



Sr. No.	Date	Orders
		<p>* <del>IN THE HIGH COURT OF DELHI AT NEW DELHI</del></p> <p>+ ITA 864/2006</p> <p>THE COMMISSIONER OF INCOME TAX ..... Appellant Through Mr. R.D. Jolly</p> <p>versus:</p> <p>M/S VIKRAM ADITYA &amp; ASSOC. P. LTD. .... Respondent Through Mr. N.P. Sahni</p> <p><b>CORAM:</b> <b>HON'BLE MR. JUSTICE MADAN B. LOKUR</b> <b>HON'BLE MR. JUSTICE VIPIN SANGHI</b></p> <p style="text-align: center;"><b><u>ORDER</u></b></p> <p>70                      10.07.2006</p> <p>The Revenue is aggrieved by an order dated 9th September, 2005 passed by the Income Tax Appellate Tribunal, New Delhi Bench 'B' in ITA No.1584/Del/2005 relevant for the assessment year 2001-2002.</p> <p>Broadly the facts of the case are that the Assessee purchased units of mutual funds on 9th February, 2001 and sold them on 11th February, 2001. Although it received the declared dividend of Rs. 43,54,838/- yet he suffered an overall loss. The Assessee adjusted its short term capital</p>



Sr. No.	Date	Orders
		<p>loss against a long term capital gain and the return was accepted by the Assessing Officer under Section 143 (3) of the Income Tax Act, 1961.</p> <p>The Commissioner of Income Tax, in exercise of powers under Section 263 of the Act, revised the assessment on the ground that the Assessee had resorted to a colourable device to evade tax, knowing fully well that it was going to incur a loss on sale of the mutual funds. In her decision dated 15th March, 2005, the Commissioner described the transaction of the Assessee as "dividend stripping" that is a transaction in which an investor buys stocks or units of mutual funds which is before the record date of dividend and these units are held only long enough to receive the dividend and to sell them subsequently.</p> <p>The Assessee preferred an appeal to the Tribunal which held in favour of the Assessee. It was held that the transaction entered into by the Assessee was not prohibited by law; the Assessee was entitled to take advantage of the tax free dividend; the genuineness of the transaction was not doubted by the Assessing Officer and finally there</p>

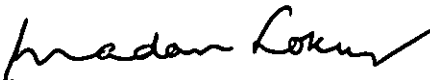



Sr. No.	Date	Orders
		<p>could be two opinions on the issue whether the Assessee had resorted to a colourable device or not. The Assessing Officer had taken the view that it was not a colourable device and this was a plausible view. It may be that the Commissioner had a different view, but that does not mean that the view of the Assessing Officer was wrong or that it deserved to be set aside.</p> <p>The scope of the revisionary power of the Commissioner under Section 263 of the Act was considered by the Supreme Court in <i>Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax, (2000) 243 ITR 83</i>. After extracting Section 263 of the Act, the Supreme Court observed as follows: -</p> <p>“A bare reading of this provision makes it clear that the prerequisite to the exercise of jurisdiction by the Commissioner suo motu 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</p>



Sr. No.	Date	Orders
		<p>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.</p> <p>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.”</p> <p>There is no doubt that in so far as the present case is concerned, the Assessing Officer took a particular view which was not unreasonable or irrational. In that sense, it could be said that the view of the Assessing Officer was not erroneous, although it may be prejudicial to the Revenue. It may be noticed at this stage that disallowance of a loss under Section 94 (7) of the Act in respect of such a transaction was effective only from the assessment year 2002-03, while we are concerned with the assessment year 2001-02. There was,</p>



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		<p>therefore, a gap in the law which appears to have been exploited by the Assessee. The legislature appears to have recognised the lacuna and taken steps to rectify it. But that does not mean that the decision of the Assessing Officer based on the law as it was can be said to be erroneous. Merely because the Assessee had taken the benefit of the lacuna, it will not raise a substantial question of law for the consideration of this Court.</p> <p>It is also worth noting that it is nobody's case that the sale and purchase of the mutual funds was not at the market price.</p> <p>We find no merit in this appeal and we also find that there is no substantial question of law that has been raised. Accordingly, the appeal is dismissed.</p> <p style="text-align: right;"> MADAN B. LOKUR, J</p> <p style="text-align: right;"> VIPIN SANGHI, J</p> <p>JULY 10, 2006 kapil</p>