Del HC-Mere Lack Of Inquiry By AO Not Sufficient For S. 263 Revision

CIT vs. Vikas Polymers (Delhi High Court)

The CIT passed an order u/s 263 taking the view that as the AO had not inquired into the genuineness of capital investments made by the partners, the assessment order was erroneous and prejudicial to the interests of the revenue. Though the assessee submitted material before the CIT as to why the capital investments were genuine, the CIT **did not deal with the submissions but instead directed the AO to look into the matter** and reframe the assessment. On appeal by the assessee, the Tribunal struck down the revision order. On appeal by the department, HELD dismissing the appeal:

(i) Power u/s 263 cannot be exercised unless both conditions are satisfied i.e. the order is (i) erroneous and (ii) prejudicial to the interest of the revenue. There is a fine though subtle **distinction** between "**lack of inquiry**" and "**inadequate inquiry**". **It is only in cases of "lack of inquiry" that revisional powers u/s 263 can be exercised**. Further, while lack of enquiry by the AO may render the assessment order "erroneous" **it is not necessarily "prejudicial to the interests of the revenue"**. The CIT must deal with the submissions of the assessee and give reasons as to how the order is erroneous and prejudicial to the interests of the revenue. **A bare assertion is not sufficient**. S. 263 proceedings cannot be initiated with a view to starting **fishing and roving** inquiries.

(ii) On facts, the CIT had revised the assessment on the basis that the AO had not made proper inquiry. Assuming this was so, **it only meant that the order was "erroneous" but it did not follow that the order was also "prejudicial"**. The CIT ought to have dealt with the submissions of the assessee and recorded a finding on how the failure of the AO was prejudicial to the interests of the revenue instead of merely directing the AO to look into the matter.

UNREPORTED

IN THE HIGH COURT OF DELHI AT NEW DELHI + ITR 3/1991 CIT.....
Appellant Through: Mr. Sanjeev Sabharwal, Advocate versus M/s. Vikas Polymers...
Respondent Through: Mr. Prakash Kumar, Advocate % Date of Reserve: July 26, 2010
Date of Decision : August 16, 2010

CORAM: HON'BLE MR. JUSTICE A.K. SIKRI HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. 3. Whether judgment should be reported in Digest? **: REVA KHETRAPAL, J.**

1. By this reference under Section 256(1) of the Income-tax Act, 1961 ("the Act"), the Income-tax Appellate Tribunal ("the Tribunal") has referred the following question of law at the instance of the revenue:-

> "Whether on the facts and in the circumstances of the case, the ITAT was correct both on facts and in law for holding that the provisions of Section

263 of the I.T. Act have not been rightly invoked in this case for the assessment year 1982-83?"

2. This reference relates to the Assessment Year 1982-83. Assessment for the aforesaid year was completed by the ITO on 19.09.1984 on a total income of Rs.90, 031/- as against the returned income of Rs.69, 500/-. On going through the assessment records of the assessee, the Commissioner of Income-tax served a notice on the assessee dated 17.03.1987, stating therein that while completing the assessment the Income-tax Officer did not inquire into the genuineness of the capital investments of the two partners, Smt. Ratni Dvi and Shri Sagar Mal Bardie for the sums of Rs.49,000/- and Rs.40,000/- respectively, and unsecured loans of Rs.98,500/- taken from M/s. Stutee Chit & Finance (P) Ltd. The Commissioner of Income-tax also observed in the second para of the said notice that no examination of accounts in respect of manufacturing account was done by the ITO. It was further observed that the assessee had shown the previous year ending on 30.06.1980, but for assessment year 1982-83, the account books appeared to have been closed on 30th March 1982. It was further observed:

"Because of the above reasons, the assessment made by the I.T.O. appears to be erroneous as well as prejudicial to the interest of the revenue. I, therefore, propose to set-aside the above assessment."

3. The assessee furnished reply to the aforesaid show-cause notice vide its detailed communication dated 21st March, 1987 justifying the order passed by the Income-tax Officer and challenging the initiation of proceedings under Section 263 of the Act itself. The assessee, *inter alia*, pointed out that in respect of Smt. Ratni Devi the deposit was of Rs.29, 000/- and not of Rs.49,000/-. Both the partners were assesses and the amounts invested by them were invested after withdrawal from their bank accounts. The investment of Rs.29,000/- was explained to the Income-tax Officer as follows:-

DATE	AMOUNT	SOURCE
18.7.1980	**11,000/-**	**This account was received back from M/s. Budh Mal Bhanwar Lal with whom the assessee had deposit in earlier years. A copy of confirmation letter is enclosed.**
10.4.1981	**18,000/-**	**This amount was received by the assessee from sale of jewellery. A photocopy of the bill of jewellery is enclosed herewith.**

