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

% **Date of Decision** : 1st March, 2012.

\+ ITA 179/2011

INCOME TAX OFFICER ..... Appellant
Through Mr. Kamal Sawhney, sr. standing counsel with Mr. Amit Shrivastava, Adv.

versus

DG HOUSING PROJECTS LTD ..... Respondent
Through Mr. Kapil Goel, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA,J: (ORAL)

The present appeal by the Revenue impugns order dated 31.2.2010 passed by the Income Tax Appellate Tribunal ("Tribunal", for short) in the case of D G Housing Projects Ltd. and relates to assessment year 2004-05.

2. Having heard counsel for the parties, the following substantial question of law is framed :

"Whether Income Tax Appellate Tribunal was right in setting

> aside the order of the Commissioner of Income Tax under Section 263 of the Income Tax Act, 1961?"

3. The assessee is a company and for the assessment year in question had filed return on 31.10.2004 declaring taxable income of Rs.3,54,712/-.

4. During the year in question the assessee had sold an immoveable property (unfortunately, the details of the said property are not mentioned in the appeal and in the annexures i.e. the assessment order, order of the Commissioner of Income Tax (CIT) and the Tribunal) and had claimed long term capital loss of Rs.35.71 lacs after indexation. The said property was purchased by the respondent-assessee in 1997 for Rs.69.63 lacs and was sold in 2003 (the date is not given in any of the orders or in the appeal) for Rs.70 lacs. The property was yielding monthly rent of Rs.2.05 lacs per month and was sold to the tenant in occupation.

5. The Assessing Officer examined the sale transaction and in the assessment order had observed:-

> "During the year under consideration the assessee company has shown income from House Property and Income from Business. The assessee company was engaged in the business of sale & purchase, construction, lease or rent of property. During the year the assessee has received rent for three months only and thereafter the property was sold to

> the tenant who was occupying the property. Profit on the same has been declared by the assessee. The assessee was given several opportunities but the company has not filed details in respect of the various expenses claimed by it. As such to cover any possible leakage, a lump sum addition of Rs.7500/- is made."

Reading of the aforesaid paragraph of the assessment order shows that the Assessing Officer had examined the said transaction and accepted the computation of the respondent-assessee. Addition of Rs.7,500/- was made to cover up possible leakages.

6. The CIT thereafter issued notice dated 24.2.2009 under Section 263 of the Income Tax Act, 1961 ("Act" for short) recording the following reasons:

> "From the computation of income filed with the return, it appears that this profit on sale of property has neither been assessed as capital gain nor as income from business. The profit on the sale of property is reduced from the business income of the assessee company in the computation of income for separate consideration but it is not considered as income by the assessee in the computation of income. Therefore, the assessee company has not offered this profit either as business income or as capital gains. In the absence of any business, the expenses have also been incorrectly allowed. Since the assessee company was deriving income from property only, no separate deduction, except the deduction u/s 24, was admissible in respect of the expenses incurred by the assessee company for the maintenance of

> property or otherwise. Accordingly, notice u/s 263dated (sic) 24.2.2009 was issued the assessee."

The respondent-assessee furnished reply and attended hearings on 24th March, 2009 and 26th March, 2009.

7. On 30th March, 2009, the CIT had passed an order, *inter alia*, holding:

> "*4. I have carefully considered the assessee's arguments and examined the assessment record. The assessee's submissions are not acceptable for the following reasons :*
> *(i) There is an apparent understatement of the sale price of the property sold. The property purchased for Rs.69.63 lacs in 1997, yielding a rent of Rs.2.05 lacs per month, is being claimed to have been sold for only Rs.70 lacs in 2003. It cannot be understood how such a high-yielding asset can be disposed off at such a low value. <u>It is clear that the aspect of full value of consideration receivable has not been properly examined by the Assessing Officer and the assessment order is erroneous and prejudicial to the interest of the revenue.</u>*
> *(ii) The assessee has argued that Schedule III of the Wealth Tax Act is not applicable to the Income Tax Act and has quoted Section 55A of the Income Tax Act to support its case. <u>However, reference need not be made to the Valuation Officer when the value of the asset is determinable as per the formula laid down in Schedule-III of the Wealth Tax Act. Only when it cannot be determined by this method does the Assessing Officer make a reference to the Valuation Officer. In this case this formula is clearly applicable and the valuation can be worked out as per the method laid down in Schedule-III. Hence the assessee's</u>*

argument is not tenable.

