



\* **HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Reserved on : 5<sup>th</sup> August, 2010  
 Judgment Pronounced on: 13<sup>th</sup> 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 19<sup>th</sup> 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 28<sup>th</sup> November, 2003 declaring



income of Rs.3,37,35,806/- and long term capital gain of Rs.7,788/-.

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return filed by the assessee was processed under Section 143(1) of the Act on 28<sup>th</sup> June, 2004 and the return was revised on 31<sup>st</sup> 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 8<sup>th</sup> 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 20<sup>th</sup> 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 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 p.... --

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's 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 an 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 passes 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 conf-----  
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 -----

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.* (S...r...), 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 ----,  
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  
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