+* **THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on : 14.05.2009

+ **ITA No 485/2008**

THE COMMISSIONER OF INCOME TAX-XIII ..... Appellant

versus

SHRI ASHISH RAJPAL ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Sanjeev Sabharwal, Advocate
For the Respondent : Mr.B B Bhagat with Mr Amit Bhagat & Mr Pulkit Gupta. Advocates

CORAM :-

HON'BLE MR JUSTICE VIKRAMAJIT SEN
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to Reporters or not ?
3. Whether the judgment should be reported in the Digest ? Yes

RAJIV SHAKDHER, J

1. The Revenue has preferred the present appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') against the judgment of the Income Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal') dated 16.11.2007 passed in ITA No. 759/Del/2007.

2. The Revenue is aggrieved by the impugned judgment of the Tribunal by which it has set aside the order of the Commissioner of Income Tax (hereinafter referred to as the 'Commissioner') dated

18/19.01.2007 whereby he in turn cancelled the assessment order dated 24.03.2005 and directed the Assessing Officer to make a fresh assessment after considering all the aspects of the case including various discrepancies pointed out by him in his order.

3. In order to adjudicate upon this appeal the following facts require to be noticed:-

4. The assessee is a builder engaged in the business of construction of properties on a collaboration basis with the owners of the properties. The assessee filed a return dated 31.10.2002 in respect of assessment year 2002-03 declaring a total income of Rs 2,69,210/- The assessee's case was picked up for 'compulsory scrutiny' under Instruction No. 11/2003 of Central Board of Direct Taxes (C.B.D.T.). Accordingly, a notice under Section 143(2) of the Act was issued to the assessee. During the course of scrutiny it transpires that several queries were raised by the Assessing Officer. In response thereto, the assessee sent communications dated 27.12.2004, 22.02.2005, 28.02.2005 and 18.03.2005.

5. A perusal of the assessment order dated 24.03.2005 would show that the Assessing Officer made specific enquiries with respect to a collaboration project situated at E-5/1, Malviya Nagar, New Delhi-110017 (hereinafter referred to as the 'Malviya Nagar property'). The assessment order also indicates that the assessee had furnished copies of

various agreements executed in respect of the Malviya Nagar property as well as the valuation report. Significantly, in response to a query as regards the cost of purchase and construction incurred by the assessee on the Malviya Nagar property, the assessee indicated that it had purchased the Malviya Nagar property on 05.10.2000 for a total consideration of Rs 16,00,000/- and had also incurred expenditure of Rs 4,50,000/- on renovation of the Malviya Nagar property. The assessee, thus, indicated that its total investment on the Malviya Nagar property was Rs 20,50,000/-. It was also indicated that the said property was sold (it seems floor wise) between 19.01.2001 to 17.10.2001 to various parties for a total sum of Rs 20,90,000/-. The communication which is referred to in the assessment order shows that the assessee offered an additional income of Rs 8,00,000/- purportedly earned from the Malviya Nagar property to buy "peace with the Department".

6. The Assessing Officer, thus, considering the material on record and the submission of the assessee, included the additional income of Rs 8,00,000/- offered by the assessee with respect to the Malviya Nagar and proceeded to tax the said sum alongwith income already declared that is a sum of Rs 2,69,210/-. By the said order a total income of Rs 10,69,210/- was brought to tax. Interest under Section 234A, 234B and 234C was also imposed. In addition, penalty proceedings under Section 271(1)(c) of the Act was also initiated.

7. It is important to note at this stage that in the interregnum i.e., during the course of scrutiny, the Assessing Officer had issued summons under Section 131 of the Act to purchasers of various properties in order to satisfy himself as regards the genuineness of the transactions in issue. It would also be pertinent to take note of the fact that in the communications dated 27.12.2004 and 28.02.2005 the assessee gave details with respect to other projects i.e., the properties located at Gitanjali Enclave and Defence Colony. Copies of the collaboration agreements, important details with respect to the agreements, area of construction and sale price as also details of receipt of Rs 26 lacs with respect to the property located at Gitanjali Enclave were supplied by the assessee through communication dated 27.12.2004 and 28.02.2005. Similarly, relevant details with regard to the Defence Colony property was furnished by the assessee in a letter dated 28.02.2005. Despite, the disclosure by the assessee of details with respect to all three projects i.e., the Malviya Nagar property as also properties located at Gitanjali Enclave and Defence Colony - a fact which was ascertained by the Tribunal and finds mention in the impugned judgment: the Commissioner issued a notice dated 11.05.2006 to the assessee on the ground that he was of the view that the assessment made in the case of the assessee was both erroneous and prejudicial to the interest of the Revenue. The reasons which found favour with the Commissioner were as follows:-