5. In light of the above discussion, the assessment order is held to be erroneous and prejudicial to the interests of revenue. It is hence set aside to be made afresh by the Assessing Officer according to law after giving opportunity to the assessee of being heard."

(emphasis supplied)

8. The Tribunal has set aside the order observing that the CIT had not held and come to the conclusion or given a finding that the actual receipt of consideration was more than what was declared in the return. The CIT had not recorded any finding that the sale consideration of the property was higher. It has been held that the CIT could not have made any addition under Section 50C as the stamp duty had not been enhanced by the registering authority and the sale deed was registered. It was not the case of the CIT that any extra stamp duty over and above the transaction value was payable because of the circle rates. The order under Section 263 of the Act was set aside/cancelled. Accordingly, Revenue is in appeal.

9. Section 263 of the Act, reads as under:-

"**263. Revision of orders prejudicial to revenue**.—(1) The 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 interest 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.

Explanation.—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

(*a*) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include—

(*i*) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income Tax Officer on the basis of the directions issued by the Joint Commissioner under Section 144-A;

(*ii*) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorised by the Board in this behalf under Section 120;

(*b*) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(*c*) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject-matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

> (3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.
> *Explanation.*—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to Section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

10. Revenue does not have any right to appeal to the first appellate authority against an order passed by the Assessing Officer. Section 263 has been enacted to empower the CIT to exercise power of revision and revise any order passed by the Assessing Officer, if two cumulative conditions are satisfied. Firstly, the order sought to be revised should be erroneous and secondly, it should be prejudicial to the interest of the Revenue. The expression 'prejudicial to the interest of the Revenue' is of wide import and is not confined to merely loss of tax. The term 'erroneous' means a wrong/incorrect decision deviating from law. This expression postulates an error which makes an order unsustainable in law.

11. The Assessing Officer is both an investigator and an adjudicator. If the Assessing Officer as an adjudicator decides a question or aspect and makes a wrong assessment which is unsustainable in law, it can be corrected by the Commissioner in exercise of revisionary power. As an investigator, it is incumbent upon the Assessing Officer to investigate the facts required to be examined and verified to compute the taxable income. If the Assessing Officer fails to conduct the said investigation, he commits an error and the word 'erroneous' includes failure to make the enquiry. In such cases, the order becomes erroneous because enquiry or verification has not been made and not because a wrong order has been passed on merits.

12. Delhi High Court in ***Gee Vee Enterprises vs. Additional Commission of Income-Tax, Delhi-I & Ors.,***(1975) 99 ITR 375, has observed as under:-

> "The reason is obvious. The position and function of the Income-tax Officer is very different from that of a civil court. The statements made in a pleading proved by the minimum amount of evidence may be accepted by a civil court in the absence of any rebuttal. The civil court is neutral. It simply gives decision on the basis of the pleading and evidence which comes before it. The Income-tax

> Officer is not only an adjudicator but also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further inquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. The meaning to be given to the word "erroneous" in section 263 emerges out of this context. It is because it is incumbent on the Income-tax Officer to further investigate the facts stated in the return when circumstances would make such an inquiry prudent that the word "erroneous" in section 263 includes the failure to make such an inquiry. The order becomes erroneous because such an inquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct."

13. In the said judgment, Delhi High Court had referred to earlier decisions of the Supreme Court in ***Rampyari Devi Sarogi vs. CIT*** (1968) 67 ITR 84 (SC) and ***Tara Devi Aggarwal vs. CIT*** (1973) 88 ITR 323 (SC), wherein it has been held that where Assessing Officer has accepted a particular contention/issue without any enquiry or evidence whatsoever, the order is erroneous and prejudicial to the interest of the Revenue. After reference to these two decisions, the Delhi High Court 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."

