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

% **Date of Decision: 10th September, 2013**

\+ ITA 1404/2009 & ITA 1691/2010

COMMISSIONER OF INCOME TAX DELHI V..... Appellant

Through Mr. T.N. Chopra with Mr. Shivendra Kumar Singh, Advocates.

versus

NEW DELHI TELEVISION LTD. ..... Respondent

Through Mr. M.S. Syali, Sr. Advocate with Ms. Husnal Syali, Mr. Mayank Nagi and Mr.Anuhbhav Rastogi Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J (ORAL)

1. By order dated 23.11.2011, two substantial questions of law were admitted for hearing in this appeal, which pertains to Assessment Year 2002-03.

> (1) "Whether the Income Tax Appellate Tribunal was right in setting aside the order dated 29th March, 2007 passed by the Commissioner of Income Tax under Section 263 of the Income Tax Act, 1961?
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> (2) Whether the assessing officer during the course of the original assessment proceedings had examined and considered that the assessee New Delhi Television Ltd. was owner of the copyright or the software in form of television programme which were sent/transmitted to Hong Kong?"

2. Return for the said year was made subject matter scrutiny assessment under Section 143(3) of the Income Tax Act, 1961 ('Act' for Short) vide assessment order dated 31.01.2005. Returned income of Rs.10,13,38,953/- was substantially accepted except for disallowance of interest of Rs.1,83,503/-. The respondent had claimed deduction under Section 80HHF of Rs.14,73,12,763/- which was specifically mentioned and allowed in the assessment order.

3. The Commissioner of Income Tax issued show cause notice u/s 263 of the Act dated 19.03.2007 observing:-

> "On perusal of assessment record of A.Y. 2002-03, it is seen that order u/s 143(3) was finalized on 31/01/2005 allowing deduction claimed u/s 80HHF of Rs.14,73,12,763/-. Essential conditions for allowing deduction u/s 80HHF include export or transfer of any film software, television software, music software, telephone news software including telecast rights. There is nothing on the record to suggest that eligible items were actually exported/transferred outside the India at the relevant time. It was necessary on the part of Assessing Officer to examine/verify that eligible items have actually been exported outside the country. This has not been done by AO.
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> From the agreement between the NDTV and M/s. STAR TV it is seen that there was no mention of specific item to be exported. **It merely stipulates that NDTV Ltd. will produce programmes/footage/tapes to be exported to the STAR TV. It is also seen the world vide copy rights of all the material produced by the NDTV Ltd. shall remain with M/s. NDTV Ltd. only. These aspects of whether the items produced and claimed to have been exported constituted eligible item in terms of Sec. 80HHF of IT Act and the admissibility of the deduction u/s 80HHF in view of copyright and ownership being continued with**

M/s NDTV were not examined by the assessing officer.

Above mentioned failures on the part of Assessing Officer have resulted in a assessment order which is erroneous as so far as prejudicial to the interest of revenue."

(Emphasis supplied)

4. The respondent objected and contested the show cause notice. Eligibility and justification of the claim under Section 80HHF was expressly examined by the Assessing Officer, who had sought and was furnished a detailed reply. Documents were filed and oral submissions were addressed and on due consideration, the claim was allowed by the Assessing Officer. The aforesaid submissions were recorded in the order dated 29.03.2007, passed by the Commissioner of Income Tax, in the following words:-

"4. It was contended that allowability /justification of claim u/s 80HHF was specifically examined by the AO who duly consider the detailed replies, oral submission and the documents filed during the assessment proceedings. As regards, items exported it was stated that NDTV has produced and exported television software related to news and current affairs to STAR TV as per agreement between assessee company and STAR TV. Hong Kong through INTEL SAT Satellite from its facility at New Delhi. Satellite space and up linking facility have been contracted from VSNL on NDTV. Transmission from NDTV studio to STAR TV Hong Kong was made on point to point basis without any physical or electronic interference. It was claimed that before the assessing officer assessee furnished large number of document like export invoices to STAR TV, copy of bank certificate of export and realization, copy of foreign inward remittance issued by the bank. During the course of proceedings u/s 263 assessee company further furnished the documents like copy of bill raised by VSNL, copy of certificate from VSNL stating that satellite space segment was leased to NDTV for up-linking news signal

from India to be down linked at Hong Kong and a one copy of software export declaration (Softex) from certified by official of Software Technology Park of India (STPI) to show the item exported."