"(i) No examination of books of account was made;

(ii) No verification were made from the persons to whom summons under Section 131 were issued and no statements were recorded on oath;

(iii) The surrender of Rs 8 lacs was made on agreed basis, on the sale of project of Malviya Nagar, other projects, which were also in posh colonies of South Delhi, remain untouched and unverified.

(iv) No proper recordings were made on the order sheet."

8. At this stage it would be important to note that we had called for record, in particular, the order sheets maintained by the Commissioner. The relevance of this exercise would be clear as we proceed further with our narrative. Suffice it to state that a scrutiny of the order sheets of the Commissioner showed that on 29.05.2006 the assessee was represented by an Advocate, one Mr M K Gandhi and the case was simply adjourned to 15.06.2006. On 15.06.2006 the case was again adjourned, when one Mr B. B. Bhagat appeared for the assessee and sought one week's adjournment which was allowed by the Commissioner and the case was adjourned to 26.06.2006. There is no order sheet for 26.06.2006, however, there is an order sheet for 28.06.2006 which indicates that Mr B B Bhagat, Advocate who represented the assessee on the previous date appeared and filed submissions. There is also reference to the fact that he was heard in support of his submissions. The order sheet entries read as follows:-

" 29.05.2006

Mr M.K. Gandhi, Adv. attended. The case is adjourned for 15th June, 2006.

Sd/-

15.06.2006

Shri B.B. Bhagat (Adv.) appeared, seeking a weeks' adjournment. Allowed & adjourned to 26.06.2006.

Sd/-

28.06.2006

Sh. B.B. Bhagat (Adv.) appeared and filed submission. He is heard.

Sd/-"

9. The Commissioner, as mentioned above, by his order dated 18/19.01.2007 evidently revised the assessment order and crystallised nine issues which, according to him, require enquiry and investigation. Briefly, these being:-

(i) that the Assessing Officer had not carried out an examination of the books of accounts of the assessee. He also noted that despite various communications the assessee had not appeared and no penalty proceedings under Section 271(1)(b) had been initiated for non-compliance with statutory notices;

(ii) the Commissioner also raised concerns with respect to the failure on the part of the assessee to examine parties who had been summoned under Section 131 of the Act;

(iii) the fact that the assessee had voluntarily offered an additional sum of Rs 8 lacs as income derived from the Malviya Nagar property ought to have made the Assessing Officer mindful of the fact that the matter required further enquiry. The Commissioner was of the view that the Assessing Officer should have called upon the assessee to disclose the basis for arriving at the figure of Rs 8 lacs as the additional income with respect to sale of the Malviya Nagar property;

(iv) there is nothing on the assessment record which would reveal the basis on which the Assessing Officer accepted the correctness of the income declared with respect to other two properties located at Gitanjali Enclave and Defence Colony;

(v) the Commissioner's refrain was the same as in the case of Malviya Nagar property that the books of accounts and vouchers had not been examined by the Assessing Officer with respect to the Gitanjali Enclave and Defence Colony properties and that the Assessing Officer had simply accepted the assessee's claim of expenditure in respect of construction of the said properties amounting to Rs 52.77 lacs;

(vi) the Commissioner also referred to expenses payable by the assessee to the tune of Rs 11,00,734/- which the assessee claimed were payable as on 31.03.2002. It was pointed out that there was no query raised and the books were not examined with reference to the said issue;

(vii) a reference was also made to a Bank Reconciliation Statement found on the record and the fact that queries with respect to issues emanating therefrom had not been raised;

(viii) there was also an issue about sale of Shop No 5 in Malviya Nagar, the consideration for which found mention in the books of accounts but the bank statement showing clearance of cheques upto July i.e., a period of six months made no reference to the cheque evidently received with respect to sale of the said shop. The Commissioner was of the view that this issue ought to have been examined;

(ix) the Assessing Officer had dropped penalty proceedings under Section 271(1)(c) after taking on record a single letter of the assessee.

