

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ WP (C) No. 4722/2008
WP (C) No. 172/2009
WP (C) No. 173/2009
WP (C) No. 174/2009
WP (C) No. 175/2009
WP (C) No. 176/2009
WP (C) No. 177/2009

% *Reserved on: September 10, 2009*
Pronounced on: December 11, 2009

NIIT Ltd.

. . . Petitioner

through :

Mr. Soli J. Sorabjee, Sr. Advocate
with Mr. Ajay Vohra, Ms. Kavita
Jha, Mr. Amit Kumar Singh,
Ms. Akansha Aggarwal and
Mr. Sriram Krishna, Advocates

VERSUS

Union of India & Ors.

. . . Respondents

through :

Mr. Parag P. Tripathi,
Addl. Solicitor General with
Ms. Rashmi Chopra and
Mr. Kunal Bahri, Advocates

CORAM :-

THE HON'BLE MR. JUSTICE A.K. SIKRI

THE HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. All these writ petitions are preferred by the same petitioner, namely, NIIT Ltd. In WP (C) No. 4722/2008, challenge is laid to the order dated 19.6.2008 passed by the Commissioner of Income Tax

(Central-II) (hereinafter referred to as the Commissioner), who is the respondent No.4 herein, under Section 263 of the Income Tax Act, 1961 (for short, the 'Act'). Vide this order, he has formed the opinion that the assessment order dated 1.6.2006 passed by the Assessing Officer (AO) under Section 143(3)/153A of the Act in respect of assessment year 1999-2000 is erroneous and prejudicial to the interest of the Revenue because of the reason that certain issues, highlighted in the said order, were not considered at the time of framing of the issues. Consequently, the assessment order has been set aside with direction to the AO to frame the assessment afresh after affording the assessee an opportunity of being heard and after making proper enquiries and verifications. According to the petitioner, this order is illegal and *mala fide*.

2. As far as the other writ petitions are concerned, only show-cause notice under Section 263 of the Act in respect of different assessment years, i.e. from assessment years 2000-01 to 2005-06 have been issued, which are challenged, but admittedly no orders under Section 263 of the Act have been passed so far. In these circumstances, it is but proper to first deal with WP (C) No. 4722/2008 on merits as the consequences from the outcome of this writ petition will determine the fate of other writ petitions as well.
3. Before we have a grip of the legal contentions on the basis of which the impugned order is challenged, it would be apposite to scan through the factual matrix in brief.

4. The petitioner is a company incorporated under the Indian Companies Act, 1956 and claims to be a global training corporation providing learning and knowledge solutions and imparting computer education and training to clients in over 30 countries. As per the averments made in the petition, it is a leading service provider in Information Technology training in India and the only Indian Information Technology Training Services Company outside Europe and India in the 20 global IT training institutes. It offers complete range of learning solutions, including learning strategy formulation, custom content development, technology and outsourced services amongst the top 10 *Fortune 500* companies. The petitioner company is ranked No. 16 among Global IT Training Companies and amongst such companies outside UK and US.

5. In November 2004, search and seizure operations under Section 132 of the Act were carried out against the petitioner and its group companies by the Directorate of Investigation, Income Tax, New Delhi. Subsequent thereto, the Directorate of Investigation completed its investigation and transferred all the records to the ACIT, Central Circle-2, wherein all the cases of the petitioner and its group companies had been centralized. Thereafter, the petitioner filed its revised returns, pursuant to which notices issued under Section 153A of the Act for the assessment years 1999-2000 to 2004-05 and assessments were completed under Section 153A in June 2006. For the assessment year 1999-2000, the Assessing Officer (AO) passed the assessment order on 1.6.2006. Subsequently, the

petitioner filed an appeal against the additions made therein and the CIT (Appeals) was pleased to allow the same vide order dated 27.9.2006. The respondents have filed appeal to the Tribunal against the relief allowed by CIT(A), which is pending disposal before the Tribunal.

6. While this appeal before the Tribunal against the assessment order dated 1.6.2006 is pending, a notice dated 23.7.2007 under Section 263 of the Act was issued by the Commissioner of Income Tax (Central-III) (respondent No.3 herein), then exercising jurisdiction over the petitioner. The petitioner filed its detailed response thereto vide communication dated 9.10.2007. Subsequently, jurisdiction was transferred to Commissioner of Income Tax (Central-II)/respondent No.4. Upon assuming the jurisdiction, the respondent No.4 issued another notice dated 15.10.2007. In response to this notice issued by the respondent No.4, the petitioner filed detailed preliminary objections to the assumption of jurisdiction under Section 263 of the Act vide its letter dated 10.1.2008. In this letter, the petitioner requested the respondent No.4 to dispose of the preliminary legal objections first, by passing a reasoned speaking order. This request was made keeping in view the ratio of the judgment of the Supreme Court in the case of *GKN Driveshaft v. CIT*, 259 ITR 19, thought in the context of Section 148 of the Act. According to the petitioner, nothing was heard thereafter and almost five months thereafter, the respondent No.4 passed impugned orders dated 19.6.2008. Vide this order, not only the legal objection raised by the petitioner was

turned down, the Commissioner proceeded to dispose of the matter on merits as well by passing the order under Section 263 of the Act giving directions to the AO, as mentioned above.