5. The Commissioner thereafter recorded and has given the following findings:-

"5. I have considered the facts of this case, submission of the assessee's counsel and the evidences furnished before the A.O.as well as before the undersigned in support of the claim that news items were actually exported through VSNL to STAR TV, Hong Kong. It is seen that evidences filed during the course of assessment proceeding merely proved that foreign exchange was received from STAR TV, Hong Kong against the invoices of export. These did not clearly establish the actual export of eligible item for the purposes of Sec. 80HHF. The A.O. accepted the claim of the assessee without any enquiry/verification. The evidences furnished during the course of this proceeding like certificate from VSNL and Softex from in respect one invoice were never furnished before the assessing officer. In respect of other invoices no such evidences were furnished before me as well as on the ground of paucity of time. As regards, the issue of admissibility of deduction u/s 80HHF in view of world wide copy rights continued to remain with NDTV, it was contended there is no mention in section 80HHF explicitly or implicitly that in such cases deduction would not be available. It was submitted that section envisages deduction for export/transfer of limited rights such as telecast rights. In support of the claim division of Mumbai Branch of ITAT in case of K.R.Films Pvt. Ltd. 102ITD 426 (2006) was also filed in which it was held that the section 80HHF applies to a assessee who is engaged in the business of export or transfer by any means out of India of any film software, television software, music software, television news software including telecasting rights. As a corollary to the facts that the scope of section covers not only the software but also the software rights, the expressions television software includes television rights as well. In this connection, it is pertinent to note that facts of that case were different and decision of Mumbai ITAT in the above referred case has not been accepted by the department.

6. As discussed above, evidences to prove actual export of eligible item and eligibility of deduction u/s 80HHF in case of export of limited rights were not examined. In the

Case of M/s Gee Vee Enterprises 99 ITR 375, the jurisdictional High Court has categorically held that failure of the Assessing Officer to conduct the required enquiry and accepting the statement of the assessee without due verification renders the order erroneous in as much as prejudicial to the interest of revenue.

In a more recent judgment rendered by the Allahabad High Court in the case of Jagdish Kumar Gulati vs. CIT 269 ITR 71, the Hon'ble Court considering various judicial pronouncement passed earlier viz. Diuggal & Co. 220 ITR 456 (Delhi) K.A. Ramawami Chettiar 220 ITR 657 (Mad.) etc. held that absence of proper enquiry in a matter renders an order erroneous as well as prejudicial to the interest of the revenue. In view of above, assessment order is held to be erroneous as so far as prejudicial to the interest of revenue."

6. Aggrieved, the respondent preferred an appeal and succeeded before the Tribunal. Commissioner's order dated 29.03.2007 in exercise of power under section 263 of the Act has been set aside. Revenue has impugned and challenged the findings recorded in the order passed by Tribunal dated 31.03.2008, by raising the aforesaid two substantial questions of law. Tribunal has exhaustively referred to the replies of the respondent dated 25.11.2004, 21.12.2004 and 20.01.2005, submitted before the Assessing Officer. The written replies are quoted in the impugned order. It was evident that the Assessing Officer had asked the respondent to justify deduction under Section 80HHF on export/transfer of software programme to 24 hours news channel STAR TV, Hong Kong. The

respondent had filed and relied on, agreement dat 21.02.1997 between them and STAR TV, Hong Kong, under which, the news software was exported and payments received in foreign exchange through banking channels etc. We shall refer to one of the replies given by the respondent subsequently. In paragraph 12 of the impugned order. Tribunal concluded that the Assessing Officer had after detailed verification accepted deduction under section 80HHF as claimed. The said claim under Section 80HHF was also accepted from Assessment Year 1999-2000 till Assessment Year 2003-2004. Actual proof of export of software was duly furnished and accepted by the Assessing Officer. The Commissioner had erred in exercising power under Section 263 on mere suspicion and for re-examination of correctness of the claim. They disagreed with the observation of the Commissioner that the Assessing Officer had not thoroughly examined and verified the claim under Section 80HHF.

