filing cross-objections then the matter would have to be remanded to the ITAT because the departmental representative had made it clear before the ITAT that the additional material will be produced to establish the fulfillment of conditions prescribed under section 153C of the IT Act.

22. Ms. Linhares submitted that for all the aforesaid reasons, these appeals be dismissed.

23. The rival contentions now fall for our determination.

24. According to us, it will be appropriate to consider the additional substantial question of law as framed by us in our order dated 30-3-2021 together with the substantial question of law No. 4 since both these questions concern the issue of very jurisdiction to proceed under section 153C of the IT Act against the Appellants/Assesseees. As noted earlier, such a jurisdictional issue was not permitted to be raised before the ITAT, *inter alia* on the ground that there was a necessity of filing cross-objections expressly raising such a jurisdictional issue and because there was no sufficient cause shown for condoning the delay of 248 days in raising such jurisdictional issue by filing cross-objections.

25. At this stage, therefore we are not concerned with the issue as to whether the jurisdictional parameters for invoking the provisions of Section 153C of the IT Act were fulfilled or not. However, at this stage, we are concerned with the issue as to whether the ITAT was right and justified in preventing the Appellants/assesseees from raising this jurisdictional issue either for want of cross-objections or because the delay in filing the cross-objections was not sufficiently accounted for.

26. To begin with therefore we propose to consider the issue as to whether there was any necessity for the Appellants/assesseees to file cross-objections before the ITAT to raise the jurisdictional issue of

compliance with jurisdictional parameters before any proceedings could be initiated under section 153C of the IT Act.

27. In this case, admittedly, the CIT (Appeals) had decided the matters in favor of the assesseees and even *set aside* the orders made by the Assessing Officers. Therefore, the assesseees did not have to institute any further appeals to the ITAT. The Revenue in this case had appealed to the ITAT against the orders made by the CIT (Appeals). Therefore, the issue is, whether the assesseees could have raised the issue of non-compliance with jurisdictional parameters set out under section 153C of the IT Act, before the ITAT, even without filing any cross-objections before the ITAT.

28. At least, *prima facie*, non-compliance with jurisdictional parameters set out under section 153C of the IT Act, if established, will go to the root of the matter and even nullify the very action initiated under section 153C of the IT Act. Based on the material furnished to the assesseees, it was the case of the assesseees that what was found in the course of search proceedings under section 132 of the IT Act in the premises of the said firm and the said company, were the books of accounts belonging to the said firm and the said company. It is the case of the assesseees that no books of accounts belonging to the assesseees *i.e.* Peter Vaz and Edgar Afonso were found in the search proceedings under Section 132 in the premises of the said firm and the said company. Therefore, it was the case of the assesseees that no proceedings under section 153C of the IT Act could ever have been initiated against these assesseees.

29. Mr. Pardiwala stressed that the provisions of Section 153C as amended up to the year 2013 required the Assessing Officer to be satisfied that the books of the accounts belonging to the assesseees who were proposed to be proceeded with under section 153C ought to have been found, as a precondition for any action under section 153C of the IT Act. For this purpose, he compared the provisions of Section 153C as amended up to 2020, in which, there is a significant departure. Amended provisions, which did not apply to the present case, provided that the action under section 153C was competent even if the books of accounts "pertaining to" and not belonging to the assessee were found during the search under section 132 upon a person not referred to in Section 153A of IT Act. He submitted that this was an issue of law and therefore, the ITAT should have permitted the assesseees to raise this issue even without the necessity of filing any cross-objections. He referred to Rule 27 of the Appellate Tribunal Rules, 1963 to contend that this Rule gives a right to the Respondent in an appeal before the ITAT to support the order appealed against on any of the grounds decided against him, even though he may not have appealed against the order.

30. Rule 27 of the Appellate Tribunal Rules, 1963 reads as follows:—

"Respondent may support order on grounds decided against him.

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

31. In this case, the assesseees merely wanted to support the order made by the CIT (Appeals), which was entirely in their favor. The assesseees wished to raise an issue, that was at least *prima facie* going to the root of jurisdiction to initiate proceedings under section 153C of the IT Act. Having regard to the provisions of rule 27 referred to above, the ITAT in our opinion should have permitted the assesseees who were Respondents before it, to support the orders of CIT (Appeals) on this ground, even without the necessity of filing any cross-objections.