4. The assessee further submitted in reply to the show-cause notice that Smt. Ratni Devi is an existing assessee and her assessment had been completed for the relevant year after verification of the investment and income made by her in her income-tax return. Her income-tax file number was mentioned as 470-R/SW1 (5) New Delhi. As regards Sagar Mal Bardie (HUF), it was pointed out that he too was assessed to income-tax with the Income-tax Officer Distt. VII, New Delhi under GIR No.5082-S. The amount invested by

him was withdrawn from his bank account. Regarding the deposit from M/s. Stutee Chit & Finance (P) Ltd. amounting to Rs.98, 500/-, it was submitted that the said amount was withdrawn from the said chit fund. The assessee firm had subscribed the chit of the above company and the same was received on account of bid in the auction held on 24.01.1981. It was explained that a cheque of Rs.1, 30,000/- was received in favour of the firm which was drawn on the Bank of India, Tayaburi Industrial Area, New Delhi. A photocopy of the pass book of the said Chit Fund Company was placed before him. It was further stated that M/s. Stutee Chit & Finance (P) Ltd. is assessed to income-tax with Income-tax Officer, Company Circle XXI under GIR No.379-S. A photocopy of the assessment order for assessment year 1982-83 was placed on record. Regarding the discrepancy for the date of closing of the accounting year, it was explained in detail. Notwithstanding, the Commissioner of Income-Tax by his order dated 27.03.1987 held that the assessment order passed by the ITO was erroneous and prejudicial to the interest of the revenue and that the same was set aside. A direction was given to the Income-tax Officer to re-frame the assessment after examining the aforesaid issues.

4. Against the order of the Commissioner, the assessee went in appeal to the Tribunal. The Tribunal, by an elaborate order dated 12th February, 2009, came to the conclusion that as the Commissioner had failed to substantiate as to how the order passed by the Income-tax Officer was prejudicial to the interest of the revenue and that too without dealing with the explanation of the assessee furnished before him, the action of the Commissioner could not be supported. The Tribunal was of the opinion that even assuming for the sake of argument that the Income-tax Officer did not apply his mind, the Commissioner did not do any better by not dealing with the explanations furnished by the assessee, particularly in respect of the deposits, two of the partners and third of the chit fund and as such, the order passed by him was held to be not tenable in law. Aggrieved by the order of the Tribunal, the Commissioner has come to this Court by way of reference of the question set out above under Section 256(1) of the Act. 6. We have heard the learned counsel for the parties and perused the records. Since the reference relates to the invocation of the provision of Section 263 of the IT Act by the Commissioner of Income-Tax, it is deemed expedient at this stage to set out the provisions of Section 263, so far as relevant:-

> *“263. (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.*

Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section, -

(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include –

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) (ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;

(b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) (c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub- section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed. ……."

7. The learned counsel for the assessee submitted that every aspect of the matter was dealt with by the Income-tax Officer, though no specific mention was made by him in the assessment order and that indeed it was not incumbent upon the Income-tax Officer to pass a detailed order. He further submitted that though the Commissioner had branded the order as "erroneous", but as to how the same is prejudicial to the interest of the revenue is not projected by him. The Commissioner had in fact not met or dealt with a single explanation given by the assessee. The Commissioner had only stated as under:-

> *"As regards the assessee's contention that the capital investment made by the partners has duly been explained in the respective assessments of the partners and that the partners are existing assessees and their assessments for the relevant assessment year have already been made. I find from the records that no such information was furnished by the assessee at the time of assessment. Similar is the position regarding unsecured loans of Rs.98, 500/- from M/s. Stutee Chit & Finance Private Ltd. The assessee has not filed any paper regarding confirmation of this loan at the time of assessment. I also find from the records that the manufacturing/trading results as disclosed by the assessee has not been examined by the ITO at all. During the year under assessment, the assessee has made purchases of Rs.57, 73,086/78. Power & electricity expenses have been shown at Rs.67, 752/-. The assessee has paid interest of Rs.52,878/-. The sales have been shown at Rs.56, 78,535/-. The trading results shown this year has not been compared with the trading results of the previous year. The expenses shown during the year do not compare favourably with the earlier year*

vis-à-vis turnover. The aspect has not been examined. No details of purchases/sales have been obtained nor the genuineness of purchases test checked or verified. Infact, no examination of manufacturing and trading & profit & loss a/c has been made by the ITO which is quite apparent from the assessment."

8. The learned counsel for the revenue, on the other hand, fully supported the order of the Commissioner and submitted that both the pre-requisites required for assuming jurisdiction under Section 263 of the Act were satisfied in the instant case, i.e.,

(i) that there is an error in the order of the Income-tax Officer, and
(ii) (ii) that the error is prejudicial to the interest of the revenue.

