

Section 263 Power – An insider’s “full & true material disclosure of material facts”

Prologue

Para 6 of the order of the Delhi Bench of the Tribunal in the case of **Gunjan Garg v. Pr. CIT [2021] 125 taxmann.com 69/187 ITD 467 (Delhi - Trib.)**, quotes certain extracts from the notice of the PCIT issued under section 263.

The order of Tribunal says: "*In review of assessment by the Joint Commissioner of Income Tax, Range-47, Delhi, it was noted that the order passed on 22 November, 2017 by the AO is erroneous and prejudicial to the interest of the revenue. Therefore, notice u/s. 263 of the Income-tax Act was issued on 12-9-2018 wherein following reasons were recorded:—*

"..... A proposal for review in your case for assessment year 2015-16 has been received from the ACIT, Circle 47(1) duly forwarded by JCIT, Range 47, New Delhi. As per the proposal, the assessment order and the assessment records, it is found that the assessment order passed u/s. 143(3) by the assessing officer for the assessment year 2015-16 dated 29-11-2017 is erroneous insofar as it is prejudicial to the interest of the revenue."(Emphasis supplied)

In the view of the authors the notice appears to embody an honest "reason to believe" and frankness on part of the PCIT; a characteristic which should ideally in form all departmental proceedings. It is indeed a disclosure of material facts fully & truly by the PCIT, though always an expectation only from the assessee.

Section 263 reads as follows:

Section 263

263. (1) The *Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or 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 interests 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.(Emphasis supplied).

Analysis

1. The PCIT refers in his section 263 notice for revision, to "*a proposal for review*" received from AO duly forwarded by JCIT, that the assessment order passed is erroneous insofar as it is prejudicial to the interests of the revenue.

2. The provisions of section 263 require the PCIT to himself call for and examine the records of any proceedings under the Act. He is, as per the provisions in the Section, neither empowered nor expected to assign the task of reviewing the proceedings/order passed under the Act to any subordinate officer viz the AO or the JCIT. However, in reality, it is generally the departmental practice that the distressed, disenchanted and beleaguered AO is required to furnish a proposal through the JCIT to PCIT for revision under section 263.

3. There is no doubt that this fact is common knowledge to - the tax-practitioners, the CAG, the various authorities of the department and the CBDT is no stranger to it; it is in fact the worst kept secret of the department. Even an RTI application to ascertain the background leading to section 263 revision may not succeed in unraveling it.

4. The fact remains that a notice such as the one issued in the above case is *ultra vires* the provisions of the Income-tax Act 1961, and also does violence to the mandate of the Supreme Court in the case of *Bhavnagar University v. Palitana Sugar Mill (P.) Ltd.* [Appeal (Civil) 8003 of 2002, dated 3-12-2002].

"....It is well settled that when a statutory authority is required to do a thing in a particular manner, the same must be done in that manner or not at all. The State and other authorities while acting under the said Act are only creature of statute. They must act within the four corners thereof."(emphasis supplied)

5. In other words, statutory power can only be exercised by the authority on whom it is conferred and by no one else. The authors have, in their combined study of the tax laws and judgments spread over 80 years, seldom come across such honest candor by a PCIT; it is noticed only for the first time. Laying a premium on honesty, we borrow from Kabir:

सॉचबराबरतपनहीं, झूठबराबरपापा।जाकेहिरदैसॉचहै, ताकेहिरदैआपा।

6. The PCIT does not refer to any provision of section 263 to act upon the said proposal, much less an authority to call for such a proposal from the AO; he does not also refer to any CBDT circular empowering him to take recourse to such a practice.

7. The acceptance by PCIT that he has acted upon a proposal received from AO through the JCIT, is sufficient to invalidate section 263 proceedings as being *ultra vires* the scheme of section 263 revision. Any action of the authorities *ultra vires* the Act, invalidates the action *ab initio*, and cannot be validated by any subsequent action.