32. In *Dahod Sahakari Kharid Vechan Sangh Ltd. (supra)*, the Division Bench of Gujarat High Court was deciding whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee needed to file cross-objections despite fully succeeding in appeal and therefore, being unable to challenge the finding of the CIT (Appeals) that the assessee was guilty of concealment

of income and/or furnishing inaccurate particulars.

33. In the above case, the CIT (Appeals) recorded a finding that the assessee had concealed particulars of his income or furnished inaccurate particulars of his income but for detailed reasons set out, the CIT (Appeals) quashed the penalty imposed upon the assessee under section 271 of the IT Act. In the appeal filed by the Revenue before the ITAT, the assessee sought to assail the finding of concealment but the ITAT did not permit the assessee to do so, on the ground that the assessee had failed to file any cross-objections.

34. The Division Bench of Gujarat High Court however held that the ITAT committed an error in law in not permitting the assessee to assail the finding of the concealment without filing cross-objections. The Court held that the ITAT apparently lost sight of the fact that the assessee had succeeded before the CIT (Appeals) that had allowed the assessee's appeal and even *set aside* the penalty in its entirety. Therefore, the assessee did not have to appeal. The position in law is well settled that the cross-objections, for all intents and purposes, would amount to an appeal and the cross objector would have the same rights which an appellant has before the Tribunal. Since the assessee did not have to appeal, the ITAT could not have insisted upon the filing of cross-objections as a precondition for permitting the assessee to assail the finding of concealment.

35. The Division Bench referred to the provisions of section 253 of the IT Act and after analyzing the scheme held that on a plain reading of the provision, it transpires that the party had been granted an option or a discretion to file cross-objections. In case a party having succeeded before the CIT (Appeals) opts not to file cross-objection even when an appeal is preferred by the other party, from that, it is not possible to infer that the said party had accepted the order or the part thereof which was against the respondent. Since the ITAT drew such an inference that was not supported by the plain language of Section 253, the High Court held that the ITAT was clearly in error.

36. The High Court then referred to Rule 27 quoted above and held that if the inference drawn by the ITAT is accepted as a correct proposition, then, it would render rule 27 of the Appellate Tribunal Rules, 1963 redundant and nugatory. The High Court held that it is not possible to interpret the provision in such a manner. Any interpretation placed on a provision has to be in harmony with the other provisions under the Act or the connected Rules and interpretation which makes other connected provisions otiose has to be avoided. Rule 27 of the Appellate Tribunal Rules is clear and unambiguous. The right granted to the respondent by the said Rule cannot be taken away by the Tribunal by referring to the provisions of Section 253(4) of the IT Act. The ITAT was, therefore, in error in holding that the finding recorded by the CIT (Appeals) remained unchallenged since the assessee had not filed cross-objections.

37. The reference in this regard can also be made to the provisions of section 260A(7) of the IT Act which provides that save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908, relating to appeals to the High Court shall, as far as may apply in the case of appeals under this Section. Now in the context of the provisions of Order XLI Rule 22 of the CPC dealing with the cross-objections, the Hon'ble Supreme Court in the case of *S. Nazeer Ahmed (supra)* has held that the High Court was clearly in error in holding that the appellant not having filed a memorandum of cross-objections in terms of Order XLI Rule 22 of the Code, could not challenge the finding of the trial Court that the suit was not barred by Order II Rule 2 of the Code. The respondent in an appeal is entitled to support the decree of the trial Court even by challenging any of the findings that might have been rendered by the trial Court against himself. For supporting the decree passed by the trial Court, it is not necessary for the respondent in the appeal, to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial Court against him when the ultimate decree itself is in his favor. A memorandum of cross-objections is needed only if the respondent claims any relief which had been negated to him by the trial Court and in addition to what he has already been given by the decree

under challenge. The Hon'ble Supreme Court, therefore, held that the respondent in the appeal had every right to canvas the correctness of the finding on the bar of Order II Rule 2 rendered by the trial Court.