9. Before we undertake the exercise of answering the reference, it is deemed expedient to reiterate the governing principles laid down by Courts with regard to the exercise of power by the Commissioner under the provisions of Section 263 of the Act. The power of *suo moto revision* exercisable by the Commissioner is undoubtedly supervisory in nature. The opening words of Section 263 empowers the Commissioner to call for and examine the record of any proceedings under the Act. A bare reading of Section 263 also makes it clear that the Commissioner has to be satisfied of twin conditions, namely,

(i) the order of the assessing officer sought to be revised is erroneous; and
(ii) (ii) it is prejudicial to the interest of the revenue. If one of them is absent – if the order of the Income-tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but it is prejudicial to the revenue – recourse cannot be had to Section 263(1) of the Act [See ***Malabar Industrial Co. Ltd. vs. CIT, (2000) 243 ITR 83 (SC)***].

10. As regards the scope and ambit of the expression "erroneous", a Division Bench of the Bombay High Court in ***CIT vs. Gabriel India Ltd., (1993) 203 ITR 108 (Bombay),*** held with reference to Black's Law Dictionary that an "erroneous judgment" means "one rendered according to course and practice of Court, but contrary to law, upon mistaken view of law; or upon erroneous application of legal principles" and thus it is clear that an order cannot be terms 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 differently or more elaborately. The Section does not visualize the substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order unless the decision is not in accordance with law.

11. Then again, any and every erroneous order cannot be the subject matter of revision because the second requirement also must be fulfilled. There must be material on record to show that tax which was lawfully exigible has not been imposed [See ***Gabriel India Ltd. (supra)***]. However, the expression "prejudicial to the interest of the revenue", as held by the Supreme Court in the ***Malabar Industrial Co. Ltd.'s*** case, is not an expression of art and is not defined in the Act and, therefore, must be understood in its ordinary meaning. It is of wide import and is not confined to the loss of tax [see ***Dawjee***

Dadabhoy & Co. (supra), CIT vs. T. Narayana Pai (1975) 98 ITR 422 (KAR), CIT vs. Gabriel India Ltd. (supra) and ***CIT vs. Smt. Minalben S. Parikh, (1995) 215 ITR 81 (Guj)***].

12. At the same time, the words "prejudicial to the interest of the revenue", as observed in ***Dawjee Dadabhoy and Co. vs. S.P. Jain, (1957) 311 ITR 872 (Calcutta)***, can only mean that "the orders of assessment challenged are such as are not in accordance with law, in consequence whereof the lawful revenue due to the State has not been realized or cannot be realized." Thus, the Commissioner's exercise of revisional jurisdiction under the provisions of Section 263 cannot be based on whims or caprice. It is trite law that it is a quasi judicial power hedged in with limitation and not an unbridled and unchartered arbitrary power. The exercise of the power is limited to cases where the Commissioner on examining the records comes to the conclusion that the earlier finding of the Income-tax Officer was erroneous and prejudicial to the interest of the revenue and that fresh determination of the case is warranted. There must be material to justify the Commissioner's finding that the order of the assessment was erroneous insofar as it was prejudicial to the interest of the revenue.

13. It is also trite that there is a fine though subtle distinction between "lack of inquiry" and "inadequate inquiry". It is only in cases of "lack of inquiry" that the Commissioner is empowered to exercise his revisional powers by calling for and examining the records of any proceedings under the Act and passing orders thereon.

In ***Gabriel India Ltd. (supra)***, it was expressly observed:-

> *"The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity [see* ***Parashuram Pottery Works Co. Ltd. vs. ITO, (1977) 106 ITR 1 (SC)****].*
>
> It was further observed as under:-
>
> *"From the aforesaid definitions as 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 visualize 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 visualized 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 conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion.

x x x x

There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.

x x x x

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……..."

14. From the above, in our considered opinion, it is clear that in the ultimate analysis it is a pre-requisite that the Commissioner must give reasons to justify the exercise of *suo moto* revisional powers by him to re-open a concluded assessment. A bare reiteration by him that the order of the Income-tax Officer is erroneous insofar as it is prejudicial to the interest of the revenue, will not suffice. The exercise of the power being quasi-judicial in nature, the reasons must be such as to show that the enhancement or modification of the assessment or cancellation of the assessment or directions issued for a fresh assessment were called for, and must irresistibly lead to the conclusion that the order of the Income-tax Officer was not only erroneous but was prejudicial to the interest of the revenue. Thus, while the Income-tax Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is

incumbent upon the Commissioner not to exercise his *suo moto* revisional powers unless supported by adequate reasons for doing so.

15. Applying the aforesaid law to the facts of the present case, we are of the view that the exercise of revisional power by the Commissioner in the instant case was uncalled for and unjustified. It was more in the nature of roving and fishing enquiry. The Commissioner has proceeded on the assumption that no such information, as was furnished to him, was furnished at the time of assessment. The Commissioner has mentioned that the Income-tax officer has not examined the cash credits of the partners or deposits of Chit Fund. Assuming this to be so (though there does not appear to be any justification for the aforesaid observation), this may make the order erroneous, but how it is prejudicial to the interest of the revenue has not been stated by the Commissioner as he did not deal with the explanation given by the assessee in the course of Section 263 proceedings.

