REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 3312 OF 2009
[Arising out of Special Leave Petition (Civil) No. 1789 of 2007]

COMMISSIONER OF INCOME TAX,
SHIMLA ... APPELLANT

VERSUS

M/S GREENWORLD CORPORATION,
PARWANOO ... RESPONDENT

WITH
CIVIL APPEAL NOS. _____OF 2009
[Arising out of Special Leave Petition (Civil) Nos. 16922-16925 of 2007]

M/S THE GREEN WORLD CORPORATION ... APPELLANT

VERSUS

INCOME TAX OFFICER, PARWANOO
& ANR. ... RESPONDENTS

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. These two appeals, being interconnected, were taken up for hearing together and are being disposed of by this common judgment.

They arise out of a common judgment and order dated 2.3.2006 in ITA No. 50 of 2005 and Civil Writ Petition No.800 of 2005 as also out of

common judgment and order dated 3.4.2007 in Civil Review No. 15 and 16 of 2006 in ITA No.50 of 2005 and C.W.P. No. 800 of 2005 passed by the High court of Himachal Pradesh, Shimla.

3. M/s Green World Corporation is a partnership concern of Shri R.S. Gupta and his wife Smt. Sushila Gupta. They had set up two units for manufacturing exercise books, writing pads, etc. at Parwanoo in the State of Himachal Pradesh in the year 1995. The said purported units were established after declaration and enforcement of a policy for tax holiday for certain period specified in the Union Budget. They had also set up a third unit for manufacturing computer software. They started filing income tax returns from the Assessment Year 1996-97 showing huge profits. In the return for the Assessment Year 2000-01 they disclosed their total sales to the tune of Rs.1,51,69,515/- out of which a sum of Rs.74,69,314/- was shown as net profit. Thus, the profits bore a proportion of 49% to the gross sales. For the earlier assessment year, i.e. 1999-2000, the proportion of the net profit to the total sales was as high as 66% because out of the total sales of Rs. 2,97,12,106/- net profits were declared to be to the tune of Rs.1,96,77,631/-. For the subsequent three assessment years i.e. 2001-2002, 2002-2003 and 2003-2004, the proportionate net profits to the gross sales were 81%, 95% and 95% respectively.

It is furthermore stated that the total investment on plant and machinery for unit No. 1 was shown to be just Rs.1,25,000/- and a very small amount of money was shown to have been spent on plant and machinery for the second unit.

4. On or about 7.2.2000, the Assessing Officer (`AO') conducted a survey at the premises of the assessee in terms of Section 133-A of the Income Tax Act, 1961 (hereinafter referred to for the sake of brevity as, "the said Act") and verified for herself: (a) factum of the existence and actual working of Unit; (b) Installation of Plant and machinery working with the aid of power; (c) Presence of requisite number of workers, some of whose statement were records; (d) available of stock of raw, semi-finished and finished material prior to Assessment year 2000-2001.

On or about 19.12.2002, AO after completing the proceeding for assessment passed an order, which reads as under:

> "Return declaring nil income after deduction under Section 80IB on the profit of Rs.74,79,995/- was filed on 31.10.2000 which was processed under Section 143(1)(a) on 26.7.2001 at returned income by my predecessor.
>
> Survey under Section 133A was conducted in the business premises of the assessee on 7.2.2000 by the then ITO. The case was selected under compulsory scrutiny. Detailed questionnaire along with statutory notices under Section 143(2)/142(1) was issued and in response to the

same, Shri Surinder Babbar, CA attended the assessment proceedings from time to time. Various details/information called for were supplied which were verified. The case is discussed as under:

The assessee details in manufacturing of Exercise books and Writing pads. The firm has two partners namely Shri Radhey Shyam Gupta and Smt. Sushila Gupta. Two units were set up by the assessee for manufacturing of Exercise Books in Unit-I and that of Writing Pads in Unit-II. Separate books of account were maintained for both the units and 11 workers were found working at the time of survey. Certain discrepancies as per cash book to that of day book were found which could not explain by the Accountant at the time of survey which were reconciled by the counsel of the assessee during the course of assessment proceedings. On sale of Rs.88,55,592/- gross profit of Rs.57,28,980/- giving rate of 64.69% for unit - 1 and on sale of Rs.63,16,392/-, gross profit of Rs.19,12,565/- for Unit-II giving 30.29% has been declared by the assessee. Sales were made both on credit as well as cash basis. Confirmed copy of account of the creditors has been produced, which is placed on record.

Keeping in view the information supplied by the assessee and facts on file, the income returned by the assessee is hereby accepted."

In the said order of assessment, AO recorded a note, which reads as under:

"After receiving a call from Shimla on 3.12.2002, I visited the office of Worthy CIT, Shimla on 4.12.2002 along with all the assessment records and relevant documents of M/s Green World Corporation. The case was thoroughly discussed

> with (sic) records and relevant worthy CIT, Shimla in the presence of learned Addl. CIT, Solan Range, Solan. All the documents and queries raised and further reply submitted by the assessee was properly glanced through by the worthy CIT and after going through the questionnaire issued to the assessee on 18.10.2002 and reply submitted by the assessee in response to that on 7.11.2002, 13.11.2002 and 25.11.2002, worthy CIT has directed that since the reply submitted by the assessee is satisfactory and upto the mark, no more information is required to be called for and to assess the case as such. He, therefore, directed in presence of the learned Addl. CIT, Solan Range, Solan to incorporate that discussion in the body of the order sheet. Needful has been done as directed. A copy of the draft assessment order was sent to the Addl. CIT, Solan Range, Solan under the office letter No. ITO/PWN.2002/03/2127 dated 13.12.2002 for according necessary approval. Approval to complete the assessment was received through telephonic from the office of the Addl. Commissioner of Income Tax, Solan Range Solan and assessment has been completed and the assessment order has been served upon the assessee on 19.12.2002."

5. Indisputably, the Commissioner of Income Tax ("CIT", for short) on whose dictates the order of assessment dated 19.12.2002 purported to have been passed was transferred and his successor on or about 5.12.2003 issued notice to the assessee purported to be under Section 263 of the Act for the Assessment Year 2000-2001 only, inter alia on the premise that the said order of assessment dated 19.12.2002 was prejudicial to the interests of the Revenue.

Assessee filed its reply thereto on or about 16.3.2004.

6. He inter alia on account of his old age, ill-health, etc. also filed an application for transfer of its cases from CIT (Shimla) to CIT (Delhi) on 4.5.2004.

The CIT (Shimla) passed an order dated 12.7.2004 under Section 263 of the Act inter alia on the premise that the Assessing Officer while finalizing the Assessment had not examined the case properly. In the said order, the following directions were issued:

> "16.3 Under the circumstances, I am left with no alternative but to decide the proceedings on the basis of material on record. In the assessment year under review, I estimate the assessee's income from Units at Parwanoo at 5% of the declared turnover. The income shown in excess of 5% amount is treated as undisclosed income from undisclosed sources. As the assessee does not fulfill many of the conditions for being entitled to deduction u/s 80IA/IB, no part of the total income, not even the one estimated @ 5% of the turnover at Parwanoo, would be entitled for deduction u/s 80IA/IB.
>
> 16.4 Charge interest u/s 234B/C for non-payment of advance tax. Penalty proceedings u/s 271(1)(c) are initiated separately for furnishing of in-accurate particulars of income assessed. The Assessing Officer is directed to calculate the tax and interest on this income and issue Demand Notice and Challan to the assessee firm.

17. Similar conditions i.e. non fulfillment of the prerequisite conditions for deduction u/s 80IA/IB and excessive declared profits prevailed in the preceding assessment years i.e. A.Y. 1996-97 , 1997-98, 1998-99 and 1999-2000; and succeeding assessment years i.e. A.Y. 2001-02, 2002-03 and 2003-04 also. It is thus obvious that either the whole or substantially the whole of income shown by the assessee in the aforementioned different assessment years could not be said to be income derived from the business of industrial undertaking and was therefore not entitled to deduction u/s 80IA/IB. Thus substantial taxable income for these assessment years have escaped assessment because of non fulfillment of the pre-requisite conditions for deduction u/s 80IA/80IB. The Assessing Officer is hereby directed to examine the case records for all the preceding assessment years including those for assessment year 1996-97 and initiate necessary proceedings u/s 148 within a week. The Assessing Officer is further directed to examine the succeeding assessment years also i.e. A.Y. 2001-02, 2002-03 and 2003-04 and initiate appropriate action u/s 148/143(2) as may be applicable, in a week's time."