8. Para 35 of the judgment of the hon'ble Supreme Court in case of *Bhikhubhai Vithalbai Patel v. State of Gujarat* AIR 2008 SC 1771 throws important light on this issue: "**It is very well settled**" declared the court that "**public orders, publicly made, in exercise of a statutory authority, cannot be construed in the light of explanations subsequently given by the decision-making authority. Public orders made by authorities are meant to have public effect and must be construed objectively with reference to the language used in the order itself.**" (See *Gordhandas Bhanji & Mohinder Singh Gill v. The Chief Election Commissioner*, AIR 1978 SC 851)

9. Such a notice under section 263, flies in the face of the long held belief, though never engrafted in any law, that senior officers of the department shall in exercise of their powers act with diligence, dexterity, finesse and reasonableness to achieve and advance the purposes of the Act.

10. It is fairly settled that the substantive power enshrined in the Act cannot be held hostage to procedural requirements, yet it bears a recall that the procedure delineated in section 263 is a substantive provision and meets the mandate of principles of natural justice, an abiding characteristic of any administrative or quasi-judicial action. It is more particularly so when revision unsettles a settled assessment. **Lord Radcliffe and Lord Reid called the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative.**

11. If the AO through the forwarding note of the JCIT, were permitted by the Income-tax Act 1961, to "review" his own orders, for enabling him to send a proposal on an order being found erroneous, the AO shall be found bestowed with the power of the constitutional courts - that of reviewing their own orders; which power is not available even to the Tribunal benches, let alone the authorities under the Act.

12. It is very respectfully submitted that this fact was not brought to notice of the hon'ble members of the bench which defense can always be invoked by the assessee, as it raises a jurisdictional issue and goes to root of issuance of section 263 notice.

13. To bring it to the notice of the bench, means to highlight the issue for consideration by them; to draw their attention specially to the paragraph narrating it, - a mere forwarding of the notice of PCIT as an appendage to the grounds of appeal, does not amount to bringing it to their notice. This finding emerges from the judgment of the hon'ble Delhi High Court in case of *SC Jhonson Products (P.) Ltd. v Asstt.* [2017] 88 taxmann.com 317/[2018] 253 Taxman 108/400 ITR 426

14. Without doubt the *bible* the Income-tax Act 1961, an astounding & fascinating piece of legislation, has accomplished grandeur & incandescence thru its tumultuous upheaval &

transformation over a century, assimilating the wisdom of judges, legislature, tax-practitioners, academicians & departmental authorities alike. Each successive interpretation of law - nay refinements of law, only adds to its glory and grace.

15. There is certainly no dearth of provisions in this Act to achieve the objects canvassed by it - yet the infirmity lies, submitted very respectfully, in weak, inefficient and contemptible enforcement of its provisions, if the authors are permitted the liberty of honest submission.

16. ***"The Government must cease to be a compulsive litigant. The philosophy that matters should be left to the courts for ultimate decision has to be discarded....."*** (*National Litigation Policy*) The notice of the PCIT inflicts a casualty on the aforesaid mandate of the National Litigation Policy.

17. If the spirit of law—so painstakingly expounded by the legislature and the judiciary is lent due credence by the enforcing authorities, no breach of law can ever be complained of.

18. It is respectfully submitted that the action of PCIT breaches not only the spirit of law but violates the letter of the law engrafted in section 263. Such an approach of acting on a proposal of AO, nurtured, cultured & cultivated clandestinely through decades, ought to be instantly exorcised - ***"Enough unto the day is the evil thereof"***, to borrow from the legend of law, Justice V R Krishna Iyer.

19. Alternatively, the law itself should be changed to permit such references from AO to the PCIT.

20. Epilogue

This article does not examine the judgment of the hon'ble Tribunal bench with respect to the facts of the case, but restricts itself to the "proposal for review" aspect, so heavily relied upon by the PCIT. As already pointed out, if such proposals are to be acted upon, the law itself should be amended to provide room for them. So long as this is not done, the present law should be honored in letter and spirit.

The sole purpose of this article remains, none other than, to petition the CBDT to instruct the Office of the PCIT to refrain from this kind of an *ultra vires* practice, to help impart sanctity, generally, to the exercise of quasi-judicial powers under the Act, and also reduce litigation-the avowed objective of this government. ***Just and fair enforcement of law shall always remain a cherry atop the confection of the rule of law.***

(Source: Taxmann.com)