16. In ***CIT vs. Kashi Nath & Co.*** reported in ***170 ITR 28 (Allahabad)***,

it was held as under:-

> *"It will be seen from the above order that the Commissioner did not examine the various cash credits said to be appearing in the names of different ladies which were said to have escaped the attention of the Income-tax Officer. He only complained of the order of the Income-tax officer for not examining the details of the credits appearing in various names. What those details required to be examined were have not been set out. There is thus absolutely no reason in support of the conclusion of the Commissioner that the assessment order was erroneous and prejudicial to the interests of the Revenue.*
>
> *The power of the Commissioner under section 263 is quasi-judicial in character. He must give reasons in support of his conclusion that the assessment order is erroneous in so far as it is prejudicial to the interests of the Revenue. If he does not give reasons, the order would be vitiated. This was the view taken by this court in the case of* ***J.P. Srivastava & Sons Ltd. vs. Commissioner of Income-tax (1978) 111 ITR 326 (All)*** *and* ***Commissioner of Income-tax vs. Sunder Lal (1974) 96 ITR 310 (All).*** *In the instant case, since the Commissioner has not applied his mind to the relevant material on record and has not given reasons for his conclusions that the assessment order was prejudicial to the interest of the Revenue, the Tribunal was justified in reversing that order."*

17. Similar view was expressed by the Punjab & Haryana High Court in ***CIT vs. R.K. Metal Works*** reported in ***112 ITR 445 (P&H)*** as follows:-

> *"……..When the assessee filed a detailed written statement before him, the Commissioner did not deal with any of the points raised in the statement. He thought that the best course in the* ***ITR 3/1991 Page 15 of 17*** *circumstances was to remand the matter to the Income-tax Officer for consideration of the points raised in the assessee's written statement. That certainly was not the proper course to be adopted by him. It was necessary for the Commissioner to state in what manner he considered that the order of the Income-tax Officer was erroneous and prejudicial to the interests of the revenue and what the basis was for such a conclusion. After indicating his reasons for such a conclusion, it would certainly have been open to him to remand the matter to the Income-tax Officer for such other investigation or enquiry as might be necessary ……."*

18. We are thus of the opinion that the provisions of Section 263 of the Act, when read as a composite whole make it incumbent upon the Commissioner before exercising revisional powers to: (i) call for and examine the record, and (ii) give the assessee an opportunity of being heard and thereafter to make or cause to be made such enquiry as he deems necessary. It is only on fulfillment of these twin conditions that the Commissioner may pass an order exercising his power of revision. Minutely examined, the provisions of the Section envisage that the Commissioner may call for the records and if he *prima facie* considers that any order passed therein by the assessing officer is erroneous insofar as it is prejudicial to the interest of the revenue, he may **after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify.** The twin requirement of the Section is manifestly for a purpose. Merely because the Commissioner considers on examination of the record that the order have been erroneously passed so as to prejudice the interest of the revenue will not suffice. The assessee must be called, his explanation sought for and examined by the Commissioner, and thereafter if the Commissioner still feels that the order is erroneous and prejudicial to the interest of the revenue, the Commissioner may pass revisional orders. If, on the other hand, the Commissioner is satisfied, after hearing the assessee, that the orders are not erroneous and prejudicial to the interest of the revenue, he may choose not to exercise his power of revision. This is for the reason that if a query is raised during the course of scrutiny by the assessing officer, which was answered to the satisfaction of the assessing officer, but neither the query nor the answer were reflected in the assessment order, this would not by itself lead to the conclusion that the order of the assessing officer called for interference and revision. In the instant case, for example, the Commissioner has observed in the order passed by him that the assessee has not filed certain documents on the record at the time of assessment. Assuming it to be so, in our opinion, this does not justify the conclusion arrived at by the Commissioner that the assessing officer had shirked his responsibility of examining and investigating the case. More so, in view of the fact that the assessee explained that the capital investment made by the partners, which had been called into question by the Commissioner, was duly reflected in the respective assessments of the partners who were income-tax assessees and the unsecured loan taken from M/s. Stutee Chit & Finance (P) Ltd. was duly reflected in the assessment order of

the said Chit Fund which was also an assessee. 19. In view of the aforesaid, the reference is answered in the affirmative, i.e., in favour of the assessee and against the revenue.