Pursuant thereto or in furtherance thereof, notices under Section 148 of the Act were issued to the Assessee for the Assessment Years 1996-97 to 1999-2000, 2001-2002 and 2002-2003.

7. Assessee preferred an appeal against the order dated 12.7.2004 before the Income Tax Appellate Tribunal (for short, "ITAT"). In its memo of

appeal, the assessee raised contentions relating to: (1) jurisdiction, (2) bias on the part of the CIT (Shimla), and (3) on merit of the matter. The Income Tax Officer of CIT (Shimla) himself remained personally present before ITAT for the purpose of defending his order under Section 263 of the Act.

8. By reason of an order dated 15.4.2005, ITAT allowed the appeal filed by the assessee setting aside the order of the CIT (Shimla) on the jurisdictional issue alone. It did not enter into the merit of the matter. It was held:

> "43. As such, considering all the facts of the case and legal position emanating from the aforesaid judicial pronouncements, we are of the considered opinion from the assessment in the present case was made by the Assessing Officer after making proper and adequate enquiries as required in the facts of the case and since the claim of the assessee for deduction u/s 80-IA was allowed by her on proper application of mind to the detailed submissions made on behalf of the assessee as well as the other relevant material including the findings of the survey, there was no error in her order as alleged by the learned CIT. On the other hand, the learned CIT held the said assessment to be erroneous mainly on the basis of surmises and conjectures without there being any material to support and substantiate the same and he having virtually reviewed the assessment order passed by the Assessing Officer applying his mind again to the entire material available on record and by making fresh enquiry brushing aside totally the examination made by the Assessing Officer, we hold that his impugned order passed u/s 263 was not sustainable in law. The same is, therefore, set

aside restoring back the order of the Assessing Officer passed u/s 143(3).

44. It is worthwhile to note here that the claim of the assessee for deduction u/s 80-IA was allowed by the Assessing Officer in the immediately preceding years involving identical facts and circumstances and this material and relevant aspect again appears to have been ignored by the learned CIT while exercising his powers conferred u/s 263. On the contrary he directed the Assessing Officer by issuing notices u/s 148 and also directed him to examine the returns filed by the assessee for the subsequent years by his impugned order which was beyond the jurisdiction conferred on him u/s 263 since the same was confined only to the year for which the assessment order was sought to be revised. We, therefore, direct that the said directions pertaining to the years other than the year under consideration as contained in the impugned order be omitted.

45. As a result of our decision on ground Nos. 1 to 5 cancelling the impugned order passed by the learned CIT u/s 263, the other grounds raised by the assessee in this appeal have been rendered only of academic nature. We, therefore, do not deem it necessary or expedient to consider and decide the same on merits."

On or about 5.7.2005, notice under Section 148 of the Act was also issued for the Assessment year 2000-2001.

9. Assessee questioned the legality of the notice under Section 148 of the Act by filing a Writ Petition before the Himachal Pradesh High Court on or about 5.8.2005, which was marked as Civil Writ Petition No. 800 of 2005.

10. Indisputably, the Central Board of Direct Taxes (for short, "CBDT"), on the application for transfer of the case filed by the assessee on 4.5.2004, passed an order dated 1.9.2005 transferring the case from the jurisdiction of CIT (Shimla) to that of CIT (Delhi) with effect from 5.9.2005, stating:

> "In exercise of powers conferred by clause (b) of sub-section (2) of Section 127 of the Income Tax Act, 1961 [43 of 1961], the Central Board of Direct Taxes hereby orders the transfer of the jurisdiction over the case of "The Green World Corporation" [PAN NO. AAAFG6719Q] from the Income Tax Officer, Parwanoo in the Commissionerate of Income Tax, Shimla in the region of Chief Commissioner of Income Tax, Shimla to the Income Tax Officer, Ward 19 [3], New Delhi in the Commissionerate of Income Tax, Delhi-VII, New Delhi, in the region of Chief Commissioner of Income Tax, Delhi-VII, New Delhi.
>
> The said order shall take effect from 5th September, 2005."

CIT (Shimla) preferred an appeal before the High Court under Section 260A of the Act on or about 17.10.2005.

On or about 30.11.2005, the High Court while condoning the delay admitted the appeal without formulating the substantial questions of law as required under Section 260A.

By reason of an order dated 9.1.2006, the High Court entertained the appeal, stating:

> "Learned Counsel for the appellant states that though CIT, Shimla has locus-standi to file the present appeal, but as an abundant caution appeal may also be taken to have been filed by CIT, Delhi as well and CIT Delhi may be ordered to be impleaded as appellant No. 2. Ordered accordingly, Registry to make necessary correction in the memo of parties.
>
> Learned Counsel for the appellants undertakes to file amended memo of parties and also the Vakalatnama for appellant No. 2 in the Registry.
>
> Arguments heard. Judgment reserved."

11. Assessee filed Special Leave Petition No. 3273 of 2006 before this Court questioning the orders dated 30.11.2005 and 9.1.2006 passed by the High Court.

12. By reason of the impugned order dated 2.3.2006, the High Court while allowing the Appeal filed by CIT (Shimla) dismissed the writ petition filed by the assessee, inter alia, opining:

(1) The order of the Assessing Officer, having been based on `uncalled for interference' in the judicial functions of the Commissioner, was bad in law.

(2) The issue in regard to the maintainability of the appeal vis-`-vis the locus standi of the CIT (Shimla) was significant as CIT (Delhi) had also been impleaded

(3) As the Assessing Officer had acted under the dictates and pressure of CIT (Shimla), the order of assessment was not maintainable.

(4) Assesseee not being a new unit, the order of assessment was bad in law.

(5) CIT could issue directions for reopening the proceedings for the other Assessment Years apart from Assessment Year 2000-2001 also, subject of course to the law of limitation.

13. Feeling aggrieved by the said judgment and order dated 2.3.2006, Assessee filed two Review Petitions being Civil Review Nos. 15 and 16 of 2006. Civil Review No.14 of 2006 was also filed by the Income Tax Officer, Shimla against the same. Another Civil Review No. 22 of 2006 also came to be filed by the Mr. D. Khare, who was the CIT at the time of passing of the Assessment Order dated 19.12.2002 as certain strictures were passed in the said order dated 2.3.2006 against him without giving an opportunity of hearing to him. A Special Leave Petition No. 1789 of 2007

was also filed by the CIT (Shimla) against the said High Court's judgment and order dated 2.3.2006.

14. On or about 7.4.2006, this Court dismissed the Special Leave Petition No. 3273 of 2006 filed by the Assessee as infructuous.

On or about 14.11.2006, Civil Review No. 14 of 2006 filed by the Income Tax Officer, Shimla was dismissed.

15. By reason of an order dated 3.4.2007, the High Court while allowing Mr. Khare's Civil Review No. 22 of 2006 expunging all observations made in the order dated 2.3.2006 rejected the assessee's review petitions to recall order against it founded on the same observations.

