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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **INCOME TAX APPEAL NO. 267/2013**

Date of decision: 9th July, 2013

DIT

..... Appellant

Through Mr. Karan Khanna, Sr. Standing
Counsel.

versus

JYOTI FOUNDATION

..... Respondent

Through Ms. Prem Lata Bansal, Sr. Advocate
with Mr. Sarfaraz Ahmad & Ms. Ruchi Jain,
Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J. (ORAL):

This appeal by the Revenue impugns order dated 24th August, 2012 passed by the Income Tax Appellate Tribunal in the case of Jyoti Foundation, a charitable trust. The assessment year involved is 2006-07 and by the impugned order the tribunal has struck down order dated 30th March, 2012 passed by the Director of Income Tax (Exemptions) under Section 263 of the Income Tax Act, 1961 (Act, for short).

2. For the Assessment Year 2006-07, pursuant to a complaint made by one Jayant Pandey, re-assessment notice under Section 147 was issued to examine and verify the sale consideration received on sale of four plots measuring 500 square yards each in village Nangli, Sakarawati, Delhi. The respondent-assessee had declared sale

consideration of Rs.4 lacs each (total Rs.16 lacs) whereas it was alleged by the complainant that the total sale consideration received was Rs.84 lacs. The Assessing Officer after conducting inquiry did not make any addition and accepted the consideration. It appears that summons were issued to Jayant Pandey, who produced copy of the bayana receipt but could not be served thereafter as he was not available at the given address.

3. The Director of Income Tax (Exemptions) issued notice under Section 263 and thereafter passed the order dated 30th March, 2012 recording as under:

“However, it is noted that assessment in this case was completed on 8.6.2009 and the beginning of the financial year and there was almost seven months left before the case gets time barred on 31.12.2009, AO has should have made enquiries to know to locate Sh. Jayant Pandey, complainant to know the veracity of the transaction, which the very basis of reopening of assessment. Merely by recording the statement of purchasers and seller, genuineness of the transaction is not proved as the purchaser and seller are the interested parties on whom the tax liability would occur in case of bayana receipt found true. The AO should have made local enquiries of the place where the property in question is sold to know the actual consideration involved in the transaction. Further, it is noted that date of execution of sale deed is almost near the date mentioned in the Bayana Receipt. It is also noted that signature of Sh. Rajesh Gupta, purchaser is same on the Bayana Receipt as on sale deed. The signature of Sh. Jayant Pandey is same on both sale deed and Bayana receipt as witness.

All these facts show that assessment

has been framed in a hurried and casual manner without applicant(sic) of mind, without making proper enquiries. The assessment order dated 8.6.2009 for assessment year 2007-08 is, therefore, held to erroneous and prejudicial to the interest of revenue as the entire consideration as per Bayana Receipt has not been brought to tax.

The assessment order for the Asstt. Year 2006-07 passed u/s 143(3)/147 of the Income Tax Act, 1961 on 8.6.2009, is, therefore, set aside u/s 263 of the Act, with the directions to the Assessing Officer, Trust Ward –IV, New Delhi to make enquiry from Sh. Jayant Pandey and obtain the original Bayana Receipt at the time of examination of various persons and bring it to the notice of the purchaser as the signatures is apparently same and conduct other enquiries to arrive at proper conclusion on the veracity of Bayana Receipt, in question and pass a fresh assessment in accordance with law after affording due opportunity of hearing to the assessee.”

4. Revisionary power under Section 263 of the Act is conferred by the Act on the Commissioner/Director of Income Tax when an order passed by the lower authority is erroneous and prejudicial to the interest of the Revenue. Orders which are passed without inquiry or investigation are treated as erroneous and prejudicial to the interest of the Revenue, but orders which are passed after inquiry/investigation on the question/issue are not per se or normally treated as erroneous and prejudicial to the interest of the Revenue because the revisionary

authority feels and opines that further inquiry/investigation was required or deeper or further scrutiny should be undertaken. In ***Income Tax Officer versus DG Housing Projects Limited***, (2012) 343 ITR 329 (Delhi) it has been observed:

“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 Saraogi 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 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 subsection (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*, (1998) 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.”

5. In the present case, inquiries were certainly conducted by the Assessing Officer. It is not a case of no inquiry. The order under Section 263 itself records that the Director felt that the inquiries were not sufficient and further inquiries or details should have been called. However, in such cases, as observed in the case of *DG Housing Projects Limited* (supra), the inquiry should have been conducted by the Commissioner or Director himself to record the finding that the assessment order was erroneous. He should not have set aside the order and directed the Assessing Officer to conduct the said inquiry.

6. In view of the aforesaid legal position, we do not think any substantial question of law arises for consideration.

The appeal is dismissed.

SANJIV KHANNA, J.

SANJEEV SACHDEVA, J.

JULY 09, 2013
VKR