7. Learned counsel for the Revenue has submitted that it is a case of non-examination of the relevant facts at the time of assessment. Assessing Officer did not specifically consider

whether the software was exported from India, mandatory pre-requirement or condition under Section 80HHF. Further, requirement of transfer of rights to the foreign party was not examined by the Assessing Officer. Reliance was placed upon ***Gee Vee Enterprises vs. CIT (1975) 99 ITR 375 (Del.); Malabar Industrial Co. Ltd. vs. CIT (2000) 243 ITR 83 (SC); CIT vs. G.M. Mittal Stainless Steel (P.) Ltd. (2003) 263 ITR 255 (SC)*** and ***Commissioner of Income Tax vs. Ashok Logani (2012) 347 ITR 22 (Del.)*** and that two decisions of the Delhi High Court in ***CIT vs. Sunbeam Auto Ltd. (2011) 332 ITR 167 (Del.) and ITO vs. DG Housing Projects Ltd. (2012) 343 ITR 329 (Del.),*** in fact, support the case of the Revenue. Our attention was also drawn to the decisions in ***CIT vs. DLF Power Ltd. (2012) 345 ITR 446 (Del)*** and ***CIT vs. Nagesh Knitwears Pvt. Ltd. (2012) 345 ITR 145 (Del).***

8. Learned counsel for the respondent has contested and stated that the judgments relied upon by the Revenue support and affirm the ratio and reasoning in the impuged order. Decision of the Delhi High Court in the case of

Ashok Logani (supra) was clearly distinguishable and w a peculiar case which has been decided on its facts. He relied upon paragraph 10 of the judgment in the case of ***Ashok Logani (supra)***.

9. The scope and ambit of Section 263 has been examined and elucidated in several decisions. Section 263 enables the Commissioner to exercise the power of revision for correcting orders passed by the Assessing Officer when the two cumulative conditions are satisfied. Firstly, the order should be erroneous and secondly, the order should also be prejudicial to the interest of the Revenue. An order is erroneous, when it is unsustainable, wrong or an incorrect decision deviating from law and the expression prejudicial to the interest of the Revenue is of wide import and is not confined to mere loss of tax.

10. In ***Gee Vee Enterprises (supra)*** failure on the part of the Assessing Officer to conduct inquiry, it was held, makes the order of the Assessing Officer erroneous. This is because an Assessing Officer is an investigator cum adjudicator. Failure to carry out any investigation, makes the order erroneous because the assessing officer errs and

commits an error in not examining the subject matter/iss which ought to have been verified. It is incumbent upon the Assessing Officer to investigate and verify facts, deductions, income etc. Thus failure to make any inquiry results in an erroneous order. The said view of the Delhi High Court is a reiteration of the law expounded in ***Rampyari Devi Saraogi vs. CIT [1968] 67 ITR 84 (SC) and Tara Devi Aggarwal vs. CIT (1973) 88 ITR 323 (SC)***. After referring to these two decisions, in ***DG Housing Projects Ltd. (supra)***, it has been observed:-

> "These two decisions show that it is not necessary for the Commissioner to make further inquiries before cancelling the assessment order of the Income-tax Officer. The Commissioner can regard the order as erroneous on the ground that in the circumstances of the case the Income-tax Officer should have made further inquiries before accepting the statements made by the assessee in his return.
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> The aforesaid observations have to be understood in the factual background and matrix involved in the said two cases before the Supreme Court. In the said cases, the Assessing Officer had not conducted any enquiry or examined evidence whatsoever. There was total absence of enquiry or verification. These cases have to be distinguished from other cases (i) where there is enquiry but the findings are incorrect/erroneous; and (ii) where there is failure to make proper or full verification or enquiry."

In such cases, the order becomes erroneous because enquiry or verification has not been made and not because wrong order has been passed on merits. A wrong order

passed on merits will be erroneous if the Commission adjudicates and holds that there is an error which is unsustainable in law and not because enquiry was not made by the Assessing Officer. The two situations stand on different footings and different parameters are applied to determine whether the order is erroneous or not.

11. The finding recorded by the Tribunal in the present case is that this is not a case of 'no inquiry'. The said finding is a finding of fact and is not perverse. Tribunal in the impugned order has referred to; three replies submitted by the respondent to the queries raised during the course of the original assessment proceedings to justify deduction under Section 80HHF. The respondent had submitted evidence in support of export/transmission of software to Hong Kong, consideration received in foreign exchange and within the time limit prescribed. Details filed included export invoices, bank certificate of export and realization and forward inward remittance certificate issued by the Bank etc. We would like to reproduce reply dated 20.01.2005, which has been quoted in the impugned order of the Tribunal and the same reads:-

C. **Reply dated 20th January 2005**

1) Initially an Agreement was executed on 29/02/1997 ("First Agreement") between NDTV and NTVI (a STAR TV's group company). It may be noted that this was more than one year prior to the commencement of the financial year under consideration and the launch of the actual channel on 01/04/1998.