REVA KHETRAPAL (JUDGE) A.K. SIKRI (JUDGE)
August 16, 2010

HIGH COURT OF DELHI AT NEW DELHI Judgment Reserved on: 5th August, 2010 % Judgment Pronounced on: 13th September, 2010 + ITA 94/2010 COMMISSIONER OF INCOME TAX DELHI-IV ..... Appellant Through Mr.Sanjeev Sabharwal, Advocate versus INTERNATIONAL TRAVEL HOUSE LTD. ..... Respondent Through Mr.Ajay Vohra and Ms.Kavita Jha, Advocates
CORAM: HON'BLE THE CHIEF JUSTICE HON'BLE MR. JUSTICE MANMOHAN

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

DIPAK MISRA, CJ The present appeal preferred under Section 260A of the Income Tax Act, 1961 (for brevity „the Act) is directed against the order dated 19th November, 2008 in ITA No.2113/Del/2008 pertaining to the assessment year 2003-04 and has been admitted on the following substantial question of law:

> "Whether the Income Tax Appellate Tribunal was correct in law in cancelling the order under Section 263 of the Income Tax Act, 1961 passed by the Commissioner of Income Tax?"

2. The facts which are requisite to be stated for adjudication of the appeal are that the assessee filed its return on 28th November, 2003 declaring income of Rs.3, 37,35,806/- and long term capital gain of Rs.7, 788/-. The return filed by the assessee was processed under Section 143(1) of the Act on 28th June, 2004 and the return was revised on 31st March, 2005, after reducing its income by Rs.20,19,111/-, declaring income at Rs.3,17,16,695/-. A notice under Section 143(2) of the Act was issued on 8th October 2004. The assessee company, a travel agent and tour operator, incurred expenditure of Rs.4, 02,421/- on foreign travel and the assessee submitted a letter dated 20th January, 2006 submitting the details of foreign travelling undertaken. The assessing officer came to hold that the assessee had not filed any details which would confirm the fact that it had obtained business in result of the above foreign travelling and, accordingly, opined that the expenditure would not come within the exemption provisions. The assessing officer disallowed 50%, i.e., Rs.2, 01,210/- and added the same to the total income of the assessee. After so assessing, the assessing officer charged interest under Sections 234B, 234C and 234D and directed initiation of penalty proceeding under Section 271(1)(C) of the Act for concealment of income or furnishing inaccurate particulars of income.

3. After the assessment order was passed, the Commissioner of Income Tax examined the record and noticed that the assessment order was prima facie erroneous and prejudicial to the interests of the revenue and accordingly, issued show cause notice under Section 263 of the Act. The assessee filed its show cause / reply. It was contended by the assessee that the assessee had merely claimed credit of TDS; that the assessee had booked tickets in various airlines for its customers for which it received commission from the airlines @ 7% on international air tickets and 5% on domestic air tickets purchased; that the assessee received performance linked bonus and overriding commission on sale of air tickets; that a part of the commission is passed on to the customers by way of discounts and the net commission was shown in the books of accounts and offered to tax by the assessee; and that the assessment made under Section 143 (3) of the Act was not erroneous and prejudicial to the interests of the revenue so as to attract any action under Section 263 of the Act. The Commissioner came to hold that as per the TDS certificate, the total amount credited was Rs.27, 46,18,000/-. However, in the P&L account, the assessee had credited only Rs.11, 93,39,485/- and that had led to a mistake committed by the assessing officer which had eventually resulted in underassessment of income to the extent of Rs.15, 52,78,515/- for the assessment year 2003-04. The CIT had opined that in order to take a final view on the issue, further examination of books of accounts would be necessary which can be conducted by the assessing officer. Eventually, he set aside the assessment on the said limited point and directed the assessing officer to decide the claim of the assessee company for regarding the payment of commission passed on to the customers by way of discounts / handling charges and to verify the net commission transferred to P&L account afresh as per law and after giving reasonable opportunity to the assessee company of being heard.

4. Being dissatisfied with the aforesaid order, the assessee preferred an appeal before the tribunal. It was contended before the tribunal that the assessee had explained why the commission of Rs.14, 99,38,574.64 received from air lines should not be added to the income of the assessee as a part of the commission was passed on to the customers by the assessee by way of discounts and the net commission income is offered to tax. During the assessment year, the assessee earned commission of Rs.24,92,50,085.31 on the sale of air tickets and out of the said amount, Rs.14,99,38,574.64 was passed on to the customers by way of discounts and the rest of the amount was offered for tax. The assessee also urged that there are two ways of depicting the commission in profit and loss account, namely, crediting the gross income and claiming deduction of the commission passed on to the customers by way of discounts or crediting the net income after netting of the discount from the gross commission income as in the assessee case and the assessee could adopt any of the methods.