16. The High Court in its impugned order dated 3.4.2007 inter alia held:

> "4. We have heard the learned counsel for the review petitioner. It is true that no notice was issued to the review petitioner nor any opportunity of being heard was granted to him by this Court before making the observations. But the aforesaid observations are not the findings of this Court that the review petitioner in fact interfered with the functioning of the Assessing Officer, Solan or pressurized her into closing the inquiry and passing the order of accepting the return as such. These observations are based on the interpretation and construction of the note appearing below the order dated 19.12.2002 of the Assessing Officer, Solan. Even though the observations are based on the interpretation and the construction of the note below the aforesaid order of the Assessing Officer,

still at certain points in para 16 and particularly in para 41 this Court has not specifically said that these observations are based on the interpretation of the said note and one may gather an impression (from some of the observations, about which there is no specific reference) that the same are the Court's own observations/findings. As a matter of fact there was no material before this Court suggesting whether what was written in the note was true or untrue. The observations were made because the note appears below the order. The purpose of making the observations in para 16 was to elaborate that the order of the Assessing Officer was bad having been passed on account of interference and under pressure from the Superior authority, according to the Assessing Officer herself. Whether the interference and the pressure mentioned in the said note, were real or imaginary, that was not gone into by this Court nor was it necessary to do so for the purpose of disposing of the appeal, because in their case (that is to say, in the case of the interference and pressure being real or even in the case of it being unreal or imaginary) the order was bad because of its being not based on any reasoning and hence an order passed without application of mind.

5. In view of the above stated position, we allow the present petition (Civil Review Petition No. 22 of 2006) and order the expunction of all those observations appearing in para 16 or 41 or elsewhere in the judgment, which give the impression that the review petitioner stands indicted for interfering with the working of the Assessing Officer, Solan or pressurizing her into accepting the return as submitted by the assessee, without making any further probe. In fact the inquiry ordered by this Court, vide para 41 of the judgment, is for the purpose of finding out whether the review petitioner had actually interfered with the working of the Assessing Officer, Solan and pressurized her into passing the order of

acceptance of the return as stated in the foot note of the order of Assessing Officer.

6. Two other Review Petitions No. 15 and 16 of 2006 have been filed by the assessee. The contents and the pith and substance of both the two review petitions are the same. Instead of one, two petitions have been filed because by the judgment of this Court not only the appeal filed against the assessee by the Revenue but also a writ petition filed by the assessee were disposed of. One petition is for the review of the order passed in the writ petition and the other for the review of the judgment passed in the appeal.

7. We have heard the learned counsel for the assessee. The points raised by him are:

(a) The appeal itself was not maintainable, because it was the Commissioner of Income Tax, New Delhi (to whom the area, where the assessee was doing his business, stands transferred) who had the competence to file the appeal, but the same had been filed by the Income Tax Commissioner, Shimla.

(b) Appeal was admitted on twelve questions as submitted to the Court by the appellant - Commissioner of Income Tax, but this Court formulated two questions after the conclusion of the hearing and answered only those two questions, which was contrary to the spirit of Section 260-A of the Income Tax Act;

(c) Questions which this Court dealt with, while disposing of the appeal, did not arise out of the order of the Tribunal as the Tribunal dealt with only the question of jurisdiction while disposing of the appeal and it did not touch the merits.

8. We find no merit in any of the aforesaid submissions. Question of maintainability of the

appeal, which was initially filed by the Income Tax Commissioner, Shimla and to which the Income Tax Commissioner, Delhi was later on added as a co-appellant, was considered by this Court while passing the judgment and the contention raised by the counsel for the assessee was dismissed with a clear cut finding that the appeal was maintainable. It is not open to the review petitioner to assail and challenge the said finding by way of review.

9. Coming to the next point, it is true that the appeal was admitted on twelve questions, but while making their submissions the counsel for the parties confined themselves only to a few points, which were covered partly by one and partly by some other questions and so the questions were re-formulated into two questions, confining their scope only to those points about which submissions were made by the learned counsel for the parties. Otherwise also, by the judgment, in question, this Court decided not only the appeal but also a writ petition filed by the review petitioner itself and this also necessitated reformulation of questions.

10. As regards submission [C] above, learned counsel submitted that this court gave the finding that the order of the Assessing Officer, Solan was bad but that such a question did not arise out of the appeal decided by the Income Tax Appellate Tribunal as the Tribunal had dealt with the question of jurisdiction only and hence this court exceeded its appellate jurisdiction while holding that the order was bad on account of non-application of mind. The submission is factually incorrect. The Tribunal while accepting the appeal of the assessee held that the order had been passed by the Assessing Officer under Section 263 of the Income Tax Act on the basis of the inquiry conducted by her and that the Commissioner of Income Tax could not have interfered with the said

> order merely because he formed a different view on scanning the record. Appellate Tribunal clearly said that the order of the Assessing Officer was based on an inquiry conducted by her. This court did not approve of this finding of the Tribunal, because the note appearing below the order of the Assessing Officer clearly shows that it is not passed on application of mind but on the interference by the Commissioner of Income Tax.
>
> 11. Since none of the submissions made by the learned counsel has any merit, both the review petitions (petition Nos. 15 and 16 of 2006) filed by the assessee, i.e. M/s The Green World Corporation, are dismissed."

17. Mr. Harish N. Salve and Mr. Sunil Gupta, learned Senior Counsel appearing on behalf of the Assessee inter alia would submit:

i. Having regard to the order of transfer passed by CBDT transferring the case from CIT (Shimla) to CIT (Delhi), CIT (Shimla) had no locus standi to maintain the appeal preferred before the High Court under Section 260A of the Act.

ii. Despite order by the High Court, CIT (Delhi) having not been impleaded as a party, it must be held that the CIT (Shimla) has no locus standi to maintain the appeal.

iii. Notice under Section 263 having been issued in respect of Assessment Year 2000-2001 only, directions in respect of the

past and the future years of Assessments could not have been issued; some of them being barred by limitation.

iv. The order of the CIT (Shimla) being biased, the Tribunal has rightly interfered therewith as the notices under Section 148 of the Act had been issued pursuant to the directions of the CIT (Shimla), the same are not maintainable.

v. Mere error of law and/or a different view from that of the Assessing Officer by itself could not have been a ground for exercising the jurisdiction under Section 263 of the Act.

vi. Section 150(1) of the Act whereupon reliance has been placed by the Revenue is not applicable.

vii. Special Leave Petition filed by CIT (Shimla) on the self same reasons is not maintainable.

viii. CIT (Shimla) has not raised any question that the order of assessment was passed at the behest of the CIT, the High Court committed a serious error in passing the impugned judgment relying on or on the basis of the said footnote. The said footnote was issued having regard to the circular letter issued by the CBDT itself dated 3.7.2001.

ix. In any event, the Tribunal having not entered into the merit of the matter, the only option available to the High Court was to remand the matter back to the Tribunal and not to enter into the merit itself.

x. CIT's direction to the Assessing Officer to initiate action under Section 148 of the Act for the earlier and subsequent years was illegal and bad in law, and, thus, the proceedings so initiated were also illegal, bad in law and were liable to be quashed.

18. Mr. I. Venkatanarayana, learned Senior Counsel appearing on behalf of the Revenue, on the other hand, would contend:

i. CIT (Shimla) had the locus standi to prefer an appeal before the High Court as he had passed the order prior to the order of transfer.

ii. The Assessee having played fraud on the Department as it had shown a huge amount of profit without there being sufficient number of workmen engaged and without consuming requisite units of electrical energy only with a view to enjoy the tax holidays, CIT (Shimla) had rightly interfered therewith.

iii. The amount of profit shown from the Parwanoo having been holding disproportionate to the investment made, the High Court was correct in passing the impugned judgment.

iv. In any event, the Assessee cannot be said to have been prejudiced in any manner whatsoever by the order of the High Court, as the appeal although was improperly filed may be held to be maintainable.

19. The principal question which arises for consideration is as to whether the order of assessment was passed at the instance of the Higher Authority.

20. An Income Tax Officer while passing an order of assessment performs judicial function. An appeal lies against his order before the Appellate Authority. A Revision Application would also lie before the Commissioner of Income Tax. It is trite that the jurisdiction exercised by the Revisional Authority pertains to his Appellate jurisdiction. {See Shankar Ramchandra Abhyankar vs. Krishnaji Dattatraya Bapat [AIR 1970 SC 1]}

21. The Act provides for its own hierarchy of authorities. Section 116 of the Act occurring in Chapter XIII thereof provides for classes of Income-tax authorities for the purpose of the Act. Clauses (e) and (f) thereof read as under:

> "(e) Assistant Directors of Income-tax or Assistant Commissioners of Income-tax.
>
> (f) Income-tax Officers"

Section 117 of the Act provides for appointment of Income-tax authorities. Control of Income-tax authorities is specified in Section 118 in the following terms:

> "118. The Board may, by notification in the Official Gazette, direct that any income-tax authority or authorities specified in the notification shall be subordinate to such other income-tax authority or authorities as may be specified in such notification."

