



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

+ **ITA No.55/2011**

**Date of Decision: 16.05.2011**

**Fab India Overseas Pvt. Ltd.**

Through: **.....Appellant**  
Mr. Mr.Rajan Bhatia,  
Advocate

Versus

**The Commissioner of Income Tax**

**..... Respondent**

Through: Mr. N.P. Sahni, Advocate

**CORAM:**

**HON'BLE MR. JUSTICE A.K. SIKRI**

**HON'BLE MR. JUSTICE M.L. MEHTA**

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

**M.L. MEHTA,J (ORAL):**

1. Admit. The following substantial questions of law arise for consideration:

- (i) Whether the ITAT was correct in law and on the facts of the case in upholding the action of the CIT under Section 263 whereby the learned CIT directed reference to Transfer Pricing Officer (TPO) even though the value of international transactions was below 5 crores and when the AO had merely followed DBDT's circular No.12/2011 dated 23/8/2001 and instruction No.3 of 2003 dated 20/05/2003 in accepting such transactions without reference to TPO?
- (ii) Whether the ITAT was correct in law and on facts of the case in upholding the action of the CIT under Section



263 in setting aside the assessment in respect of (A) "commission expenses" (b) "general charges" even though the AO had framed an assessment under Section 143(3) after issue of questionnaire under Section 142(1) and even though full details had been filed by the assessee and material was placed on record?

2. With the consent of the learned counsel for the parties, we have heard the matter finally at this stage.

3. The assessee company is engaged in export and local trading of various handloom products, including readymade garments. It filed its return of income on 1<sup>st</sup> November, 2004 declaring an income of Rs.5,26,51,170/-. The case of the Assessee was processed under Section 143(1) of the Income Tax Act (for short, "*the Act*"). Subsequently, the case was selected for scrutiny and a notice under Section 143(2) of the Act was issued on 10<sup>th</sup> October, 2005. The Assessing Officer passed the assessment order on 29<sup>th</sup> November 2006 under Section 143(3) of the Act and determined the taxable income at Rs.5,74,58,752/-. The Commissioner of Income Tax took cognizance of the matter under Section 263 of the Act observing the assessment under Section 143(3) of the Act to be erroneous and prejudicial to the interest of the revenue. Accordingly, a notice under Section 263 of the Act was issued. Brief reasons assigned in the show cause notice read as under:

*"From an examination of the income-tax assessment records for A.Y. 2004-05 of M/s Fab India Overseas P. Ltd. 14, N Block Market,*



*Greater Kailash-I, New Delhi-1, it transpires that the assessee company has made international transaction with its associates. It has not been verified as to whether the transactions have been made at the arms length price.*

*Brokerage of Rs.11,52,195/- as debited in the Profit & Loss A/c (Schedule-15) has been allowed without verification.*

*General charges of Rs.11,20,500/- have been claimed in the return and allowed without any verification.*

*Commission on sales claimed at Rs.16,96,845/- (included in the selling and distribution expenses debited at Rs.2,16,173/-) has been allowed without any verification.*

4. In response to the above show-cause notice, the assessee filed written submissions vide letter dated 10<sup>th</sup> February 2009 before the Commissioner. With regard to the aforesaid items, as mentioned in notice under Section 263, he recorded his findings as under:-

*“International transactions: Even though the details of the transaction were furnished by the assessee, it is clear from the assessment records that the arms length nature of the payment was not examined. The Assessing Officer may, therefore, make a reference to the Transfer Pricing Officer and take into account the observation of the Transfer Pricing Officer before reframing the assessment.*

*Brokerage: It is contended that a part of the expenditure has already been disallowed under Section 40(a)(i). However, the disallowance under Section 40(a)(i) was for non-deduction of tax at source. It is not evident from the record if the Assessing Officer*



*examine the reasonableness of the total brokerage, payment of Rs.11,52,195/-. The Assessing Officer is, therefore, directed to examine the terms and conditions of the agreement under which the brokerage payment has been made.*

*General charges: It is argued that the details of general charges amounting to Rs.11,20,500/- was submitted vide letter dated 14.09.2006 to the Assessing Officer. However, it is not clear from the record if the Assessing Officer verified the nature and allowability of the general charges.*

....

*From the terms of the above contract, it will be seen that the assessee is incurring almost the entire expenses of the Chennai premises of the agent. If all these expenses are added to the amount of commission paid, the rate of the commission would work out to be very substantial and not 5% as mentioned in the agreement.*

*It is clear therefore that even though some details about the commission were furnished during the assessment proceedings, the Assessing Officer did not examine if the rate and amount of commission was reasonable. There is nothing on record to show if the Assessing Officer has examined whether Gem Photographic India Pvt. Ltd. which is private limited company is covered by the provisions of Section 40A(2)(b) by enquiring if there are any common shareholder or whether the two concerns are associated in any manner as covered by the provisions of that section."*

5. The assessee preferred an appeal against the order of the Commissioner which came to be disposed of by learned Income Tax



Appellate Tribunal vide order dated 25<sup>th</sup> February 2010 which is impugned here before us.