7. Though the Act provides for statutory remedy of appeal against such an order passed under Section 263 of the Act, instead of availing the same, the petitioner chose to file the present writ petition, as according to the petitioner, the impugned order is wholly without jurisdiction being violative of the principles of natural justice. The grievance of the petitioner, in this behalf, is that vide its letter dated 10.1.2008, the petitioner had taken preliminary objection to the assumption of jurisdiction under Section 263 of the Act and had requested the Commissioner to dispose of the same in the first instance. Thus, the petitioner submits that even if the Commissioner wanted to proceed ahead on merits, the Commissioner should have indicated so and given an opportunity to the petitioner to make its submissions on merits as well. This was not done and the petitioner was taken by surprise when it received impugned order touching on the merits of the case as well and justifying passing of orders under Section 263 of the Act also. Based on this, the first and foremost contention of the petitioner is that the impugned order passed is in violation of the principles of natural justice and, thus, warrants to be set aside on this ground.
8. In addition, Mr. Soli J. Sorabjee, learned senior counsel appearing for the petitioner, advanced following two arguments :-

(a) The re-opening of the case culminating into passing of orders under Section 263 of the Act was at the direction/dictates of the superior authorities on account of undue pressure and influence exerted by Shri A.L. Mehta. The impugned order, therefore, is *mala fide* and is bad in law.

(b) The original assessment under Section 153A was completed and assessment order dated 1.6.2006 was passed by the AO under monitoring of the Commissioner of Income Tax. Furthermore, at that time, the regular reports were also sent to the Central Board of Direct Taxes (CBDT) through proper channel from time to time on the progress of the assessments. The plea, thus, is that when the assessment proceedings are monitored by the Commissioner, who is having jurisdiction over the AO, such an assessment order passed by the AO cannot be subjected to revisional jurisdiction under Section 263 of the Act.

9. We may point out at this stage itself that insofar as the first contention of the petitioner is concerned, Mr. Parag P. Tripathi, learned Addl. Solicitor General was fair in conceding that the respondent No.4/Commissioner will have no objection in affording an opportunity to the petitioner to make its submissions on merits as well and passing the order afresh. On the basis of this concession of the learned Additional Solicitor General, after obtaining instructions from the respondents, the matter could have been disposed of at that stage itself inasmuch as with this concession the impugned order, on

merits, has to be set aside. However, the petitioner persisted with the other two contentions and argued them in detail.

10. We now proceed to take note of these contentions.

11. **RE: MALA FIDES**

Mr. Sorabjee submitted that under Section 263 of the Act, the satisfaction has to be of the Commissioner himself acting independently in *bona fide* exercise of his judgment. According to him, the sequence of events and the surrounding circumstances establish that the issue of show-cause notices dated 23.7.2007 and 15.10.2007 and the impugned order dated 19.6.2008 were not passed in *bona fide* exercise of independent and unfettered judgment but were impelled and directed by the superior authorities in the Income Tax hierarchy. The tone and contents of several preemptory communications addressed by Mr. A.L. Mehta to the superior authorities pressurized such authorities to direct the Commissioner to initiate proceedings against the petitioners.

12. Mr. Sorabjee made a fervent plea that Mr. A.L. Mehta was not a run-of-the-mill whistleblower. Mr. A.L. Mehta was employed with the petitioner from 1995 till December 2001 as Deputy General Manager and thereafter tendered his resignation, which was duly accepted by the petitioner. Mr. Mehta had raised certain illegal demands at the time of his resignation, which were not accepted by the petitioner and having been disgruntled on account of non-satisfaction of his totally illegal demands, made up his mind to somehow harm and

damage the petitioner company. With that intent, Mr. Mehta started fabricating and filing totally false and frivolous complaints against the petitioner company before various Government organizations. He was a resourceful and well connected informant who would earn his reward if adverse orders are passed against the petitioner by way of higher assessment of income or imposition of penalty. He endeavoured to demonstrate, from the various communications written by him to the CBDT and other authorities and in turn communication by the CBDT to the respondent No.4 that Shri Mehta wielded great clout with the department. This attempt was founded on the following submissions :-