5. The tribunal posed the question whether the gross commission income is accounted for under both the methods. The tribunal opined that the only difference is that in one case, the gross income is credited to the profit and loss account whereas the net income is credited in the other and the tax effect under both the methods is the same because the net commission income is chargeable to tax in both the cases. As is evident from the order of the tribunal, no addition to the income of the assessee can be made merely because of the difference in the accounting treatment of the commission in the books of the accounts of

the assessee as both the accounting systems are acceptable. The assessing officer had duly applied his mind and was satisfied with the explanation offered by the assessee and did not make any addition in that regard. The assessing officer had not incorporated the facts in detail in the order but that would not mean that there had been no application of mind. The tribunal further took note of the fact that the details of tax deducted at source during the financial year had been shown. The income that was shown as commission income was reflected in detail in the show cause and in the books of accounts. The tribunal has referred to the same in detail by referring to the paper book that was filed before it and, after adverting to the facts and the law in the field, came to hold that the revenue had not been able to point out any defect in the accounting system followed by the assessee in respect of the commission received by it being shown in the books of accounts. After so holding, the tribunal expressed the view as follows:

> "22. In view of the above facts, we have come to a conclusion that there is no defect in the presentation of audited accounts and it does not effect the taxation of commission income, hence, the A.O. has rightly subjected the assessee to tax in the original assessment on the gross commission income after reducing there from the amount passed on to the customers in terms of the agreement and, therefore, there is no error in the assessment completed under section 143(3) of the Act nor there can be any prejudice caused to the Revenue as the assessee has been subjected to taxation in respect of net amount of commission earned during the relevant assessment year. The assessment order passed by the A.O. was after proper application of mind and the A.O. considered the details and the explanation furnished by the assessee and, therefore, the order passed by the A.O. under section 143(3) of the Act is neither erroneous nor prejudicial to the interests of Revenue.
>
> 23. Consequently, the invoking of jurisdiction under section 263 of the Act by the Commissioner of Income Tax for revising the return without recording a specific finding regarding the extent to which the order passed by the A.O. was prejudicial to the interest of Revenue and rather asking the A.O. to conduct further inquiry to verify the net commission transferred to P&L Account afresh when the A.O. had already examined this aspect merely amounted to change of opinion which is not permissible under section 263 of the Act and, hence, the order passed by the Commissioner of Income Tax under section 263 of the Act requires to be cancelled. Accordingly the order passed by the Commissioner of Income Tax under section 263 of the Act is hereby cancelled and the grounds of appeal taken by the assessee stand allowed."

6. We have heard Mr.Sanjeev Sabharwal, learned counsel for the appellant, and Mr.Ajay Vohra and Ms.Kavita Jha, learned counsel for the respondent.

7. Mr.Sabharwal, learned counsel for the appellant, has submitted that the tribunal was not justified in dislodging the order passed by the Commissioner of Income Tax under Section 263 of the Act as the order passed by the assessing officer was erroneous and prejudicial to the interests of the revenue. The learned counsel would submit that the analysis made by the CIT should not have been faulted by the tribunal.
8. Mr.Vohra, learned counsel for the assessee, per-contra, contended that the CIT has travelled beyond the issue raised in the notice which was not permissible. To support the said contention, he has placed reliance on the decisions rendered in ***Commissioner of Customs v. Toyo Engineering India Ltd.*** (2006) 7 SCC 592 (SC), ***Commissioner of Income Tax v.Jagadhiri Electric Supply & Industrial Co***. 140 ITR 490 (P&H), ***CIT v. Shri Ashish Rajpal*** 180 Taxman 623 (Del), ***Commissioner of Income Tax v. Contimeters Electricals (P) Limited*** 178 Taxman 422 (Del), ***CIT v. Gulmohar Finance Ltd.*** 170 Taxman 483 (Del.) and ***CIT v. R.G. Umaranee*** 262 ITR 507 (Mad).

9. It is also canvassed by him that where the assessing officer passed an order after conducting necessary inquiry and on due application of mind, the CIT could not assume jurisdiction to revise such an order simply because the CIT wanted inquiries to be conducted in a particular manner or the CIT was of the opinion that some or more inquiries needed to be conducted. To bolster the said submission, he pressed into service the decisions in ***Malabar Industrial Co. Ltd. v. CIT*** 243 ITR 83 (SC), ***Paul Mathew & Sons v. CIT*** 263 ITR 101 (Ker.), ***CIT v. Gabriel India Ltd.*** 203 ITR 108 (Bom), ***CIT v. Arvind Jewellers*** 259 ITR 502 (Guj.), ***Sun Beam Auto Limited*** (2009) TOIL-552-HC-Del-IT, ***CIT v. Ratlam Coal Ash Co.*** 171 ITR 141 (MP), ***CIT v. Ganpat Ram Bishonoi*** 152 Taxman 242 (Raj), ***CIT v. Mehrotra Brothers*** 270 ITR 157 (MP) and ***CIT v. Associated Food Products (P) Ltd.*** 280 ITR 377 (MP).