38. In the present case, it is not as if the issue of non-fulfillment of jurisdictional parameters of Section 153C was raised but rejected by the CIT (Appeals). Such an issue was not raised before the CIT (Appeals). Having regard to the provisions of Rule 27 of the Appellate Tribunal Rules, 1963 as also the provisions of section 260A(7) read with Order XLI Rule 22 of CPC as interpreted by the Hon'ble Supreme Court in *S. Nazeer Ahmed (supra)* we think that the ITAT should not have precluded the assesseees from raising the issue in the appeals instituted by the Revenue, even without the necessity of filing any cross-objections. Accordingly, the additional substantial question of law is required to be answered in favor of the Appellants/assesseees and against the Revenue.

39. Even otherwise in the context of the substantial question of law No. 4, we think that sufficient cause was made out by the Appellants to seek condonation of delay of 248 days in filing cross-objections. The application for condonation of delay was accompanied by an affidavit and there was no necessity of filing an affidavit of a legal advisor or Chartered Accountant to the effect that they had tendered some incorrect advice to the assesseees. Besides, if the impugned judgment and order made by the ITAT is perused, then, it is apparent that the ITAT has not focused on the issue of whether there was sufficient cause for explaining 248 days delay in instituting cross-objections, but rather the ITAT has faulted the assesseees for not raising the issue of non-compliance with jurisdictional parameters, either soon after they received notices under section 153C of the IT Act or before the Assessing Officer in the first instance. According to us, these were not relevant considerations at the stage of deciding whether sufficient cause was shown to explain 248 days delay in instituting cross-objections.

40. In *N. Balakrishnan v. M. Krishnamurthy* [1998] 7 SCC 123 the Hon'ble Supreme Court has held that as long as the conduct of the applicant does not, on the whole, warrant to castigate him as an irresponsible litigant, generally, the delay can be condoned. The Hon'ble Supreme Court has observed that during these days when everybody is fully occupied with his avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities and to visit him with drastic consequences.

41. The Hon'ble Supreme Court has also held that it is axiomatic that the condonation of delay is a matter of discretion and Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. The length of the delay is no matter, acceptability of the explanation is the only criterion.

42. The Hon'ble Supreme Court has reasoned that the primary function of the Court is to adjudicate the dispute between the parties and to advance substantial justice. The time limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. Rules of limitation are not meant to destroy the right of parties but they are meant to see that parties do not resort to dilatory tactics. The Hon'ble Supreme Court has also held that in every case of delay there can be some lapse on the part of the litigant concerned. However, that alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of *malafides* or it is not put forth as part of a dilatory strategy the Court must show utmost consideration to the suitor.

43. The ITAT in the present matters, has not deferred to the above principles explained by the Hon'ble Supreme Court in considering applications for condonation of delay. This was a case where the final order made by CIT(appeals) was entirely in favor of the assesseees. They had nothing to gain by delaying the filing of cross-objections. According to us, even without filing cross-objections, the assesseees could have supported the order appealed by the revenue by urging an issue mainly of law that, at least *prima facie* went to the root of jurisdiction. All these aspects were not taken into account by the ITAT while refusing to condone the delay in filing the cross-objections.

44. The ITAT with respect has misconstrued the provisions of Section 124 of the IT Act. Sections 120 to 124 of the IT Act no doubt refer to the jurisdiction of the Income-tax Authorities. However, from the scheme of these provisions, it is apparent that reference is to the territorial jurisdiction of the authorities. Section 124(1) refers to direction or order issued under section 120 vesting with jurisdiction in the Assessing Officer over any area, limits of an area, etc. Section 124(2) provides that where a question arises under this Section as to whether the Assessing Officer has jurisdiction to assess any person, the question will have to be determined by the authorities specified which will include, in a given case the Board. Section 124(3) then provides that no person shall be entitled to call in question the jurisdiction of an Assessing Officer, where an action has been taken under section 132 or 132A after the expiry of one month from the date on which he was served with a notice under section 153C or after the completion of the assessment, whichever is earlier. Now, this provision refers to mainly the territorial jurisdiction of the Assessing Officer. This provision cannot be interpreted to mean that an assessee is left without a remedy where the Assessing Officer invokes the provisions of Section 153C of the IT Act without fulfillment of the jurisdictional parameters prescribed therein.

45. In *Vijaybhai N. Chandrani (supra)*, the Hon'ble Supreme Court held that the High Court must not ordinarily entertain the writ petitions against notices under section 153C of the IT Act when the assessee has the remedy of filing response before the Assessing authorities and thereafter appealing against the decision of Assessing authority, should be the same adverse to the assessee. This decision, therefore, is not authority for the proposition that the jurisdictional issue cannot be raised in an appeal before the ITAT, without such issue being raised before the Assessing Officer in the first instance. This decision, in fact, indicates the jurisdictional issue was specifically kept open by the Hon'ble Supreme Court so that the same could be raised at the appropriate stage before the appropriate forum.

