

GAHC010123592021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3986/2021

CMJ BREWERIES PRIVATE LIMITED
A COMPANY INCORPORATED UNDER THE PROVISIONS OF THE
COMPANIES ACT, 1956, HAVING ITS REGD. OFFICE AT 1, BLOCK III CMJ
HOUSE, FERNDAL COMPLEX, KEATING ROAD, SHILLONG- 793001,
MEGHALAYA AND REP. BY SHRI BINIT SINGHANIA, THE AUTHORISED
SIGNATORY OF THE PETITIONER COMPANY

VERSUS

THE UNION OF INDIA AND 3 ORS
THROUGH THE SECRETARY, MINISTRY OF FINANCE, NORTH BLOCK, NEW
DELHI- 110001

2:PRINCIPAL COMMISSIONER OF INCOME TAX
GHY-1
AAYAKAR BHAWAN
G.S.ROAD
GHY-05
ASSAM

3:JCIT
RANGE-1
GHY
AAYAKAR BHAWAN
G.S.ROAD
GHY-05
ASSAM

4:ACIT
CIRCLE-1
GHY
AAYAKAR BHAWAN

G.S.ROAD
GHY-05
ASSA

Advocate for the Petitioner : DR. A SARAF, MR P BARUAH,MR. P DAS,MR. N N DUTTA,MR S J SAIKIA,MR. Z ISLAM

Advocate for the Respondent : SC, INCOME TAX, MR. S CHETIA (r-3,4),MR. S SARMA (r-2)

Date of Hearing : 28.05.2024.

Date of Judgment : 27.08.2024

**BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA**

:: JUDGMENT AND ORDER (CAV)::

Heard Dr. A. Saraf, learned Senior Counsel assisted by Mr. P. Baruah, learned counsel for the petitioner. Also heard Mr. S. Chetia, learned Standing Counsel, Income Tax Department.

2. The petitioner is a company incorporated under the Companies Act, 2013 having it's registered office at 1, Block III CMJ House, Ferndale Complex, Keating Road, Shillong-793001, Meghalaya and is represented in the present proceedings by the authorised signatory, Sri Binit Singhania.

3. For the assessment year 2017-18, the petitioner e-filed its original return under Section 139(1) of the Act on 31.10.2017 declaring a total loss of

Rs.58,74,28,484/- . The case of the petitioner was selected for scrutiny under the Computer Assisted Scrutiny Selection (CASS) vide Notice No. ITBA/AST/S/143(2)/2018-19/1010964997(1) dated 09.08.2018 under Section 143(2) of the Act.

4. The petitioner responded by its communication dated 20.12.2018 in the said assessment proceedings. The Assessing Officer by order dated 31.12.2018 passed the final assessment order under Section 153A/153D/143(3) of the Act vide Assessment Order dated 31.12.2018, making an addition of Rs.87,29,120/-, thereby reducing the total loss to Rs.57,86,99,364/-. The said assessment order was passed by taking into account the records and evidences filed by the writ petitioner. Thereafter, the respondent No.4 forwarded a proposal to the respondent No.2 dated 10.03.2021 for revision of the Assessment Order dated 31.12.2018 under Section 263 of the Act. The respondent No.2 solely on the basis of the proposal dated 10.03.2021, issued a Show Cause Notice No. ITBA/REV/F/REV1/2020-21/1031736946(1) dated 24.03.2021 directing the petitioner to show cause as to why the order under Section 263 of the Income Tax Act should not be issued for revision of the Assessment Order dated 31.12.2018 passed by the then Assessing Officer for the assessment year 2017-18. The only ground in the Show Cause Notice dated 24.03.2021 was in respect of an amount of Rs.9,93,67,946/- claimed under the head prior period expenses,

which, according to the respondents ought to have been disallowed under the provisions of Section 37 of the Act but was not disallowed in the original assessment proceedings under Section 143(3) of the Act. By the Show Cause Notice the petitioner was directed to appear for hearing on 26.03.2021 and consequently, the petitioner was granted one day to appear before the authorities in response to the Show Cause Notice. Subsequently, the personal hearing was rescheduled on 30.03.2021. The petitioner appeared before the respondent No.2 in response to the Show-Cause Notice and submitted its written submissions. Thereafter, vide order No. ITBA/REV/F/REV5/2020-21/1032115258(1) dated 31.03.2021 the respondent No.2 passed the impugned order holding the Assessment Order dated 31.12.2018 passed by the then Assessing Officer as erroneous and prejudicial to the interests of the revenue. Being aggrieved, the present writ petition has been filed.