2) On March 21, 1998 proximate to the channel launch, there was a new Agreement ("Second Agreement") signed between NDTV, STAR TV of Hong Kong and NTVL, Subsequently, an Agreement dated November finality of "Second Agreement"(of March 21, 1998). All agreements have been placed on record. These agreements are valid through the year relevant to the assessment year commencing from A.Y. 1999-2000 upto A.Y. 2003-04, and applicable to Assessment Year 2002-03 (subject year).

3) It is submitted that once the Second Agreement was signed, the First agreement stood novated, altered and replaced to the effect that:

a) The principal agreement was now between STAR TV of Hong Kong and NDTV.

b) NTVI had no legal role to play in fulfilling, executing or enforcing any terms and conditions of the contract.

The above position is absolutely clear only from the combined reading of the two agreements but also from the conduct of the parties and the manner in which the transactions, pursuant to the contract(s) were carried out.

4) The following facts may also be noted;

a) The Software produced by NDTV is transmitted from Delhi to STAR TV, Hong Kong, by NDTV through "INTELSAT SATELLITE" (8 Mhz, C-Bank capacity on IS-804 at 64°E Satellite) directly from its facilities at New Delhi.

b) The satellite space and the up linking facilities to uplink the signals to the satellite have been contracted directly by NDTV from VSNL on lease basis, which fact is self evidence from the bills raised by BSNL on NDTV.

c) NDTV pays VSNL for the uplink charges and the lease from the satellite transponder.

d) The satellite and the uplink are contracted with VSNL on a "point to point basis" from Delhi to Hong Kong. This means that the signal cannot be transmitted, diverted or delivered to any other place from Delhi except Hong Kong.

e) At Hong Kong the software is received by STYAR TV through its arrangements to down link from the satellite, and after adding any other relevant material/advertisement etc. to is STAR TV then further uplinks and sends the same through another satellite to its ultimate viewer.

f) Payment from export of software is made by STAR TV as per the rates agreed to in Second Agreement of March 21, 1998.

5) In Summary:

a) NDTV transmits/exports directly to

STAR TV on principal to principal basis, and all transmission arrangements are contracted directly by NDTV.

b) The export/transmission/delivery reaches Hong Kong directly from NDTV studio on a "point to point basis without any physical or electronic inference being possible.

c) STAR TV pays NDTV directly in foreign exchange through normal banking channels.

d) All requirements of sc. 80HHF are fully satisfied.

6) All aspects of these agreements and manner of export/transmission have been discussed in earlier year's viz. A.Y. 1999-00, 2000-01 and 2001-02 and deduction under 80HHF allowed to the assessee. It is retreated that all facts and circumstances remain exactly the same as in earlier years.

The deduction under Section 80HHF may kindly be allowed for A.Y. 2002-03 as claimed.

12. It is not disputed that the reply was furnished to the Assessing Officer. The assessment order records that the case was discussed. In paragraph 4 of the impugned order dated 29.03.2007, the Commissioner, has referred to this contention of the assessee. He has not controverted or denied the said contention in paragraphs 5 and 6 of the order passed by him. In paragraph 5, Commissioner has

observed that evidences were furnished before t Assessing Officer as well as before him to show/establish news items were actually exported through VSNL to STAR TV, Hong Kong but these did not clearly establish actual export of eligible items. But why and what reason there was a doubt in the mind of the Commissioner is not elucidated. Silence or word "clear" do not show that the order was erroneous. Commissioner has thereafter mentioned that certain evidences were also filed before him in support but these were not furnished before the Assessing Officer. Thereafter, Section 80HHF is referred to and stated that the worldwide copyright continued to remain with the respondent. Commissioner duly referred to the contention of the respondent that the section envisaged export or transfer of limited rights such as telecasting rights. Reliance was placed on Mumbai Branch of the Tribunal in ***KR Films Pvt. Ltd. vs. ITO Ward 102 ITD 426 (2006)***, relied upon by the respondent. This decision, Commissioner notes supports the contention of the respondent that they were engaged in the business of export of news items and Section 80HHF would include limited transfer or export of the said rights in the

copyright. The Commissioner after referring to t contentions and legal submissions has not given any opinion or finding in paragraph 5 or 6 but has merely noted that the decision of Mumbai Tribunal had not been accepted by the Department. Abruptly the Commissioner concluded that further inquiry or examination was required by the Assessing Officer and thus the order passed by the Assessing Officer was erroneous and prejudicial to the interest of the Revenue.