10. The learned counsel has further canvassed that the order passed by the tribunal cannot be found fault with because all aspects have been gone into in detail before the order passed by the CIT is set aside and, therefore, no substantial question of law arises.
11. First, we shall advert to the fact whether the Commissioner could have exercised jurisdiction under Section 263 of the Act because he was of the opinion that some or more inquiries needed to be conducted. In this context, we may refer with profit to the decision in ***Malabar Industrial Co. Ltd. v. Commissioner of Income Tax*** (supra) where, after referring to Section 263 of the Act, their Lordships have opined thus:

> "A bare reading of this provision makes it clear that the prerequisite to the exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income-tax Officer is erroneous in so far as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i) the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent - if the order of the Income-tax Officer is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue - recourse cannot be had to section 263(1) of the Act.

> 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.
>
> The phrase "prejudicial to the interests of the Revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in *Dawjee Dadabhoy & Co. v. S.P. Jain & Anr*. [1957] 31 ITR 872, the High Court of Karnataka in *CIT v. T. Narayana Pai* [1975] 98 ITR 422, the High Court of Bombay in *CIT v. Gabriel India Ltd.* [1993] 203 ITR 108 and the High Court of Gujarat in *CIT v. Smt. Minalben S. Parikh* [1995] 215 ITR 81 treated loss of tax as prejudicial to the interests of the Revenue."

After so stating, their Lordships proceeded to hold as under:

> "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 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 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. *Rampyari Devi Saraogi v. CIT* [1968] 67 ITR 84(SC) and in *Smt. Tara Devi Aggarwal v. CIT* [1973] 88 ITR 323 (SC)."

In the said case, their Lordships took note of the fact that the Income Tax Officer had failed to apply his mind to the case in its entire perspective and, hence, the order passed by him was erroneous.

12. In ***Mehrotra Brothers*** (supra), the High Court gave the stamp of approval to the order of the tribunal which, after relying on ***CIT v. Ratlam Coal Ash Co.*** [1988] 171 ITR 141, had held that when the Income Tax Officer considered the records before him and completed the assessment after considering the evidence filed and after his satisfaction about the genuineness of cash credits, the order of revision under Section 263 on the vague ground that the assessing officer did not make proper enquiry was not valid.

13. It has to be kept in mind that while exercising power under Section 263 of the Act, the Commissioner has to be satisfied that the order is prejudicial to the interest of the revenue and there are materials available on record which require the Commissioner to satisfy him in a prima facie manner that the order is not only prejudicial to the interest of the revenue but also erroneous in nature. In the absence of any of the factors being satisfied, he does not assume jurisdiction to initiate a suo motu power of revision. The exercise of such a power is dependent on the conditions precedent being satisfied. The Commissioner does not have unfettered power to initiate proceeding by revision, re-examining the matter and directing fresh on his own whim for change or having a different view. He has been conferred with a quasi-judicial power and the same is hedged with limitation and, therefore, it has to be exercised within the parameters of the provision. When the Commissioner is himself not able to form an opinion, he cannot direct another inquiry by the assessing officer under Section 263 of the Act. In this regard, we may profitably reproduce a passage from ***Associated Food Products P. Ltd.*** (supra):

> "10. In view of the aforesaid pronouncement of law and taking into consideration the language employed under section 263 of the Act, it is clear as crystal that before exercise of powers two requisites are imperative to be present. In the absence of such foundation exercise of a suo motu power is impermissible. It should not be presumed that initiation of power under suo motu revision is merely an administrative act. It is an act of a quasi-judicial authority and based on formation of an opinion with regard to existence of adequate material to satisfy that the decision taken by the Assessing Officer is erroneous as well as prejudicial to the interests of the Revenue. The concept of "prejudicial to the interests of the Revenue" has to be correctly and soundly understood. It precisely means an order which has not been passed in consonance with the principles of law which has in ultimate eventuate affected realisation of lawful revenue either by the State has not been realised or it has gone beyond realisation. These two basic ingredients have to be satisfied as sine qua non for exercise of such power. On a perusal of the material brought on record and the order passed by the Commissioner it is perceptible that the said authority has not kept in view the requirement of section 263 of the Act inasmuch as the order does not reflect any kind of satisfaction. As is manifest the said authority has been governed by a singular factor that the order of the Assessing Officer is wrong. That may be so but that is not enough. What was the sequitur or consequence of such order qua prejudicial to the interest of the Revenue should have been focussed upon. That having not been done, in our considered opinion, exercise of jurisdiction under section 263 of the Act is totally erroneous and cannot withstand scrutiny. Hence, the Tribunal has correctly unsettled and dislodged the order of the Commissioner."

14. In ***Commissioner of Income-tax v. Arvind Jewellers*** [2003] 259 ITR 502 (Guj.), it has been held thus:

> "Coming to the facts of the present case, it is the finding of fact given by the Tribunal that the assessee has produced relevant material and offered explanations in pursuance of the notices issued under section 142(1) as well as section 143(2) of the Act and after considering the materials and explanation, the Income-tax Officer has come to a definite conclusion. The Commissioner of Income-tax did not agree with the conclusion reached by the Income-tax Officer. Section 263 of the Act does not empower him to take action on these facts to arrive at the conclusion that the order passed by the Income-tax Officer is erroneous and prejudicial to the interests of the Revenue. Since the material was there on record and the said material was considered by the Income-tax Officer and a particular view was taken, the mere fact that a different view can be taken, should not be the basis for an action under section 263 of the Act and it cannot be held to be justified."