6. With regard to the brokerage, the learned Tribunal noted that the assessee has preferred an appeal before CIT (A) and this could not have been taken up by the Commissioner while exercising his powers under Section 263(1) of the Act as per Clause (c) Explanation 1. To this extent, the order of the Commissioner was modified and the order of the Commissioner directing the Assessing Officer to investigate this issue in respect of the brokerage was rescinded. The rest of the order of the Commissioner whereby directions were given to the Assessing Officer to conduct an enquiry *de novo* with regard to remaining items viz international transactions, commission and general charges was maintained.

7. With regard to the International Transactions, it transpired that the Assessee had made international transactions with its associates. The Commissioner noticed that the same had not been ascertained as to whether the transactions have been made at the arms length. It was rightly noted by the Commissioner as also by the Tribunal that there is not a single whisper in the enquiry conducted by the Assessing Officer regarding the international transactions made by the Assessee with its associates and that such transaction was to be verified by making a reference to TPO. The Assessing Officer was bound to examine prima facie such transactions. What has been recorded by the Commissioner and the



Tribunal apparently makes the order of the Assessing Officer erroneous because no such enquiry has been made with regard to the international transaction.

8. We do not find any infirmity or illegality in the findings of the Commissioner and also of the Tribunal in this regard. Consequently Question No.1 is answered against the Assessee and in favour of the Revenue.

9. With regard to commission and general charges, it is a matter of fact that the Assessee did supply the required information to the Assessing Officer in response to the questionnaire. This is also so recorded by the Commissioner that even in the submissions filed vide letter dated 10<sup>th</sup> February 2009 in response to the notice under Section 263 of the Act, it has been stated that the details of commission payment were submitted by the Assessee vide letter dated 25<sup>th</sup> August 2006. A copy of the same was also presented during proceedings under Section 263 of the Act. It was also submitted that the payment of commission has also been made in the earlier years and was considered allowable expenditure in the assessment proceedings. Similarly, with regard to the claim towards general charges also, it was recorded by the Commissioner that the same were submitted by the Assessee vide letter dated 14<sup>th</sup> September, 2006 to the Assessing Officer. The reasons given by the Commissioner for *de novo* enquiry in this regard was that it was not clear from the record if the Assessing Officer verified the nature and allowability of the general

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charges. It is true that though the Assessing Officer has not given detailed reasons in this regard, but there is nothing on record to suggest that he did not make any enquiry or applied his mind with regard to the submissions made by the Assessee vide its letter dated 14<sup>th</sup> September 2006. It is seen that details of general charges given by the Assessee were submitted as Annexure-H to the Assessing Officer. At the most, it can be said to be a case of inadequate enquiry. In fact, required information was given by the Assessee to the Assessing Officer who made the assessment under Section 143(3). May be that the detailed reasons of the same were not given by Assessing Officer, but after considering submissions of Assessee, he assessed the total income at Rs.5,74,58,752/-, as against the declared income of Rs.5,26,51,170/-. In this regard, reference can be made to the decision of this Court in *CIT v Sunbeam Auto Ltd. [2010] 189 TAXMAN 436 (Delhi)* wherein it was held as under:

*1. We have considered the rival submissions of the counsel on the other side and have gone through the records. The first issue that arises for our consideration is about the exercise of power by the Commissioner of Income Tax under Section 263 of the Income Tax Act. As noted above, the submission of learned counsel for the Revenue was that while passing the assessment order, the AO did not consider this aspect specifically whether the expenditure in question was revenue or capital expenditure. This argument predicates on the assessment order, which apparently does not give any reasons while allowing the entire expenditure as Revenue expenditure. However, that by itself would not be indicative*



*of the fact that the AO had not applied his mind on the issue. There are judgments galore laying down the principle that the AO in the assessing order is not required to give detailed reason in respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the Commissioner to pass orders under Section 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. In **Gabriel India Ltd. (Supra)**, law on this aspect was discussed in the following manner:*

*"xxx... From a reading of sub-section (1) of section, 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. (See Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1 (SC) at page 10).*

**Xxx**

*From the aforesaid definitions 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.*

xxx

*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.*



xxx

*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 ... xxx"*

10. In view of aforesaid, it is reiterated that the Assessing Officer called for certain clarifications through the questionnaire of the Assessee and that the same were furnished with the required details. This fact is even taken note of by the Commissioner himself in his order. The only grievance of the Commissioner was that the Assessing Officer should have made further enquiries rather than accepting the explanation given by the Assessee. It cannot be said to be a case of lack of enquiry. We accordingly, answer Question No.2 in favour of the Assessee and against the Revenue.
11. The appeal stands disposed of in terms of above order.

**M.L. MEHTA, J.**

**MAY 16, 2011**

**A.K. SIKRI, J.**

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