13. In the light of the facts in the present case, we feel that the aforesaid findings, recorded by the Commissioner in the order dated 29.03.2007, do not meet the requirements of Section 263. Undeniably, power under Section 263 is wide and broad but it can be exercised only when twin conditions, mentioned in Section 263 are satisfied. There is difference between purported incomplete or inadequate verification or no verification whatsoever by the Assessing Officer. This distinction for the purpose of exercise of powers under Section 263 of the Act was noticed by the Delhi High Court in ***Sunbeam Auto Ltd. (supra),*** wherein it has been held:-

"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 Assessing Officer 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 Assessing Officer had not applied his mind on the issue. There are judgments galore laying down the principle that the Assessing Officer in the assessment 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 a 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. [1993] 203 ITR 108 (Bom), law on this aspect was discussed in the following manner (page 113)

. . . 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 (See Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1 (SC) at page 10) . . .

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 visualise 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 visualised 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 a conclusion and such a conclusion cannot be formed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion . . . 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 . . .”

14. In the present case, the claim of the assessee was allow by the Assessing Officer on being satisfied with the explanation furnished and evidence produced. Assessing Officer was satisfied that the export was made and consideration was received in foreign exchange within the stipulated time. The reply dated 20.01.2005 sets out the mode and manner in which software was exported. In ***DG Housing Projects Ltd. (supra)*** after referring to the decision in ***Sunbeam Auto Ltd. (supra),*** it was observed:-

> "Thus, in cases of wrong opinion or finding on the merits, the Commissioner of Income-tax has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry, if required and necessary, before the order under section 263 is passed. In such cases, the order of the Assessing Officer will be erroneous because the order passed is not sustainable in law and the said finding must be recorded. The Commissioner of Income-tax cannot remand the matter to the Assessing Officer to decide whether the findings recorded are erroneous. In cases where there is inadequate enquiry but not lack of enquiry, again the Commissioner of Income-tax must give and record a finding that the order/inquiry made is erroneous. This can happen if an enquiry and verification is conducted by the Commissioner of Income-tax and he is able to establish and show the error or mistake made by the Assessing Officer, making the order unsustainable in law. In some cases possibly though rarely, the Commissioner of Income-tax can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. However, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further enquiries without a finding that the order is erroneous. Finding that the order is erroneous is a condition or requirement which must be satisfied for exercise of jurisdiction under section 263 of the Act. In such matters, to remand the matter/issue to the

Assessing Officer would imply and mean the Commissioner of Income-tax has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

This distinction must be kept in mind by the Commissioner of Income tax while exercising jurisdiction under section 263 of the Act and in the absence of the finding that the order is erroneous and prejudicial to the interests of the Revenue, exercise of jurisdiction under the said section is not sustainable. In most cases of alleged "inadequate investigation", it will be difficult to hold that the order of the Assessing Officer, who had conducted enquiries and had acted as an investigator, is erroneous, without the Commissioner of Income-tax conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. The Commissioner of Income-tax cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the Commissioner of Income-tax to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the Commissioner of Income-tax hold and records reasons why it is erroneous. An order will not become erroneous because on remit, the Assessing Officer may decide that the order is erroneous.

Therefore, the Commissioner of Income-tax must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the Commissioner of Income-tax must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the Commissioner of Income-tax can rely includes not only the record as it stands at the time when the order in question was passed by the Assessing Officer but also the record as it stands at the time of examination by the Commissioner of Income-tax (see CIT v. Shree Manjunathesware Packing Products and Camphor Works [1998] 231 ITR 53 (SC)). Nothing bars/prohibits the Commissioner of Income-tax from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous."

15. The said decision refers to the decision of the Supreme Court in ***Malabar Industrial Co. Ltd. (supra),*** that where

the Assessing Officer has adopted one of the two cours permissible and available to him and this has resulted in loss of Revenue or two views were possible and the Assessing Officer had taken one view with which the Commissioner may not agree, the said order cannot be treated as an erroneous order and prejudicial to the interest of the Revenue unless the view taken by the Assessing Office is unsustainable in law and therefore renders the order erroneous. The Commissioner must also show that prejudice is caused to the interest of the Revenue.

16. ***Ashok Logani (supra)*** case is distinguishable and would fall within the exception carved out in ***DG Housing Projects Ltd. (supra)*** that there may be cases, though rarely, where the Commissioner can show and establish that the facts on record or inference from the facts per se justified and mandated further inquiry or investigation but the Assessing Officer had erroneously not undertaken the same. ***Ashok Logani (supra)*** case would fall under the said rare category. In the said case, substantial cash of Rs.62,30,300/- was found during the course of search but the Assessing Officer did not make any addition and

accepted the claim of the assessee and no reason w discernible from the assessment order. Paragraph 10 of the said judgment records that respondent had surrendered a sum of Rs.61,30,000/- but in the return of income, Rs.21,00,000/- was offered for taxation. Paragraph 10 of the said judgment records peculiar facts.