- (i) The informant Mr. A.L. Mehta has access to orders passed by the AO and other Income Tax authorities which are not adverse to the petitioner as the said informant desires. He castigates and casts serious unfounded aspersions on the AOs and the Income Tax authorities who have not passed orders to his liking against the petitioner. For example, Mr. A.L. Mehta's letter dated 3.7.2007 addressed to CBDT has alleged that the Chief Commissioner of Income Tax, who took the view that no remedial action was called for in the case of the petitioner, was biased.
- (ii) Again, he has levelled serious, baseless and indiscriminate allegations against the Income Tax authorities whose only sin was that they did not pass adverse orders against the petitioner

which would have benefited the informant, namely, Mr. A.L. Mehta, in getting his reward.

- (iii) The CBDT not only took cognizance of the informant, but had even instructed the authorities to look into his complaints, which was totally impermissible.
- (iv) The tenor of various letters would show that the CBDT had almost dictated the line of action to the respondent No.4 making him virtually impossible to exercise independent judgment and unfettered discretion in discharge of his statutory function under Section 263 of the Act.

13. Mr. Sorabjee made a vehement plea that cumulative effect of the informant's communication and conduct and the letters of CBDT had to be seen in order to determine whether, having regard to human probabilities and ordinary course of human conduct, the Commissioner could exercise independent judgment and discretion in such an atmosphere. According to him, it was a case of *mala fides* and in any event there was a real likelihood/ danger that exercise of independent judgment was not possible in the facts of the present case.

14. The aforesaid submissions were supported and supplemented with the following case law:-

- (i) ***M.P. Special Police Establishment v. State of M.P. & Ors.,*** (2004) 8 SCC 788, wherein a Constitution Bench of the Apex Court held as under :-

“18. As has been mentioned above, the Division Bench had noted this case. The Division Bench however held

that even though this principle may apply to the case of a Chief Minister it cannot apply to a case where Ministers are sought to be prosecuted. We are unable to appreciate the subtle distinction sought to be made by the Division Bench. The question in such cases would not be whether they would be biased. The question would be whether there is reasonable ground for believing that there is likelihood of apparent bias. Actual bias only would lead to automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case. The principle of real likelihood of bias has now taken a tilt to 'real danger of bias' and 'suspicion of bias'. [See Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and Ors. (2000) 1 SCC 182 paras 27, 33 and 35 and Judicial Review of Administrative Action, by de Smith, Woolf and Jowell (5th Edn. at p.527) where two different spectrums of the doctrine have been considered].”

- (ii) *J & K Synthetics Ltd. v. CBDT*, 83 ITR 335 (SC), for the proposition that under Section 119 of the Act, the Board was not competent to give direction regarding the exercise of any judicial power by its subordinates.
- (iii) *Sirpur Paper Mill Ltd. v. CWT*, 77 ITR 6 (SC), wherein it was held that the Central Board may control exercise of the power of the officers of the department in administrative matters, but not in discharge of quasi-judicial functions.
- (iv) *CIT v. Greenworld Corporation*, 224 CTR 113, wherein the Apex Court had held that even a higher authority cannot interfere with the independence of the adjudicating authority, which is the basic feature of any statutory scheme involving adjudicatory process.
- (v) *Purtabpur Company Ltd. v. Cane Commnr. of Bihar*, AIR 1970 SC 1896, wherein the order passed by the Cane Commissioner

was set aside as that order was passed on the directions of the Chief Minister.

- (vi) *State of U.P. v. Maharaja Dharmander Prasad Singh*, AIR 1989 SC 997, wherein the Supreme Court again reiterated the principle that the authority cannot permit its decision to be influenced by the dictation of others as this would amount to abdication and surrender of its discretion and such an act would be *ultra vires*.

15. Following judgments highlighting the same principle were also cited:-

- (i) *Jeewanlal (1929) Ltd. v. ACIT*,
108 ITR 407
- (ii) *Jawahar Lal v. Competent Authority, Range-II, New Delhi*,
137 ITR 605
- (iii) *Sheo Narain Jaiswal v. ITO*
176 ITR 352
- (iv) *Yashwant Talkies v. CIT*
157 ITR 103
- (v) *CIT v. T.R. Rajakumari*
96 ITR 78
- (vi) *Rajputana Mining Agencies v. ITO*,
118 ITR 585
- (vii) *IL & FS Investment Managers Limited*
298 ITR 32