Section 119 lays down the manner in which the instructions may be given to the subordinate authorities by the higher authorities. Sub-Section (1) thereof provides for the power of the Board whereas sub-section (2) specifies the power of the Board to issue such directions. The said orders passed by the Board are required to be placed before each House of Parliament. It must be read before each House of Parliament by the Central Government.

Section 120 of the Act provides for the jurisdiction of Income-tax authorities. Sub-section (1) thereof reads as under:

> "120. (1) Income-tax authorities shall exercise all or any of the powers and perform all or any of the functions conferred on, or, as the case may be, assigned to such authorities by or under this Act in accordance with such directions as the Board may issue for the exercise of the powers and performance of the functions by all or any of those authorities."

Section 124 of the Act lays down the jurisdiction of Assessing Officers.

Power to transfer cases is provided for under Section 127; sub-Sections (1) and (2) whereof read as under:

> "127. Power to transfer cases
>
> (1) The Director General or Chief Commissioner or Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one or more Assessing Officers subordinate to him (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) also subordinate to him.
>
> (2) Where the Assessing Officer or Assessing Officers from whom the case is to be transferred and the Assessing Officer or Assessing Officers to

whom the case is to be transferred are not subordinate to the same Director General or Chief Commissioner or Commissioner,-

(a) where the Directors General or Chief Commissioners or Commissioners to whom such Assessing Officers are subordinate are in agreement, then the Director General or Chief Commissioner or Commissioner from whose jurisdiction the case is to be transferred may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, pass the order;

(b) where the Directors General or Chief Commissioners or Commissioners aforesaid are not in agreement, the order transferring the case may, similarly, be passed by the Board or any such Director General or Chief Commissioner or Commissioner as the Board may, by notification in the Official Gazette, authorise in this behalf."

The Explanation appended to the said provision states:

"Explanation.-- In section 120 and this section, the word "case", in relation to any person whose name is specified in any order or direction issued thereunder, means all proceedings under this Act in respect of any year which may be pending on the date of such order or direction or which may have been completed on or before such date, and includes also all proceedings under this Act which may be commenced after the date of such order or direction in respect of any year."

Sections 131 to 136 provide for the administrative powers of the Commissioner.

Section 253 of the Act provides for appeals to the Appellate Tribunal. Sub-Section (1) whereof reads thus:

> 253. Appeals to the Appellate Tribunal.
> (1) Any assessee aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order-
> (a) an order passed by a Deputy Commissioner (Appeals) before the 1st day of October, 1998 or, as the case may be, a Commissioner (Appeals) under section 154, section 250, section 271, section 271A or section 272A; or
> (b) an order passed by an Assessing Officer under clause (c) of section 158BC, in respect of search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, after the 30th day of June, 1995, but before the 1st day of January, 1997; or
> (ba) an order passed by an Assessing Officer under sub-section (1) of section 115VZC; or
> (c) an order passed by a Commissioner under section 12AA or under clause (vi) of sub-section (5) of section 80G or under section 263 or under section 271 or under section 272A or an order passed by him under section 154 amending his order under section 263 or an order passed by a Chief Commissioner or a Director General or a Director under section 272A."

An appeal before the High Court would lie on a substantial question of law as provided for under Section 260A of the Act.

22. We may, at this juncture, also notice the CBDT circular issued on 3.7.2001 vesting powers on different Commissioners; Item 27 whereof confers power in the Commissioner of Income-tax, Delhi-VII, Delhi to exercise jurisdiction in respect of offices of the Income Tax Assessing Officer situate at Civil Lines (No. 114).

23. Before, however, adverting to the jurisdictional issue raised by the Assessee herein, we may consider the jurisdiction of the Commissioner of Income-tax to issue notice in terms of Section 263 of the Act. It provides for a revisional power. It has its own limitations. An order can be interfered suo motu by the said authority not only when an order passed by the Assessing Officer is erroneous but also when it is prejudicial to the interests of the Revenue. Both the conditions precedent for exercising the jurisdiction under Section 263 of the Act are conjunctive and not disjunctive.

24. An order of assessment passed by an Income-tax Officer, therefore, should not be interfered with only because another view is possible. The Commissioner of Income-tax, however, has specified a number of reasons in support of its order, namely, (1) on non-fulfillment of pre-requisite conditions for deduction under Section 80-IA/80-IB - it was held that the activities of the assessee do not amount to manufacturing; (2) little consumption of electricity and thus manufacturing is without the aid of

power; (3) non-employment of requisite workers in manufacturing process; (4) non-fulfillment of the condition of new plant and machinery; (5) extra-ordinary high profits; (6) abrupt closure of business; (7) no reason for more than ordinary profits; (8) books of accounts incomplete and unreliable; (9) the manufacturing units at Parwanoo were not genuinely run; (10) high profits have been declared.

In regard to reasons for more than ordinary profits, it was stated:

> "12.1 Many of the essential expenses without which business cannot be run or either not debited at all or have been suppressed considerably. Depreciation of assets such as furniture, fixtures, car, scooter etc. has also been claimed at half the rate while have been with the assessee through out the year. The lower claim of depreciation prejudices the revenues case for the subsequent years also."

It was concluded:

> "15.6 Keeping in view the totality of the facts and circumstances of the case, the only inescapable conclusion in this case is that the assessee has/had no genuine manufacturing unit at Parwanoo. The Parwanoo base is being only used as a fagade to convert/route its otherwise undisclosed income from undisclosed sources through the units at Parwanoo to claim deduction u/s 80IA/80IB. Otherwise, there was no reason that the partners should not have stationed themselves at Parwanoo or nearby. There is no justification for abrupt closure of almost each of the three units in the 4th or 5th year when they were yielding peak profits. The Unit No. 1 and Unit 2 were closed following a surprise survey u/s 133A which revealed that there

was little industrial activity in the premises at Parwanoo. It was with a view to avoid the embarrassing situation of defending the indefensible that the assessee deemed it fit to show these units as having been closed before the date of Survey in the accounting period relevant to A.Y. 2000-01."

It was held:

16. I have carefully considered the written submission of the assessee and these are not acceptable as being incorrect. In view of the above, I am of the view that the Assessing Officer has acted not only erroneously, but also in a manner prejudicial to the interest of revenue by allowing the deduction u/s 80IB in the assessment order dated 19.12.2002 where he had brought substantial amount of evidence against it on record and proved beyond all reasonable doubts that the assessee had falsely made claim of heavy deductions knowing fully well:

that its activities/operations did not amount to manufacturing;

that the manufacturing, if any, was not carried with the aid of power;

that it does not fulfill the condition of new Plant & Machinery;

that it did not satisfy the condition of employment of 20 workers throughout or through the substantial part of the year, and

that the declared profits were reasonably high and exorbitant and non genuine also."

On the aforementioned finding, it was held:

> "16.3 Under the circumstances, I am left with no alternative but to decide the proceedings on the basis of material on record. In the assessment year under review, I estimate the assessee's income from Units at Parwanoo at 5% of the declared turnover. The income shown in excess of 5% amount is treated as undisclosed income from undisclosed sources. As the assessee does not fulfill many of the conditions for being entitled to deduction u/s 80IA/IB, no part of the total income, not even the one estimated @5% of the turnover at Parwanoo, would be entitled for deduction u/s 80IA/IB."

Other directions were issued and diverse proceedings were also directed to be initiated.

25. Indisputably, the Assessee carried the matter in appeal. Before the Appellate Authority, a large number of grounds were raised. We may, however, notice that a question with regard to the propriety on the part of the Commissioner of Income-tax to interfere with the functions of the Assessing Officer was raised, stating that the said order was passed at the dictate of the higher authorities.