10. Based on the aforesaid, the Commissioner formed an opinion that the assessment order required to be cancelled and accordingly, the Assessing Officer was directed to make a fresh assessment. In coming to the said conclusion, the Commissioner articulated the following reasons in his order:

> "I am not convinced with the submission of the assessee. The facts of the instant case are not identical to the facts of the cases on which reliance was placed by the counsel of the assessee. Moreover, there is absolutely no evidence that the Assessing Officer called for the books of accounts other than certain details recorded at page 2 of the order sheet. There is also no evidence whatsoever that the assessee produced the books of accounts as stated in the submission. It is evident that the Assessing Officer considered the offer of Rs 8 lakh from the Malviya Nagar project only that too without any basis and without any inquiry and application

> of mind on the other projects and other aspects of this case. In view of the various discrepancies pointed out above, passing an assessment order without proper verification of the issues that too without even examining the books of accounts is definitely erroneous and prejudicial to the interest of revenue."

11. Being aggrieved, the assessee preferred an appeal to the Tribunal. The Tribunal by the impugned judgment set aside the order of the Commissioner under Section 263 of the Act. While doing so, the Tribunal made the following observations and findings of fact:-

(i) that they had examined the assessment record on their own. From the record, it was revealed that the assessee had filed copious details covering various aspects of the matter. It noted that by a letter dated 27.12.2004 the assessee had given details regarding unsecured loans, taken by him; justification for claiming depreciation on car; investment in fixed deposit with Canara Bank; details of loan given to one Pradeep Arora; Reconciliation Statement in respect of the savings account with Canara Bank, Malviya Nagar Branch; details regarding the names and addresses of persons from whom total construction and consultancy receipts of Rs 75.61 lacs were received; and the explanation as to why no work-in-progress at the end of the year had been shown ;

(ii) reference to a letter dated 14.02.2005 wherein details with respect to Malviya Nagar property were given, in particular, cost and expenses incurred on the Malviya Nagar property, as also copies of sale deeds of two properties in the same locality were filed;

(iii) referred to letter dated 28.02.2005 which gave details with respect to property located at Gitanjali Enclave. Details with respect to Shop No 5 and 6 in the Malviya Nagar property and copies of relevant agreements as also sale deeds in respect of portions of said property which the assessee had been asked to submit. Details of salary expenses, accounting charges, vehicle maintenance account, entertainment expenses, telephone expenses etc. were also given;

(iv) the confirmation of unsecured loan in the earlier years taken from one Shri Jagdish Chander;

(v) in the very same letter dated 28.02.2005 details were also given regarding the construction and labour charges in the sum of Rs 52,77,094/- debited to the profit and loss account;

(vi) a chart was filed to demonstrate that the value of work-in-progress and the cost of construction was comparable to the valuation certificates. Reference was also made to a letter dated 22.03.2005 wherein the assessee had conceded that it would surrender an additional income of Rs 8 lacs with respect to the Malviya Nagar property in order to buy peace with the Department in lieu of the penalty proceedings being dropped;

(vii) it is also mentioned that the record contained notices issued under Section 131 of the Act in respect of various persons. The Tribunal also seems to have made the effort of going through the order sheet entries of

the Assessing Officer which demonstrated that details were sought from the persons summoned.

