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. 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.
104.1981	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.

5. 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) 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) 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) 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) 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*

> *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
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