26. The Tribunal in its order dated 15.4.2005 referred to in great details the respective contentions raised by the parties before it. It, however, went to the merit of the matter to opine inter alia that the machineries were installed; production of finished goods was shown in the books of accounts; Assessee

had furnished explanation with regard to the queries made and also filed its detailed reply as required by the Assessing Officer; books of account have been produced by the Assessee before the Assessing Officer as would appear from the letter of the Assessing Officer dated 18.10.2002; the activities of the Assessee amounted to manufacture and it was wrongly held by the Commissioner of Income-tax that the unit of the Assessee was not registered with the Central Excise Department; it was exempt from payment of excise duty. It was furthermore held that there was no error in the order of assessment passed by the Assessing Officer.

It was observed:

> "38. Similarly, the other discrepancies sought to be pointed out by the learned CIT in his impugned order were duly explained on behalf of the assessee firm leaving no error in the order of assessment passed by the Assessing Officer u/s 143(3). For instance, the lower claim of the assessee for depreciation in the year under consideration was based on straight line method followed by the assessee and since the same method followed consistently in the preceding years was accepted by the Department, the order of the Assessing Officer accepting the same even in the year under consideration as per rule of consistency could not be held to be erroneous. In any case, the entire income of the assessee being deductible u/s 80IA, the lower claim of depreciation was not causing any prejudice to the interest of Revenue at least in the year under consideration and the apprehension of the learned CIT about such prejudice which may be caused to the Revenue in the subsequent years was based on

> assumptions and surmises depending on ultimate eventualities like the one happened in the present case when the units were finally closed down by the assessee after five years. Even the other discrepancies pointed out by the learned CIT in his impugned order in terms of maintenance of stock record and books of accounts including cash book were duly examined by the Assessing Officer as is evident from the specific queries raised by her in writing seeking clarification/explanation from the assessee and the elaborate submissions made in reply on behalf of the assessee explaining/clarifying each and every query so raised. Even the closure of unit by the assessee firm situated at Parwanoo despite substantial profit was entirely a decision taken by the assessee which might have been influenced by different considerations and in any case, this aspect was not relevant so much so to make the assessment completed by the Assessing Officer to be erroneous for non-consideration of the same."

We must also place on record that the incumbent of the office of the CIT (Shimla) himself appeared before the Tribunal which is a bit unusual.

27. In fact, in the memo of appeal, the Revenue went to the extent of attributing bias to the Tribunal, stating that after the great amount of arguments that Shri A.K. Manchanda, CIT, Shimla who was himself the respondent also and had a natural, legal and constitutional right to defend his case that the Hon'ble Tribunal permitted him to represent the case on facts subject to the condition that he would not be permitted to address the bench on legal issue.

28. The High Court furthermore noticed the objection of the Assessee that CIT (Shimla) could not maintain appeal before it. It furthermore noticed the question raised before it for the first time that the Assessment Order has been passed by the Assessing Officer at the dictates of the higher authorities.

Before the High Court as many as 12 questions were raised.

The High Court held:

> "37. The aforesaid discussion pertaining to the interpretation of Sections 150 (1) and 153(3)(ii) including the operation of Section 149, prescribing limitation for issue of notice, under Section 148 and Section 153(2) providing limitation for passing an order, under Section 147, however, does not mean that the Commissioner of Income Tax, in exercise of his power, under Section 263 of the Income Tax Act, cannot record a finding or give a direction for re-opening the assessment pertaining to assessment years other than the assessment year(s) covered by the revisional proceedings. The only effect of the above discussion and interpretation is that the bar of limitation contained in Sections 149 and 153 (2) will not be lifted, if the order or the finding or the direction of the appellate or the revisional authority, pertain to an assessment year other than the assessment year, which was the subject matter of the appellate or revisional proceedings, unless the case is covered by Explanations 2 and 3 to Section 153. In other words, the Revenue cannot successfully press into service the provisions of Sections 150(1) and 153(2) lifting the bar of limitation in cases where the order of revisional or appellate authority relates to assessment year (s) other than the assessment year(s) to which the appeal or revision pertained."

In regard to the validity of the notices under Section 148 of the Act, it was opined that they were not saved from the limitation under the exclusionary provisions of Sections 150(1) and 153(3)(ii) of the Act. It was directed:

> "41. Before parting with the judgment, we feel that is desirable and in the public interests that the Chief Vigilance Commissioner is approached by the Appointing Authority of the Commissioner of Income Tax, who interfered in the statutory functioning of the Assessing Officer and pressurized her to pass the order accepting the return of the assessee to inquire into the matter and if on inquiry the Chief Vigilance Commissioner finds and reports that the said Commissioner of Income Tax was guilty of misconduct, action is taken against him by his such Authority, as per law. We direct the Appointing Authority of the said Commissioner accordingly."

Two sets of review applications were filed; one by Shri Dhirendra Khare, and another by the Assessee. The High Court while allowing the Khare's review application expunging all observations made in its order dated 2.3.2006 rejected the review application filed by the Assessee.

JURISDICTION UNDER SECTION 263

29. The scope of provisions of Section 263 of the Act is no longer res integra. The power to exercise of suo motu of revision in terms of Section 263(1) is in the nature of supervisory jurisdiction and same can be exercised

only if the circumstances specified therein, viz., (1) the order is erroneous; (2) by virtue of the order being erroneous prejudice has been caused to the interest of the revenue, exist.

In Malabar Industrial Co. Ltd. vs. CIT [243 ITR 83 (SC)] : [(2000) 2 SCC 718), this Court held:

> "7. There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.
>
> xxx xxx xxx
>
> 10. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the assessing officer. Every loss of revenue as a consequence of an order of assessing officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income Tax Officer is unsustainable in law. It has been held by this court that where a sum not earned by a person is assessed as income in his

> hands on his so offering, the order passed by the assessing officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue."
>
> (emphasis supplied)

The principle laid down therein was followed in Commissioner of Income-Tax vs. Max India Ltd. [(2007) 295 ITR 282 (SC)], stating:

> "In our view at the relevant time two views were possible on the word "profits" in the proviso to Section 80HHC(3). It is true that vide the 2005 amendment the law has been clarified with retrospective effect by insertion of the word "loss" in the new proviso. We express no opinion on the scope of the said amendment of 2005. Suffice it to state that in this particular case when the order of the Commissioner was passed under Section 263 of the Income Tax Act, 1961, two views on the said word "profits" existed."

Referring to Malabar Industrial Co. Ltd. (supra), it was observed:

> "Every loss of revenue as a consequence of an order of the assessing officer cannot be treated as prejudicial to the interests of the revenue. For example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue , unless the view taken by the Income Tax Officer is unsustainable in law."

It is beyond any doubt or dispute that only in terms of the directions issued by the Commissioner dated 12.7.2004 under Section 263 of the Act, notices under Section 148 of the Act were issued.

30. Indisputably, CIT (Shimla) had no jurisdiction to issue directions. Notices issued pursuant thereto would be bad in law. We may, however, place on record that the Revenue in the `List of Dates' while questioning the observations made by the High Court that the notices under Section 148 of the Act for Assessment Years 1996-97 and 1997-98 are not saved from the rigors of the law of limitation, under the exclusionary provisions of Sections 150(1) and 153(3)(ii) of the Act, stated:

> "In this regard, it is important to note that these notices were issued to give effect to the directions contained in the revision order u/s 263 passed by the CIT on 12.7.2004 unlike Section 149 of the Act, there is no time limit u/s 150(1) that starts with non obstante clause and to that extent the observations of the Hon'ble High court are in error.
>
> Further Section 150(2) provides necessary restriction on Section 150(1) and even under the said restriction provided by Section 150(2), the issue of notices u/s 148 of the AY 1996-97 and 1997-98 in instant case is within the restricted time limit provided u/s 150(2) of the IT Act."

Section 150 of the Act reads as under:

> "150 - Provision for cases where assessment is in pursuance of an order on appeal, etc. (1) Notwithstanding anything contained in section 149, the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision or by a Court in any proceeding under any other law.
> (2) The provisions of sub-section (1) shall not apply in any case where any such assessment, reassessment or recomputation as is referred to in that sub-section relates to an assessment year in respect of which an assessment, reassessment or recomputation could not have been made at the time the order which was the subject-matter of the appeal, reference or revision, as the case may be, was made by reason of any other provision limiting the time within which any action for assessment, reassessment or recomputation may be taken."