11.1 Based on the aforesaid, the Tribunal came to the conclusion that looking at the voluminous record filed with the Assessing Officer it could not be said that the books of accounts were not examined, when the assertion of the assessee was that they were produced before the Assessing Officer for examination; merely on the basis that there is no such reference of examination of books of accounts in the order sheet entries maintained by the Assessing Officer. The Tribunal also observed that a perusal of the summons issued under Section 131 by the Assessing Officer indicated that each one was required to furnish details and documents and that it is not the requirement under Section 131 that the Assessing Officer should record statements of persons who were summoned to give evidence or produce documentary evidence. The Tribunal also concluded that the assessee had furnished details with regard to properties located at Gitanjali Enclave as well as Defence Colony. In this regard, the Tribunal noted the contents of the assessee's letter dated 27.12.2004 and 28.02.2005 filed with the Assessing Officer. The Tribunal was, thus, of the view that the Assessing Officer had taken care to collect details and facts, and put them on the record; and hence it could not be said that the Assessing Officer's order was without basis. The Tribunal was of the view that having found the details satisfactory, the mere fact that what had been accepted by the Assessing Officer as

satisfactory did not find mention in the assessment order would not render the assessment order liable for a revision by the Commissioner in exercise of power under Section 263 of the Act.

11.2 The Tribunal was also of the view that the order of the Commissioner deserved to be set aside in view of the fact that the final order dated 18/19.01.2007 proceeded to set aside the assessment based on certain grounds which did not find mention in the initial notice dated 11.05.2006. The Tribunal observed that the Commissioner has mentioned as many as nine grounds in his order dated 18/19.01.2007 justifying the cancellation of the assessment order some of which had not been addressed in the initial notice. It was, thus, of the view that since several reasons have been adverted to in Paragraph 2 of the order of the Commissioner dated 18/19.01.2007 some of which did not find place in the initial notice dated 11.05.2006, it would be difficult to determine as to what role they played in the decision arrived at by the Commissioner. It observed that when an authority passes an order for reasons, some of which are valid and some invalid, it would be difficult to sustain the same, as the Court has no means to find out how much influence the invalid reasons wielded on the ultimate decision of the Commissioner.

12. Aggrieved by the impugned judgment of the Tribunal, the Revenue has preferred the present appeal before us. Mr Sanjeev

Sabharwal, Senior Standing Counsel for the Revenue has submitted that it is quite evident from the order of Revision passed by the Commissioner that the Assessing Officer had failed to make any enquiry and/or investigation with respect to many aspects of the assessee's business, in particular, with respect to the properties located at Gitanjali Enclave and Defence Colony. The learned counsel laid great stress on the discrepancies referred to in Paragraph 2 of the Commissioner's order dated 18/19.01.2007. It was learned counsel's submission that on this short ground alone the impugned judgment of the Tribunal ought to be reversed. He further submitted that the Tribunal's conclusion that the order of revision was bad in law in view of the fact that the initial notice dated 11.05.2006 referred to only four issues whereas the final order of revision dated 18/19.01.2007 referred to nine grounds is untenable in view of the fact that there is no requirement under Section 263 of the Act to issue a notice, as against a situation in which the Revenue seeks to exercise powers under Section 147 read with Section 148 of the Act, where a notice must necessarily precede initiation of proceedings under the Act. In support of his submission, reliance was placed on the judgments of the Supreme Court in the case of ***CIT, West Bengal II vs Electro House (1971) 82 ITR 824*** and ***Gita Devi Aggarwal vs CIT, West Bengal & Ors. (1970) 76 ITR 496 (SC)***. He further submitted that in view of the fact that there is no requirement of a notice being issued by the Commissioner in order to

initiate proceeding under Section 263 of the Act. All that an assessee can demand in terms of the said provision is an opportunity of being heard in consonance with the principles of natural justice with respect to these issues with which assessee was not confronted. He contended that even if such an opportunity was not granted to the assessee while the order-in-Revision was passed the same could be accorded to the assessee even at this stage i.e., by the Assessing Officer when he proceeds to make a fresh assessment.