16. Countering these arguments, Mr. Parag P. Tripathi, learned Additional Solicitor General, tried to cut the very root of the submissions by contending that the person against whom *mala fides* are alleged, namely, Mr. A.L. Mehta, was not even impleaded as a party to these proceedings. Thus, no *mala fides* could be imputed

insofar as Mr. Mehta is concerned in his absence, as held by the Supreme Court in (1997) 9 SCC 151 and *M/s. Medley Minerals India Ltd. v. State of Orissa & Ors.*, JT 2004 (8) SC 29. He further submitted that the petitioner's contention that the assessment has been completed under monitoring of senior officials is also wrong as is clear from paras 3 and 4 of the impugned order depicting independent mind of the respondent No.4. Similarly, the plea of the petitioner that the proceedings have been initiated on account of any pressure, as alleged, is also wrong and misconceived. His submission was that the records clearly indicated otherwise.

17. He also argued that the communications of CBDT would only indicate that the CBDT had called for the reports about the action taken by the Commissioner and in none of these letters any attempt to influence the decision of the Commissioner was made either by the CBDT or even by Mr. A.L. Mehta. Therefore, there was nothing to show that the impugned order was passed at the dictates of the CBDT. These letters were, at the most, in the realm of '*administrative review*' reflecting '*robust departmental thinking*'. Furthermore, while exercising the power under Section 263 of the Act, insofar as the Revenue is concerned, the consideration is as to whether any income had escaped assessment. This aspect has been dealt with by the Commissioner by applying his own independent mind and there was no influence by any person, much less CBDT, on the exercising of such a power by the Commissioner, as was clear from the reading of the impugned order itself.

18. He submitted that the powers of revision are provided under Section 263 of the Act wherein the Commissioner, on examination of record of any proceedings under the Act. On such examination, if he considers that any order passed therein by the AO is erroneous insofar as it is prejudicial to the interests of the Revenue, he may, after giving opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, can direct a fresh assessment. Also in the other writ petitions for different assessment years, no orders under Section 263 of the Act have been passed and the proceedings have been stated by this Court in WP (C) No. 172/2009 vide order dated 15.1.2009. The petitioner cannot, therefore, allege violation of the principles of natural justice in the said cases and has shirked from participation in the said proceedings on the ground of apprehension of similar orders which may be passed as in the present petition. The petitioner cannot have a grievance of violation of the principles of natural justice in the said proceedings but is deliberately not allowing the proceedings to continue. He added that a probable of Rs.100 crore is involved in the present batch of petitions and the petitioner is trying to delay the adjudication/recovery of the same by adopting dilatory tactics on one pretext or the other. The intention of the petitioner is manifest in its conduct.
19. His further submission was that none of the letters written by the CBDT or Mr. Mehta indicated that there was any dictate therein for

the Commissioner to pass orders in a particular manner. He also submitted that the remedy of statutory appeal was open and order could be challenged on all grounds, including on the ground advanced in this writ petition and, therefore, this Court should not exercise its extraordinary jurisdiction by interfering in the matter.

20. The legal position which cannot be disputed is that when a particular authority is vested with the power to discharge statutory function, like the Commissioner who is empowered to pass orders under Section 263 of the Act, it is that authority which is to apply its independent mind and arrive at its own conclusion without being influenced by any other authority, much less the higher authority. Unfettered discretion lies in the Commissioner of Income Tax to pass orders under Section 263 of the Act. He is supposed to examine the records produced before him to arrive at a conclusion whether the assessment order passed by the AO suffers from infirmities and needs to be revised under Section 263 of the Act. The parameters which are laid down in Section 263 of the Act need to be fulfilled in exercising such a discretion. It is the Commissioner who has to satisfy himself, on the basis of available records, that in a given case the conditions stipulated under Section 263 of the Act are satisfied. In arriving at this conclusion, he is not to be controlled even by a higher authority. Likewise, the higher authority is not to interfere with the independence of his unfettered discretion which is statutorily conferred upon the Commissioner. If it is found that the order is

passed at the dictates of the higher authority, such an order can be set aside.