14. 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.

15. In the case of ***Commissioner of Income Tax vs. Sunbeam Auto Ltd.*** (2011) 332 ITR 167 (Del), Delhi High Court was considering the aspect, when there is no proper or full verification, and it was held as under:-

> "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 rending 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 . . . 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."”

16. Thus, in cases of wrong opinion or finding on merits, the CIT 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. CIT 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 CIT 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 CIT 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 CIT 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 CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question.

17. This distinction must be kept in mind by the CIT 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 interest of 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 CIT conducting verification/inquiry. The order of the Assessing Officer may be or may not be wrong. CIT cannot direct reconsideration on this ground but only when the order is erroneous. An order of remit cannot be passed by the CIT to ask the Assessing Officer to decide whether the order was erroneous. This is not permissible. An order is not erroneous, unless the

CIT 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 CIT must after recording reasons hold that the order is erroneous. The jurisdictional precondition stipulated is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. We may notice that the material which the CIT 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 CIT [see ***CIT vs. Shree Manjunathesware Packing Products***, 231 ITR 53 (SC)]. Nothing bars/prohibits the CIT from collecting and relying upon new/additional material/evidence to show and state that the order of the Assessing Officer is erroneous.

18. It is in this context that the Supreme Court in ***Malabar Industrial Co. Ltd. vs. Commissioner of Income Tax***, (2000) 243 ITR 83 (SC), had observed that the phrase 'prejudicial to the interest of 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 interest of Revenue. Thus, when the Assessing Officer had adopted one of the courses permissible and available to him, and this has resulted in loss to Revenue; or two views were possible and the Assessing Officer has taken one view with which the CIT may not agree; the said orders cannot be treated as an erroneous order prejudicial to the interest of Revenue unless the view taken by the Assessing Officer is unsustainable in law. In such matters, the CIT must give a finding that the view taken by the Assessing Officer is unsustainable in law and, therefore, the order is erroneous. He must also show that prejudice is caused to the interest of the Revenue.

19. In the present case, the findings recorded by the Tribunal are correct as the CIT has not gone into and has not given any reason for observing that the order passed by the Assessing Officer was erroneous. The finding recorded by the CIT is that "order passed by the Assessing Officer may be erroneous". The CIT had doubts about the valuation and sale consideration received but the CIT should have examined the said aspect himself and given a finding that the order passed by the Assessing

Officer was erroneous. He came to the conclusion and finding that the Assessing Officer had examined the said aspect and accepted the respondent's computation figures but he had reservations. The CIT in the order has recorded that the consideration receivable was examined by the Assessing Officer but was not properly examined and therefore the assessment order is "erroneous". The said finding will be correct, if the CIT had examined and verified the said transaction himself and given a finding on merits. As held above, a distinction must be drawn in the cases where the Assessing Officer does not conduct an enquiry; as lack of enquiry by itself renders the order being erroneous and prejudicial to the interest of the Revenue and cases where the Assessing Officer conducts enquiry but finding recorded is erroneous and which is also prejudicial to the interest of the Revenue. In latter cases, the CIT has to examine the order of the Assessing Officer on merits or the decision taken by the Assessing Officer on merits and then hold and form an opinion on merits that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. In the second set of cases, CIT cannot direct the Assessing Officer to conduct further enquiry to verify and find

out whether the order passed is erroneous or not.

20. The CIT is patently wrong in mentioning and stating that Schedule III to the Wealth Tax Act, 1957 was not applicable but, the Assessing Officer should have adopted the said formula/method. The aforesaid reasoning cannot be accepted and does not show or establish that the assessment order was erroneous.

21. In view of the aforesaid reasoning, the question of law is answered in favour of respondent-assessee and against the Revenue and the appeal is accordingly dismissed. No costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

MARCH 01, 2012
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