13. In response, the learned counsel for the assessee Mr Amit Bhagat submitted that the impugned judgment deserves to be sustained for the reasons that the assessee had submitted the books of accounts for examination; he had filed each and every detail sought for by the Assessing Officer with respect to the queries raised in particular with respect to three property projects in issue i.e., the Malviya Nagar property and the properties located at Gitanjali Enclave and Defence Colony. He further submitted that the fact that the assessment order made no reference to the properties located at Gitanjali Enclave and Defence Colony or in respect of other issues which find reference in the Commissioner's order could not lead to the conclusion that no enquiry/investigation had been made by the Assessing Officer merely by virtue of the fact that there is no discussion in the assessment order. He contended that the record would show that there was application of mind by the Assessing Officer. He further contended that it is a general

practice adopted by Assessing Officers that when they accept an explanation in respect of a query raised during the course of scrutiny the same generally does not find a mention in the assessment order. He further submitted that as a matter of fact, the Commissioner in his notice dated 11.05.2006 had shown a concern with regard to four issues and in response, the assessee had filed written submissions with respect to the issues raised in the said notice. It was the learned counsel's assertion that no opportunity whatsoever was granted by the Commissioner with respect to other issues which form the basis of the order passed under Section 263 of the Act. The learned counsel submitted that in view of this fact situation, the order-in-Revision passed in breach of the principles of natural justice was bad in law and hence rightly set aside by the Tribunal.

14. Before we advert to the submissions made by the learned counsels appearing for the parties, it would be wise to recall the parameters and principles laid down by the Courts which govern the exercise power by the Commissioner under the provisions of Section 263 of the Act.

(i) The power is supervisory in nature, whereby the Commissioner can call for and examine the assessment records.

(ii) The Commissioner can revise the assessment order if the twin conditions provided in the Act are fulfilled, that is, that the assessment order is not only erroneous but is also prejudicial to

the interest of the Revenue. The fulfilment of both the conditions is an essential prerequisite. [See ***Malabar Industrial Co. Ltd vs CIT (2000) 243 ITR 83(SC)***]

(iii) An order is erroneous when it is contrary to law or proceeds on an incorrect assumption of facts or is in breach of principles of natural justice or is passed without application of mind, that is, is stereo-typed, in as much as, the Assessing Officer, accepts what is stated in the return of the assessee without making any enquiry called for in the circumstances of the case, that is, proceeds with 'undue haste'. [See ***Gee Vee Enterprises vs ACIT, Delhi-I & Ors. (1975) 99 ITR 375***]

(iv) The expression "prejudicial to the interest of the Revenue" while not to be confused with the loss of tax will certainly include an erroneous order which results in a person not paying tax which is lawfully payable to the Revenue. [See ***Malabar Industrial Co. Ltd.*** *(supra)*].

(v) Every loss of tax to the Revenue cannot be treated as being "prejudicial to the interest of the Revenue". For example, when the Assessing Officer takes recourse to one of the two courses possible in law or where there are two views possible and the Commissioner does not agree with the view taken by the Assessing Officer which has resulted in a loss. [See ***CIT vs Max India Ltd. (2007) 295 ITR 282 (SC)***]

(vi) There is no requirement of issuance of a notice before commencing proceedings under Section 263 of the Act. What is required is adherence to the principles of natural justice by granting to the assessee an opportunity of being heard before passing an order under Section 263. [See ***Electro House*** *(supra)*].

(vii) If the Assessing Officer acts in accordance with law his order cannot be termed as erroneous by the Commissioner, simply because according to him, the order should have been written 'more elaborately'. Recourse cannot be taken to Section 263 to substitute the view of the Assessing Officer with that of the Commissioner. [See ***CIT vs Gabriel India Ltd (1993) 203 ITR 108(Bom)***]

(viii) The exercise of statutory power under Section 263 of the Act is dependent on existence of objective facts ascertained from prima facie material on record. The evaluation of such material should show that tax which was lawfully exigible was not imposed. [See ***Gabriel India Ltd*** *(supra)*]