In the present case, various correspondence and documents which are referred to by the learned senior counsel appearing for the petitioner indicate that Mr. A.L. Mehta had been writing time and again that income had escaped assessment and, therefore, the matter should be looked into. Such communications were addressed to the CBDT as well. The CBDT, in turn, forwarded those communications to the respondent No.4 and wanted the respondent No.4 to decide as to whether the allegations of Mr. Mehta are correct and whether income had escaped assessment or not in the relevant assessment years in which the AO had already passed the assessment orders. No doubt, some anxiety is shown by the CBDT in this behalf. However the argument of the respondents is that the CBDT had wanted the matter to be examined and never intended that the orders are to be passed in one particular manner only. It was pointed out that no such directions were given by the CBDT to the respondent No.4 directing him to pass an order under Section 263 of the Act, necessarily reopening the assessments. He was called upon to examine the matter. The Commissioner passed detailed order under Section 263 of the Act, which depicts his independent mind, and various observations made in this order are not at the dictates of any authority. It was for this reason that submission of learned senior counsel for the petitioner was not that any such specific direction was given. Attempt was to demonstrate that the CBDT had “almost

dictated the line of action” to the respondent No.4 making him virtually impossible to exercise independent judgment and unfettered discretion in discharge of his statutory function under Section 263 of the Act. It is not necessary for us to give any authoritative pronouncement on this aspect in the facts of this case. Reason is simple and obvious.

21. The learned ASG, as noted above, as conceded that an opportunity shall be granted to the petitioner for making its submissions on the merits of the case by the Commissioner and thereafter fresh order would be passed. For this reason alone, once we proceed to set aside the impugned order, the effect would be that the concerned Commissioner will have to go into this issue afresh for considering the submissions of the petitioner, which would necessarily involve application of his independent mind. This, coupled with the fact that the Commissioner who passed the order is no more the concerned officer, i.e. the respondent No.4, the matter will have to go to another office discharging the duties in the capacity of respondent No.4. In these circumstances, the very basis of the submission that the impugned order was passed on the dictated lines of CBDT vanishes. At the same time, we make it clear that the present Commissioner/respondent No.4, while exercising his powers under Section 263 of the Act, shall look into the matter with independent mind without being influenced by the observations made in the impugned order. While doing so, he shall have regard to the submissions that would be made by the petitioner pleading that it is

not a case for exercising powers under Section 263 of the Act. We also permit the petitioner to raise the plea that Mr. Mehta is not a whistleblower, but is a disgruntled person being an ex-employee of the petitioner, who has been fabricating and filing false and frivolous complaints against the petitioner.

22. **RE:- Assessment completed under monitoring/supervision – Not amenable to revision under Section 263 of the Act**

The case of the petitioner is that the assessment under Section 153A of the Act was completed under the monitoring of the ACIT/CIT/CCIT/CBDT and, therefore, such an order could not be regarded as erroneous, much less prejudicial to the interest of the Revenue. To support this contention, the petitioner relied upon certain documents and more specifically letters dated 13.2.2006, 27.4.2006/5.5.2006 from CBDT to the CCCIT, 16.5.2006 from CIT to the Addl. CIT, 26.5.2006 whereby CCIT forwarded status report of the AO to CBDT. It was, thus, contended that once an assessment order is passed under the monitoring of the Commissioner, the successor Commissioner could not set aside the assessment on the ground that the assessment order was passed without application of mind. Judgment of the Punjab & Haryana High Court in *Hari Iron Trading Co. v. CIT*, 263 ITR 437, that of Calcutta High Court in *CIT v. Hastings Properties*, 253 ITR 124 (Cal.) and the Madras High Court in *Festo Elgi (P) Ltd. v. CIT*, 246 ITR 705 (Mad.) were pressed into service in support of this submission.

Since the matter has to be considered afresh by the Commissioner, even this contention can be raised by the petitioner before the said Commissioner and the Commissioner, while passing the order, shall specifically deal with this contention.

23. The upshot of the aforesaid discussion is that WP (C) No. 4722/2008 is allowed and the impugned order dated 19.6.2008 passed by the Commissioner of Income Tax (Central-II)/respondent No.4 is hereby set aside. However, liberty is granted to the respondent No.4 to appropriately deal with the matter and pass fresh order after giving opportunity of being heard to the petitioner on various points canvassed before us or which it intends to raise at the time of fresh hearing. We also make it clear that we have not authoritatively pronounced on the contentions raised by the petitioner, either way, and the Commissioner shall deal with such contentions objectively without being influenced by any observations in this judgment.

24. WP (C) Nos. 172/2009, 173/2009, 174/2009, 175/2009
WP (C) No. 176/2009 & 177/2009

Insofar as these writ petitions are concerned, no order under Section 263 of the Act has been passed so far and only show-cause notice is given. Needless to mention, in these cases as well, which relate to different assessment years, the Commissioner shall be governed by the same parameters delineated above and these petitions stand disposed of in these terms. It is specifically clarified that as the petitions were pending in this Court, issue of limitation would not be raised by the petitioners.

25. All pending applications in these cases stand disposed of.

(A.K. SIKRI)
JUDGE

(VALMIKI J. MEHTA)
JUDGE

December 11, 2009
nsk