The aforementioned provision although appears to be of a very wide amplitude, but would not mean that recourse to reopening of the proceedings in terms of Sections 147 and 148 of the Act can be initiated at any point of time whatsoever. Such a proceeding can be initiated only within the period of limitation prescribed therefore as contained in Section 149 of the Act.

Section 150 (1) of the Act is an exception to the aforementioned provision. It brings within its ambit only such cases where reopening of the

proceedings may be necessary to comply with an order of the higher authority. For the said purpose, the records of the proceedings must be before the appropriate authority. It must examine the records of the proceedings. If there is no proceeding before it or if the Assessment year in question is also not a matter which would fall for consideration before the higher authority, Section 150 of the Act will have no application.

In Income-Tax Officer, A-Ward, Sitapur vs. Murlidhar Bhagwan Das [52 ITR 335 (SC)], it was held:

> "The proceedings would be in time, if the second proviso to section 34(3) of the Act could be invoked. The question, therefore, is what is the true meaning of the terms of the second proviso to section 34(3) of the Act. It reads:
>
> "Provided further that nothing in this section limiting the time within which any action may be taken, or any order, assessment or re-assessment may be made, shall apply to a re-assessment made under section 27 or to an assessment or re-assessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 31, section 33, section 33A, section 33B, section 66 or section 66A."
>
> Prima facie this proviso lifts the ban of limitation imposed by the other provisions of the section in the matter of taking an action in respect of or making an order of assessment or re-assessment falling within the scope of the said proviso. The scope of the proviso is confined to an assessment or re-assessment made on the assessee

> or any person in consequence of an order to give effect to any finding or direction contained in any order made under section 31 i.e., in an appeal before the Assistant Appellate Commissioner, under section 33 i.e., in an appeal before the Tribunal, under section 33A i.e., in a revision before the Commissioner, under section 33B i.e., in a revision before the Commissioner against an order of the Income-tax Officer, and under sections 66 and 66A i.e., in a reference to the High Court and appeal against the High Court's order to the Supreme Court. Learned counsel for the appellant contends that the scope of the proviso is only confined to the assessment of the year that is the subject-matter of the appeal or the revision, as the case may be. Learned counsel for the Department argues that the comprehensive phraseology used in the proviso takes in its broad sweep any finding given by the appropriate authority necessary for the disposal of the appeal or the revision, as the case may be, and to any direction given by the said authority to effectuate its finding and that the said finding or direction may be in respect of any year or any person. As the phraseology used in the proviso is not clear or unambiguous, the question raised cannot be satisfactorily resolved without having a precise appreciation of a brief history of section 34 of the Act culminating in the enactment of the proviso in the present form."

This Court noticed the development of law as also the fact that the decision of the Income-Tax Officer given in a particular year does not operate as res judicata to opine:

> "The lifting of the ban was only to give effect to the orders that may be made by the appellate, revisional or reviewing tribunal within the scope of its jurisdiction. If the intention was to remove the

> period of limitation in respect of any assessment against any person, the proviso would not have been added as a proviso to sub-section (3) of section 34, which deals with completion of an assessment, but would have been added to sub-section (1) thereof."

In regard to the question that what would be the meaning of the term `finding' or `direction', it was held:

> "A "finding", therefore, can be only that which is necessary for the disposal of an appeal in respect of an assessment of a particular year. The Appellate Assistant Commissioner may hold, on the evidence, that the income shown by the assessee is not the income for the relevant year and thereby exclude that income from the assessment of the year under appeal. The finding in that context is that that income does not belong to the relevant year. He may incidentally find that the income belongs to another year, but that is not a finding necessary for the disposal of an appeal in respect of the year of assessment in question. The expression "direction" cannot be construed in vacuum, but must be collated to the directions which the Appellate Assistant Commissioner can give under section 31. Under that section he can give directions, inter alia, under section 31(3)(b), (c) or (e) or section 31(4). The expression "directions" in the proviso could only refer to the directions which the Appellate Assistant Commissioner or other tribunals can issue under the powers conferred on him or them under the respective sections. Therefore, the expression "finding" as well as the expression "direction" can be given full meaning, namely, that the finding is a finding necessary for giving relief in respect of the assessment of the year in question and the direction is a direction which the appellate or revisional authority, as the case may be, is

> empowered to give under the sections mentioned therein."

It was clarified that the words `any person' would refer to those who were not eo nominee parties to the appeal although the assessment of their income would depend upon the assessments of the Assessee.

Mudholkar, J. speaking for the minority referred to this Court's decision in S.C. Prashar vs. Vasantsen Dwarkadas [(1963) 49 ITR 1] wherein the validity of the aforementioned provisions was questioned; read down the proviso appended to Section 34(1) stating:

> "No doubt, this Court has recently held in S. C. Prashar & Anr. v. Vasantsen Dwarkadas & ors. [(1963) 49 ITR 1] that the proviso in so far as it removes the bar of limitation with respect to persons other than the assessee, is invalid as it infringes the provisions of Art. 14 of the Constitution. That, however, is a question apart. What we have to consider is the legislative intent, and for ascertaining it, it is legitimate to look also at that part of the enactment which has been held to be invalid."

To the similar effect are the decisions of this Court in N. KT. Sivalingam Chettiar vs. Commissioner of Income-Tax, Madras [66 ITR 586 (SC)] and Rajinder Nath vs. Commissioner of Income-Tax, Delhi [120 ITR 14 (SC)].

In N.KT. Sivalingam Chettiar (supra), this Court held:

"Counsel for the commissioner contends that the principle of Murlidhar Bhagwan Das's case does not govern the present case, because in that case proceedings for assessment were commenced in consequence of or to give effect to an express direction of the Appellate Assistant Commissioner and it was held by this court that a direction not necessary for the disposal of the appeal in respect of the assessment of the year in question before him was inoperative to remove the bar of limitation. Counsel says that, where a mere finding in recorded by the appellate or revisional authority different considerations arise and the bar of limitation prescribed by section 34 would be removed if a proceeding be commenced for assessment in consequence of or to give effect to the finding. This argument has, in our judgment, no force.

xxx xxx xxx

It is clear from the observation made by this court that a finding within the second proviso to section 34(3) must be necessary for giving relief in respect of the assessment of the year in question. The court in that case expressly lent approval to the observations of the Allahabad High Court in Pt. Hazari Lal v. Income-tax Officer, Kanpur that the word "finding" only covers "material questions which arise in a particular case for decision by the authority hearing the case or the appeal which, being necessary for passing the final order or giving the final decision in the appeal, has been the subject of controversy between the interested parties or on which the parties concerned have been given a hearing."

In Rajinder Nath (supra), this Court held:

"The expressions "finding" and "direction" are limited in meaning. A finding given in an appeal, revision or reference arising out of an assessment must be a finding necessary for the disposal of the particular case, that is to say, in respect of the particular assessee and in relation to the particular assessment year. To be a necessary finding, it must be directly involved in the disposal of the case. It is possible in certain cases that in order to render a finding in respect of A, a finding in respect of B may be called for. For instance, where the facts show that the income can belong either to A or B and to no one else, a finding that it belongs to B or does not belong to B would be determinative of the issue whether it can be taxed as A's income. A finding respecting B is intimately involved as a step in the process of reaching the ultimate finding respecting A If, however, the finding as to A's liability can be directly arrived at without necessitating a finding in respect of B, then a finding made in respect of B is an incidental finding only. It is not a finding necessary for the disposal of the case pertaining to A. The same principles seem to apply when the question is whether the income under enquiry is taxable in the assessment year under consideration or any other assessment year. As regards the expression "direction" in Section 153(3)(ii) of the Act, it is now well settled that it must be an express direction necessary for the disposal of the case before the authority or court. It must also be a direction which the authority or court is empowered to give while deciding the case before it. The expressions "finding" and "direction" in Section 153(3)(ii) of the Act must be accordingly confined. Section 153(3)(ii) is not a provision enlarging the jurisdiction of the authority or court. It is a provision which merely raises the bar of limitation of making an assessment order under Section 143 or Section 144 or Section 147. Income Tax Officer, A-Ward, Sitapur v. Murlidhar Bhagwan Das 52 I.T.R. 335 and N. Kt. Sivalingam

> Chettiar v. Commissioner of Income-tax, Madras 66 I.T.R. 586 (S.C.). The question formulated by the Tribunal raises the point whether the Appellate Assistant Commissioner could convert the provisions of Section 147(1) into those of Section 153(3)(ii) of the Act. in view of Section 153(3)(ii) dealing with limitation merely, it is not easy to appreciate the relevance or validity of the point."