46. In *Municipal Commissioner, Calcutta (supra)*, the objection raised was to the constitution of the Tribunal itself after the party took its chance of securing a favorable order before the very Tribunal. Such issue is not involved in the present matter and therefore, this decision does not apply to the present matter.

47. In *Ng Technologies Ltd. (supra)*, the Division Bench of the Delhi High Court, in the context of levy of penalty under section 271 of the IT Act held that legal opinion of Chartered Accountant cannot be put forward as a smoke-screen and facade to avoid penalties when it is established that the claims or entries made were contrary to elementary and well-known basic principles of accountancy. Again, no such issue arises in the present case. The condonation of delay, in the present matters, was applied for on the ground that the legal advisor had advised the assessee to prefer cross-objections after omitting to raise the jurisdictional issue before the CIT (Appeals). This is a case where the CIT (Appeals) order was entirely in favor of the assessee. In terms of Rule 27 of the Appellate Tribunal Rules as well, the assessee was entitled to support this order before the ITAT even without the necessity of filing any cross-objections.

48. The ITAT, in this case, has failed to advert to the principles laid down by the Hon'ble Supreme Court in *N. Balakrishnan (supra)* and misinterpret the provisions of section 124 of the IT act. For all these reasons even the substantial question of law No. 4 is required to be answered in favor of the assessee and against the Revenue. This is assuming that there was any necessity of filing the cross-objections to raise a jurisdictional issue only to support the order of CIT(appeals) that was entirely in favor of the assessee.

49. Mr. Pardiwala then submitted that this Court should go into the issue of fulfillment or otherwise of the jurisdictional parameters under section 153C of the IT Act and if the same is found to be wanting, to quash the proceedings under section 153C of the IT Act. Ms. Linhares, however, contended that this may not be the appropriate course of action to adopt because before the ITAT the departmental

representative had expressly retained liberty to produce the material to satisfy the Tribunal that the jurisdictional parameters of Section 153C had in fact been fulfilled should the tribunal consider admitting the cross-objections. She submits that the Revenue should, therefore, not be deprived of this opportunity.

50. In paragraph 27 of the impugned judgment and order made by the ITAT, there is a reference to the ITAT specifically inquiring with the departmental representative to produce the satisfaction note recorded by the Assessing Officer of the person searched. The order records that the departmental representative submitted that the assessment files are not immediately available, but in the event, the Tribunal was pleased to admit the cross-objections, then, the same will be produced as the files were split and were at the office of the Assessing Officer at Central Circle as also the Assessing Officer of the assessee. The impugned order of the ITAT also refers to verification of certain facts in the context of action under section 153C of the IT Act.

51. Having regard to the aforesaid, we agree with Ms. Linhares that the matter will have to be remanded to the ITAT for fresh consideration of appeals instituted by the Revenue after permitting the assessee to raise the issue of non-compliance with the jurisdictional parameters of section 153C of the IT Act.

52. Accordingly, we *set aside* the impugned judgment and order in so far as it concerns the present assessee and remand the matters to the ITAT with a direction to permit the assessee to raise the issue of compliance or non-compliance with the jurisdictional parameters necessary to initiate action under section 153C of the IT Act. At the same time, we make it clear that all contentions of all parties, including, other contentions raised in these appeals are expressly kept open and may not be deemed to have been decided by us one way or other. The only reason we have not adverted to the other issues is that if the jurisdictional issue is ultimately upheld by the ITAT, then it may not be necessary to decide the other issues.

53. The parties to now appear before the ITAT on 26th April 2021 at 11.00 a.m. and file authenticated copy of this order. We request the ITAT to dispose of such appeals as expeditiously as possible by granting a full opportunity to both the assessee as well as the Revenue.

54. These appeals are disposed of in the aforesaid terms. However, in the facts and circumstances of the present case, there shall be no order as to costs.

55. The Misc. Civil Applications, if any, pending are also disposed of in the aforesaid terms.

Jyoti

*Matter remanded.

† Arising out of Order of ITAT, dated 1-12-2016.