15. In the case at hand, the tribunal had opined that while framing the assessment order under Section 143(3) of the Act, the assessing officer asked the assessee to explain why the commission received by him from airlines which had been passed on to the customers by way of discount should not be added to the income of the assessee and the assessee had given the explanation. The assessing officer accepted the explanation offered by the assessee. After so stating, the tribunal had further opined that the revenue could not point out any defect in the accounting system followed by the assessee in respect of the commission received by the assessee being shown in the books of accounts and the part of the same being passed on to the customers by the assessee by way of discounts and the net commission received by the assessee only being shown as income. After so stating, the tribunal has concluded as follows:

> "…there is no error in the assessment completed under section 143(3) of the Act nor there can be any prejudice caused to the Revenue as the assessee has been subjected to taxation in respect of net amount of commission earned during the relevant assessment year. The assessment order passed by the A.O. was after proper application of mind and the A.O. considered the details and the explanation furnished by the assessee and, therefore, the order passed by the A.O. under section 143(3) of the Act is neither erroneous nor prejudicial to the interest of Revenue."

16. In view of the aforesaid analysis, we are of the considered opinion that the tribunal had appositely apprised the law and come to hold that a change of opinion or view would not enable the Commissioner to exercise jurisdiction under Section 263 of the Act more so, when the assessing officer had considered the details and the explanation offered by the assessee.

17. The second aspect that is required to be adverted is whether the Commissioner without recording a specific finding with regard to the fact that the order passed by the assessing officer was prejudicial to the interest of the revenue could have passed an order under Section 263 of the Act, or as Mr. Vohra, learned counsel for the assessee would put it that the Commissioner had travelled beyond what was stated in the notice. The hub of the matter is whether the manner in which the Commissioner has proceeded to exercise the jurisdiction under Section 263 of the Act is sustainable or not. As is discernible from the order, he has asked the assessing officer to conduct an inquiry to verify the net commission transferred to P&L account afresh. The Commissioner has remained totally oblivious of the fact that the assessing officer had already examined this aspect but the Commissioner had thought to direct a re-inquiry for merely a change of opinion which is impermissible under Section 263 of the Act. In this context, we may refer to the decision in ***Gabriel India Ltd.*** (supra) wherein the Commissioner, after scrutiny of the order of the Income Tax Officer, found that the order did not disclose application of mind and despite examining the matter at length and hearing the assessee could not come to a definite conclusion that the expenditure was not revenue expenditure but expenditure of capital nature. He referred the matter back to the Income Tax Officer to examine the same and to decide afresh. The said action of the Commissioner was not approved by the tribunal. In that background, the High Court of Bombay expressed the view as follows:

> "From a reading of sub-section (1) of section 263, it is clear that the power of suo motu revision can be exercised by the Commissioner only if, on examination of the records of any proceedings under this Act, he considers that any order passed therein by the Income-tax Officer is "erroneous in so far as it is prejudicial to the interests of the Revenue". It is not an arbitrary or unchartered power. It can be exercised only on fulfilment of the requirements laid down in sub-section (1). The consideration of the Commissioner as to whether an order is erroneous in so far as it is prejudicial to the interests of the Revenue, must be based on materials on the record of the proceedings called for by him. If there are no materials on record on the basis of which it can be said that the Commissioner acting in a reasonable manner could have come to such a conclusion, the very initiation of proceedings by him will be illegal and without jurisdiction. The Commissioner cannot initiate proceedings with a view to starting fishing and roving enquiries in matters or orders which are already concluded. Such action will be against the well-accepted policy of law that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity."

18. In ***Sirpur Paper Mills Ltd. v. ITO*** [1978] 114 ITR 404 (AP), it has been held that the department cannot be permitted to begin fresh litigation

because of new views they entertain on facts or new versions which they present as to what should be the inference or proper inference either on the facts disclosed or the weight of the circumstances.

19. If the obtaining factual matrix is tested on the anvil of the aforesaid pronouncement of law, it is quite clear that the Commissioner has really made an effort to cause a routine inquiry with regard to the matter that had already been concluded. The Commissioner, as it appears, has thought that he has the authority to begin a fresh litigation because of the view entertained by him. The aforesaid inexhaustible approach is not permissible. He was required to arrive at a definite conclusion but he had not done so.

20. In view of our aforesaid analysis, we do not perceive any reason to interfere with the order of the tribunal and, accordingly, we give the stamp of approval to the same. Consequently, the appeal, being devoid of merit, stands dismissed without any order as to costs.

CHIEF JUSTICE MANMOHAN, J

September 13, 2010