It is, thus, evident that jurisdiction to issue directions is limited.

31. We may now consider the effect of the `Noting'. The Noting of the Assessing Officer was specific. It was stated so in the proceedings sheet at the instance of the higher authorities itself. No doubt in terms of the circular letter issued by CBDT, the Commissioner or for that matter any other higher authority may have supervisory jurisdiction but it is difficult to conceive that even the merit of the decision shall be discussed and the same shall be rendered at the instance of the higher authority who, as noticed hereinbefore, is a supervisory authority. It is one thing to say that while making the orders of assessment the Assessing Officer shall be bound by the statutory circulars issued by CBDT but it is another thing to say that the assessing authority exercising quasi judicial function keeping in view the scheme contained in the Act, would lose its independence to pass an independent order of assessment.

In State of Kerala & Ors. vs. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582], noticing Union of India vs. Azadi Bachao Andolan [(2004) 10 SCC 1], this Court held:

> "26. In Union of India and Anr. vs. Azadi Bachao Andolan, a circular was issued by CBDT under Section 119 of the Income-tax Act, 1961. It was challenged inter alia on the ground that it was ultra vires the provisions of Section 19(1). The argument was rejected by this Court in the following words: (SCC p.32, para 47)
>
> `47. It was contended successfully before the High Court that the circular is ultra vires the provisions of Section 119. Sub-section (1) of Section 119 is deliberately worded in a general manner so that CBDT is enabled to issue appropriate orders, instructions or directions to the subordinate authorities "as it may deem fit for the proper administration of this Act". As long as the circular emanates from CBDT and contains orders, instructions or directions pertaining to proper administration of the Act, it is relatable to the source of power under Section 119 irrespective of its nomenclature. Apart from Sub-section (1), Sub-section (2) of Section 119 also enables CBDT
>
> > `for the purpose of proper and efficient management of the work of assessment and collection of revenue, to issue appropriate orders, general or special, in respect of any class of income or class of cases, setting forth directions or instructions (not being prejudicial to the assessees) as to the guidelines, principles or procedures to be followed by other Income Tax Authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties.

In our view, the High Court was not justified in reading the circular as not complying with the provisions of Section 119. The circular falls well within the parameters of the powers exercisable by CBDT under Section 119 of the Act.'

27. Lastly, the binding effect of the said circular No. 16/98 needs to be kept in mind. As stated above, the said circular was issued by the Board by exercising statutory powers vested in it under Section 3(1A). As stated above, Section 3(1A) provides for an enabling power of the Board which was recognized as an Authority under the 1963 Act. The said power was to be exercised in special cases. As stated above, granting of administrative reliefs by the Board came within its authority. As stated above, the said circular was issued for just and fair administration of the 1963 Act. As stated above, Section 3(1A) is similar to Section 119(1) of the 1961 Act. The circulars of this nature are issued by the Board consisting of highest senior officers in the Revenue Department. These circulars are to be respected by the officers working under the supervision of the Board. These circulars are binding on all the authorities administering the tax department. The power of the Board to issue such circular is traceable to Section 3(1A)(c) of the Act. The said circular is statutory in nature. Therefore, it is binding on the Department though not on the courts and the assessees. In the present case, as stated above, completed assessments were sought to be reopened by the AO on the ground that the said circular No. 16/98 was not binding. Such an approach is unsustainable in the eyes of law. If the State Government was of the view that such circulars are illegal or that they are ultra vires Section 3(1A), which it is not, it was open to the State to nullify/withdraw the said circular under Section 60 of the 1963 Act. Till today, the circular continue to remain in force. Till today, it has not been withdrawn. In the circumstances, it is not open to

> the officers administering the law working under the Board of Revenue to say that the said circular is not binding on them. If such a contention was to be accepted, it would lead to chaos and indiscipline in the administration of tax laws."

32. When a statute provides for different hierarchies providing for forums in relation to passing of an order as also appellate or original order; by no stretch of imagination a higher authority can interfere with the independence which is the basic feature of any statutory scheme involving adjudicatory process.

In Commissioner of Police, Bombay vs. Gordhandas Bhanji [AIR 1952 SC 16], this Court has held:

> [7] This sanction occasioned representations to Government presumably by the "public" who were opposing the scheme. Anyway, the Commissioner wrote to the respondent on the 19/20th September, 1947, and direct him "not to proceed with the construction of the cinema pending Government orders." Shortly after, on the 27/30th September, 1947, the Commissioner sent the respondent the following communication:
>
> "I am directed by Government to inform you that the permission to erect a cinema at the above site granted to you under this office letter... dated the 16th July, 1947, is hereby cancelled."

It was furthermore opined:

> "We are clear that public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

{See also Pancham Chand & Ors. vs. State of Himachal Pradesh & Ors.[(2008) 7 SCC 117]

Yet again in The Purtabpur Company Ltd. vs. Cane Commissioner of Bihar [AIR 1970 SC 1896], this Court held:

> "...The power exercisable by the Cane Commissioner under Clause 6(1) is a statutory power. He alone could have exercised that power. While exercising that power he cannot abdicate his responsibility in favour of anyone - not even in favour of the State Government or the Chief Minister. It was not proper for the Chief Minister to have interfered with the functions of the Cane Commissioner. In this case what has happened is that the power of the Cane Commissioner has been exercised by the Chief Minister, an authority not recognised by Clause (6) read with Clause (11) but the responsibility for making those orders was asked to be taken by the Cane Commissioner.
>
> 14. The executive officers entrusted with statutory discretions may in some cases be obliged to take into account considerations of public policy and in some context the policy of a Minister or the

> Government as a whole when it is a relevant factor in weighing the policy but this will not absolve them from their duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for them to be given binding instructions by a superior."

[See also Tarlochan Dev Sharma vs. State of Punjab & Ors. [(2001) 6 SCC 260]

33. The other question which requires determination is as to whether the CIT (Shimla) could maintain an appeal before the High Court.

An appeal is ordinarily maintainable at the instance of the Assessing Officer. Not only an order of assessment was passed but also CIT (Shimla) had already passed an order. Notices under Section 148 of the Act had already been issued much prior thereto.

Before us, reliance has been placed upon some decisions by Mr. Salve to contend that CIT (Shimla) has no jurisdiction. Even in a situation of this nature such a view appears to have been taken in Commissioner of Income Tax vs. Sahara India Financial Corporation Ltd. [212 CTR 178 (Delhi)] wherein a question whether the appeal preferred by the Revenue in the Delhi High Court was questioned by the assesse on the ground of lack of territorial jurisdiction, it was held:

"11. Learned Counsel for the assessed contended that since the assessment orders had already been passed in respect of the assessed and a decision had also been taken by the Tribunal, there was no question of transferring the jurisdiction in respect of the assessed from one place to another. We are of the view that this argument is completely misplaced. The Explanation to Section 127(4) of the Act tells us what the word 'case' means in relation to any person whose name is specified in any order or direction issued under Section 127 of the Act. The Explanation says that 'case' means all proceedings under the Act in respect of any year:

(i) which may be pending on the date of the order or direction;

(ii) which may have been completed on or before the date of the order or direction;

(iii) including all proceedings which may be commenced after the date of the order or direction in respect of any year.

12. In other words, the Explanation to Section 127(4) of the Act talks of proceedings, past, present and future in respect of a person whose name is specified in the order or direction passed under Section 127 of the Act and this would apply to any previous year.