15. Let's examine the facts of the present case in the light of the aforesaid principles. From the facts obtained it is quite clear that after the assessee had filed his return on 31.10.2002, a notice under Section 143(2) of the Act was issued for the purposes of carrying out a scrutiny in respect of the return of income filed by the assessee. In the course of

scrutiny, as indicated in the impugned judgment of the Tribunal, several communications were addressed by the assessee to the Assessing Officer whereby, the information, details and documents sought for, were adverted to and filed. The Tribunal in order to satisfy itself, as to whether the Assessing Officer had sought for details and carried out an enquiry in respect of transactions which were entered into by the assessee in the course of his business, called for the assessment record and scrutinized the same. The Tribunal returned a finding of fact that the assessee had submitted copies of documents and details with regard to various matters, including, in particular, with respect to the properties at Malviya Nagar as well as those located at Gitanjali Enclave and Defence Colony. The issue that has been raised before us is that, since the assessment order adverted to only Malviya Nagar property and was silent with respect to the properties located at Gitanjali Enclave and Defence Colony; on this short ground alone the Revisional order of Commissioner ought to be sustained. It would be important to remind ourselves that while the supervisory power of Commissioner is wide, it cannot be invoked to substitute the view of the Assessing Officer. If upon a perusal of the record filed with the authorities below the Tribunal formed a view that there had been an enquiry which had not been conducted with 'undue haste' surely we would be slow to hold otherwise. More so when, this conclusion, the Tribunal had arrived at after examining the record which the assessee filed with the Assessing

Officer during the course of scrutiny. The point to be noted is that on a perusal of the record the Tribunal observed, by reference to a general practice in vogue, that merely because the assessment order did not refer to the queries raised during the course of the scrutiny and the response of the assessee thereto, it could not be said that there was no enquiry and hence the assessment was erroneous and prejudicial to the interest of the Revenue. This observation of the Tribunal, according to us, deserves due weight, as in its vast experience it would have come across several such orders. In almost similar situation the Division Bench of the Bombay High Court in ***Gabriel India Ltd*** *(supra)* made the following observation:-

> *"From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order, unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax*

Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion.....

..... We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. The Income-tax Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard."

(emphasis is ours)

16. The fact that a query was raised during the course of scrutiny which was satisfactorily answered by the assessee but did not get reflected in the assessment order, would not by itself lead to a conclusion that there was no enquiry with respect to transactions carried out by the assessee. The fact that there was an enquiry can also be demonstrated with the help of the material available on record with the Assessing Officer. The material, to which a reference has been made in the impugned judgment, would show that there was no 'undue haste' in examining the material prior to the passing of the assessment order dated 24.03.2005. At least four letters dated 27.04.2004, 22.02.2005, 28.02.2005 and 18.03.2005 were addressed by the assessee to the Assessing Officer giving details, documents and information pertaining

to various queries raised by the Assessing Officer. These have been examined by the Tribunal. We have no reason to believe that examination was less than exacting. Therefore, the conclusion of the Commissioner that there was "lack of proper" verification is unsustainable.

17. This brings us to another aspect of the matter, which is that even though the notice dated 11.05.2006 issued by the Commissioner before commencing the proceedings under Section 263 of the Act referred to four issues, the final order dated 18/19.01.2007 passed referred to nine issues, some of which obviously did not find mention in the earlier notice and hence resulted in the proceedings being vitiated as a result of the breach of the principles of natural justice.

17.1 As observed by us above, there is no requirement under Section 263 of the Act to issue a notice before embarking upon a revisionary proceedings. To that extent the submission of the learned counsel for the Revenue Mr Sanjeev Sabharwal has to be accepted. What is mandated under Section 263 of the Act is that once the Commissioner calls for and examines the record, pertaining to the assessee, and forms a prima facie view that the order passed by the Assessing Officer is both erroneous and prejudicial to the interest of the Revenue, he is obliged to afford an opportunity to the assessee before passing an order, to the prejudice of the assessee. In the instant case, the Commissioner sought