17. The present case does not fall in the category of exception. The Commissioner in his order dated 29.03.2007 was uncertain and ambiguous, if not perceptibly reluctant and unable to meet the contention, facts and legal position put forth. He has accepted that evidences were furnished before the Assessing Officer with regard to the claim that news items were exported from VSNL to Star TV, Hong Kong but observed that this was not clearly established without elucidating. Conspicuously he did not record that evidences were incorrect or false, or why and for what reasons the assessment was erroneous in accepting export was made. Mere *ipsi dixit* is not sufficient to establish that the assessment was erroneous. Even with regard to the eligibility under Section 80HHF, no finding has been recorded except recording that decision of Mumbai Branch

of the Tribunal in ***K.R. Films Pvt. Limited (supra)*** has r been accepted by the Revenue. Why and for what reason, Section 80HHF should be interpreted differently, is not stated or elucidated. The Section itself is not examined and interpreted. Without recording the said finding, the Commissioner could not have stated or averred that the claim allowed under Section 80HHF was erroneous.

18. In the present case, jurisdictional pre-conditions stipulated in Section 263 of the Act are not satisfied. The Assessing Officer did conduct investigation and accepted the claim under Section 80HHF on being satisfied that the conditions stipulated in the said Section are satisfied. It is not the case of "no investigation". It is also not a case where per-se further investigation was required. Commissioner in his order, as noticed above, has been tentative and hesitant and did not decide whether the claim under Section 80 HHF has been rightly allowed by the Assessing Officer. He has noted the stand of the respondent, before him and before the Assessing Officer, but refrained from forming any opinion as to whether the acceptance of the claim by the Assessing Officer was erroneous or not. Power of review

under Section 263 of the Act can be invoked only if t order is erroneous and for this the Commissioner must record the reason that the order was erroneous and the claim under Section 80HHF was wrongly allowed. Once the said claim was considered and examined by the Assessing Officer, Commissioner cannot set aside the order without recording contrary finding. This will be contrary to Section 263 of the Act. In paragraph 6 of the order dated 29th March, 2007, the Commissioner uses the expressions 'erroneous and prejudicial to the interest of Revenue' but did not cite any reason or ground for the said conclusion. Use of the words without elucidation indicates, that the said observation are presumptive or a suspicion and mere repetition of words but this does not satisfy the requirements under Section 263 of the Act. Order under Section 263 must be clear and must set out logical ground and reason as to why the assessment is erroneous and prejudicial to the interest of the Revenue. Decision in ***Gee Vee Enterprises (supra)*** is not applicable as enquiry was conducted by the Assessing Officer and he formed an affirmative opinion accepting the claim of the respondent.

19. In ***DLF Power Ltd.(supra),*** a similar reasoning and rat was given and reference was made to the decision of a Full Bench of ***Delhi High Court in CIT vs. Kelvinator of India (2012) 256 ITR 1 (Del.) FB***. In the said case, order of remand to the Commissioner of Income Tax for fresh decision was passed after noticing that the Tribunal had considered the question of bifurcation of interest income with reference to the deduction under Section 80IA. It was recorded that this bifurcation and the nature of income was accepted by the Tribunal though the Commissioner of Income Tax had only given a tentative opinion that some elements of income may be eligible. Tribunal had given its own factual finding without there being verification or full and proper rebuttal. In these circumstances, it was observed that where an Assessing Officer does not carry out investigation which was per se required, there would be an error in the sense that the Assessing Officer has failed to carry out the requisite inquiry. This was again a case falling under the exception carved out and mentioned in the case of ***DG Housing Projects Ltd. (supra).***

20. In view of the aforesaid discussion, question No.2 has to

be answered against the Revenue and in favour of t respondent assessee and it has to be held that the Assessing Officer during the course of original assessment proceedings, had delved deep into the question of deduction under Section 80HHF and was satisfied that the deduction made were as per law. Question No.1 is also answered in favour of the respondent assessee and against the Revenue.

21. Tribunal was right in setting aside the order dated 29.03.2007, passed by the Commissioner under Section 263 of the Act.

22. The appeal is disposed of, with no order as to costs.

SANJIV KHANNA, J.

SANJEEV SACHDEVA, J.

SEPTEMBER 10, 2013
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