13. The order passed under Section 127(2) of the Act clearly relates to the 'case' of the assessed mentioned in the Schedule, and by virtue of the Explanationn, all future proceedings that may be taken under the Act (obviously including an appeal under Section 260A thereof) would now have to be in harmony with the order passed under Section 127(2) of the Act. Consequently, the jurisdiction in respect of the 'case' and the assessed having been shifted from Lucknow to Delhi, the Revenue could file the appeal under Section 260A of the Act only

in Delhi and it could not have filed an appeal in the Lucknow Bench of the Allahabad High Court."

Yet again in Commissioner of Income-Tax, West Bengal & Anr. vs. Anil Kumar Roy Chowdhary & Anr. [66 ITR 367 (SC)] this Court opined:

"It may be that the Income-tax Officer who completed the original assessment would also be concerned with the appeal to be filed by the Commissioner, but it does not mean that he is exclusively so concerned. If the case had been transferred by the Commissioner or the Board of Revenue from the Income-tax Officer who completed the assessment to another Income-tax Officer, then obviously the former officer will have no concern with the appeal. But if there has been no such transfer then we are unable to appreciate why he alone is concerned with the appeal. The Income-tax Officers can have concurrent jurisdiction over some matters. On illustration of this is provided by section 64(4)."

The High Court dissented from the decision of the Punjab High Court in R. B. L. Benarsi Das v. Commissioner of Income-tax. The Punjab High Court in that case held that there was nothing in section 33(2) to prohibit the Commissioner from directing any Income-tax Officer, other than the one who in fact passed the assessment order, to appeal. We consider that it is not correct to say that any Income-tax Officer who has concern with the appeal.

The High Court rightly relied on Commissioner of Income-tax v. S. Sarkar & Co. in dissenting from the view expressed by the Punjab High Court in R. B. L. Benarsi Das v. Commissioner of Income-tax, but in our view the High Court erred in holding that the facts of the

> present case are governed by the earlier decision of the Calcutta High Court. In this case, on the facts found by the Appellate Tribunal, one Income-tax Officer had passed the assessment order while another Income-tax Officer has jurisdiction over the assessee. In our view, the latter Income-tax Officer having jurisdiction over the assessee could be directed by the Commissioner to file the appeal."

In the aforementioned case, therefore, this Court proceeded on the basis that the concurrent jurisdiction of two authorities is permissible.

In Uday Shankar Triyar vs. Ram Kalewar Prasad Singh & Anr. [(2006) 1 SCC 75], this Court referring to the provisions of the Code of Civil Procedure held as under:

> "17. Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a hand-maid to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well recognized exceptions to this principle are:
>
> i) where the Statute prescribing the procedure, also prescribes specifically the consequence of non-compliance;

ii) where the procedural defect is not rectified even after it is pointed out and due opportunity is given for rectifying it;

iii) where the non-compliance or violation is proved to be deliberate or mischievous;

iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court;

v) in case of Memorandum of Appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant;"

It was a case where the Assessing Officer before whom the case was transferred completed the proceedings. It was in the aforementioned context it was opined that new Assessing Officer assumes jurisdiction exclusively in completing the proceedings. Such is not the case here.

34. In this case, CIT (Shimla) had passed an order. His order was set aside by the Tribunal. He, therefore, in ordinary course could have preferred an appeal only by the time when administrative decision could be taken by him to prefer an appeal. The right to prefer an appeal arose on the date on which the Tribunal passed an order. It might have taken some time to prefer an appeal. Ordinarily, he was the authority who could have preferred an appeal. By preferring an appeal new proceedings were initiated. In any event, nothing has been shown as to how the assessee was prejudiced.

In a case of this nature, the provisions akin to Section 21 of the Code of Civil Procedure may be held to be applicable for the purposes of questioning the jurisdiction of the High Court to entertain an appeal on the ground of lack of territorial jurisdiction. In a peculiar case of this nature, we are of the opinion that prejudice must be shown.

{See Kiran Singh & Ors. vs. Chaman Paswan & Ors. [AIR 1954 SC 340] Para 11}

In Mantoo Sarkar vs. Oriental Insurance Co. Ltd. & Ors. [2008 (16) SCALE 197], this Court held:

> "17. The Tribunal is a court subordinate to the High Court. An appeal against the Tribunal lies before the High Court. The High Court, while exercising its appellate power, would follow the provisions contained in the Code of Civil Procedure or akin thereto. In view of sub-section (1) of Section 21 of the Code of Civil Procedure, it was, therefore, obligatory on the part of the appellate court to pose unto itself the right question, viz., whether the first respondent has been able to show sufferance of any prejudice. If it has not suffered any prejudice or otherwise no failure of justice had occurred, the High Court should not have entertained the appeal on that ground alone.
> 18. We, however, while taking that factor into consideration must place on record that we are not oblivious of the fact that a decision rendered without jurisdiction would be coram non juris. Objection in regard to jurisdiction may be taken at

any stage. (See Chief Engineer, Hydel Project v. Ravinder Nath , [(2008) 2 SCC 350]) wherein inter alia the decision of this Court in Kiran Singh v. Chaman Paswan, [AIR 1954 SC 340] was followed, stating:

> "26. The Court also relied upon the decision in Kiran Singh v. Chaman Pawan [AIR 1954 SC 340] and quoted (in Harshad Chiman Lal case {[(2005) 7 SCC 791], SCC pp. 804-805, para 33} therefrom: {Kiran Singh case (supra), AIR p.342, para6
>
> > `6. ...It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, ...strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."
>
> Though in the aforementioned decision these observations were made since the defendants before raising the objection to the territorial jurisdiction had admitted that the court had the jurisdiction, the force of this decision cannot be ignored and it has to be held that such a decree would continue to be a nullity."

19. A distinction, however, must be made between a jurisdiction with regard to subject matter of the suit and that of territorial and pecuniary jurisdiction. Whereas in the case falling within the former category the judgment would be a nullity, in the latter it would not be..."

35. This case poses before us some peculiar questions. Whereas the order under Section 263 of the Act and consequently the notices under Section 148 of the Act have been held to be not maintainable, we are constrained to think that the Assessing Officer had passed an order at the instance of the higher authority which is illegal. For the aforementioned purpose, we may not go into the question of bona fide or otherwise of the authorities under the Income Tax Act. They might have proceeded bona fide but the order of assessment passed by the Assessing Officer on the dictates of the higher authorities being wholly without jurisdiction, it was a nullity. We, therefore, are of the opinion that with a view to do complete justice between the parties, the assessment proceedings should be gone through again by the appropriate assessing authority.

36. It is true that despite order passed by the High Court, CIT (Delhi) has not been impleaded. Presumably, because of the said defect in the order passed by the High Court of Himachal Pradesh at Shimla, Revenue could not implead CIT (Delhi) as a party in the appeal. CIT (Delhi), however, has been impleaded as a party in the Special Leave Petition (SLP) filed by the Assessee. CIT (Delhi) has although in an irregular manner filed a rejoinder. Counter affidavit was filed by the Assessee in the appeal preferred by the

Revenue and the same is on record. The said authority, therefore, is otherwise before us.

37. It is now well settled that this Court in exercise of its extra-ordinary jurisdiction under Article 136 of the Constitution of India may, in the event an appropriate case is made out, either refuse to exercise its discretionary jurisdiction or quash both the orders if it is found that setting aside of one illegal order would give rise to another illegality.

In Transmission Corpn. of A.P. Ltd. vs. Lanco Kondapalli Power (P) Ltd. [(2006) 1 SCC 540], this Court held:

> "53. It is now well-settled that this Court would not interfere with an order of the High Court only because it will be lawful to do so. Article 136 of the Constitution vests this Court with a discretionary jurisdiction. In a given case, it may or may not exercise its power."

We, therefore, in exercise of our jurisdiction under Article 142 of the Constitution of India direct that the assessment be reopened by the Commissioner of Income-tax, Delhi -VII.

38. These appeals are disposed of with the aforementioned directions. No costs.

.....J.
[S.B. Sinha]

.....J.
[Dr. Mukundakam Sharma]

New Delhi;
May 06, 2009