to accord such an opportunity to the assessee by putting him to notice as regards aspects which the Assessing Officer had failed to scrutinize. During the course of the revisionary proceedings this was conveyed to the assessee by way of a notice dated 11.05.2006. It is not disputed that in the order dated 18/19.01.2007 the Commissioner has referred to certain other issues which did not form part of the initial notice dated 11.05.2006. To our minds it was always open to the Commissioner to put such issues/discrepancies, found by him based on material on record, to the assessee. It is to be noted, however, that the learned counsel for the assessee vehemently denied that the assessee had been given any opportunity to meet issues other than those to which reference has been made in the Commissioner's notice dated 11.05.2006. For this purpose, the learned counsel for the assessee sought to place reliance on the impugned judgment passed by the Tribunal, wherein this aspect of the matter has been discussed elaborately. In order to satisfy ourselves we called upon learned counsel for the Revenue Mr Sanjeev Sabharwal to place on record any communication, order or any other document which would show that the assessee had been given an opportunity to deal with those aspects which did not form part of the initial notice dated 11.05.2006, but were taken into account by the Commissioner while passing his order dated 18/19.01.2007. In this regard, the learned counsel for the Revenue placed on record order sheet entries of the proceedings conducted by the Commissioner. We have already

extracted the order sheet entries commencing from 15.06.2005 to 28.06.2006. A perusal of those entries would clearly demonstrate that there is nothing on record which would show that the assessee was given an opportunity to respond to these discrepancies which formed part of the order-in-Revision dated 18/19.01.2007 but were not part of notice dated 11.05.2006. This was put to the learned counsel for the Revenue, who in response fairly conceded that there was nothing on record which would establish the contrary. It was, however, urged by the learned counsel for the Revenue Mr Sanjeev Sabharwal that the assessee would have his opportunity to give satisfactory replies to the discrepancies raised in the Revisional Order before the Assessing Officer and that such an opportunity would meet the requirements of the provision. We are afraid that that is not the position envisaged in law. If one were to permit correction of such a grievous error in the manner suggested it would tantamount to, in a manner of speaking, closing the stable doors after the horse has bolted. The assessments, unless reopened by paying faithful obeisance to statutory provisions and conditionalities provided therein, attain finality on their conclusion. The provisions of Section 263 mandate that an order for enhancing, or modifying the assessment, or cancelling the assessment and directing a fresh assessment can only be passed after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as is deemed necessary. The threshold condition for reopening

the assessment is that before passing an order an opportunity has to be granted to the assessee and, such an opportunity granted to the assessee is a necessary concomitant of the enquiry the Commissioner is required to conduct to come to a conclusion that an order for either an enhancement or modification of the assessment or, as in the present case, an order for cancellation of the assessment is called for, with a direction to Assessing Officer to make a fresh assessment. This defect cannot be cured by first reopening the assessment and then granting an opportunity to the assessee to respond to the issues raised before Assessing Officer during the course of fresh assessment proceedings. To buttress his submission the learned counsel for the Revenue has relied upon the judgment of the Supreme Court in the case of ***Rampyari Devi Saraogi vs CIT, West Bengal & Ors. (1968) 67 ITR 84***. This is a case in which, the order issued by the Commissioner, itself revealed that the assessment was being reopened based on an additional supporting material. The Supreme Court in such fact situation thus ruled that non supply of additional supporting material would not effect the basic issue of assessment being carried out without adequate investigation. In the instant case the Order-in-Revision refers to issues and discrepancies which did not find mention in the initial notice dated 11.05.2006 and not to additional or supporting material as in the case of ***Rampyari Devi*** *(supra)*. Therefore, to suggest that it would be sufficient compliance of the provisions of Section 263 of the Act, if an opportunity to respond to

the discrepancies mentioned in the Order-in-Revision is given to the assessee in reassessment proceedings before the Assessing Officer, is according to us is completely untenable. It is the requirement of Section 263 of the Act that the assessee must have an opportunity of being heard in respect of those errors which the Commissioner proposes to revise. To accord an opportunity after setting aside the assessment order, would in our view not meet the mandate the Section 263 of the Act. If such an interpretation is accepted it would make light of the finality accorded to an assessment order which cannot be reopened unless due adherence is made to the conditionalities incorporated in the provisions of the Act in respect of such powers vested in the Revenue.

18. In view of our discussion above, we are of the opinion that impugned judgment passed by the Tribunal deserves to be sustained. The findings returned by the Tribunal are pure findings of fact. No substantial question of law has arisen for our consideration. Resultantly, the appeal is dismissed. No order as to cost.

RAJIV SHAKDHER, J.

May 14, 2009 **VIKRAMAJIT SEN, J.**
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