5] Referring to the provisions of Section 263 under the Income Tax Act, 1961, learned Senior Counsel for the writ petitioner submits that a bare perusal of Section 263 of the Act makes it clear that there are mandatory preconditions and procedures laid down which are required to be scrupulously followed before invoking the jurisdiction by the Principal Chief Commissioner of Income Tax or the Chief Commissioner. It is submitted that the Revisional Authority has to call for and examine the records of the case and the assessee must be given an

opportunity of being heard. The Revisional Authority will invoke its jurisdiction under Section 263 of the Income Tax Act only upon being satisfied that the order passed by the assessee officer is erroneous and that it is also prejudicial to the interests of revenue. The Revisional Authority, only upon being satisfied and upon hearing the assessee may pass an order modifying or cancelling the assessment order and directing a fresh assessment if required.

6] Learned Senior Counsel for the petitioner submits that by the impugned order dated 31.03.2021, the Revisional Authority has categorically held that on examination of the matter, it cannot be confirmed accurately as to whether the assessee did not claim the deduction for the earlier years. It was held that although the explanation of the assessee seems plausible, in the opinion of the Revisional Authority, it would be better if the matter was examined at length. Learned Senior Counsel for the petitioner submits that a plain reading of the impugned order reveals that there was no finding by the Revisional Authority that the order of the Assessing Officer was erroneous and that it was also prejudicial to the interests of revenue.

7] Learned Senior Counsel for the petitioner submits that the Revisional Authority came to a finding that whether the benefit was claimed or not by the assessee could not be confirmed accurately. As such, there was no finding that

the order passed by the Assessing Officer is erroneous and the benefit granted to the petitioner is prejudicial to the interests of revenue. The order of the Assessing Officer calls for a remission is required to be revised under Section 263 of the Act. The term "*erroneous*" is not defined under the act.

8] Learned Senior Counsel has pressed into service the judgment of the Apex Court rendered in ***Malabar Industrial Company Limited vs Commissioner of Income Tax, Kerala State***, reported in (2000) 2 SCC 718. Referring to the said judgment, he submits that the Apex Court has held that incorrect assumption of facts or an incorrect application of law will satisfy the requirement an order being erroneous. He also refers to the judgment of this Court rendered in ***Rajendra Singh vs Superintendent of Texas***, 1991 GLR 449, wherein Division Bench of this Court referring to the Black's Law Dictionary, has held that "*erroneous*" means "*involving error and deviating from law*". It is submitted that an "*erroneous assessment*" refers to an assessment that deviates from law and is therefore invalid and is therefore a defect that is jurisdictional in nature. He also refers to and relies upon the judgment of another Division Bench of this Court rendered in ***CIT vs Daga Entrade (P) Limited*** reported in (2010) 327 ITR 467. Referring to the said judgment, he submits that only in cases where the Assessing Officer passed the order ignoring relevant materials, causing prejudice to the interest of revenue, suo-moto

revisional jurisdiction could be exercised by the CIT. Since there was an apparent conflict between the findings in **Rajendra Singh** (supra), and **Daga Entrade (P) Limited** (supra), the matter was referred to a Full Bench and the Full Bench in **Commissioner of Income Tax vs Jawahar Bhattacharjee** reported in (2012) 2 GLR 495 which ultimately held that the decision of the Division Bench in **Daga Entrade (P) Limited** is not in conflict with the earlier decision of this Court in **Rajendra Singh** (supra). It is held that the jurisdiction under Section 263 of the Income Tax Act, 1961 can be invoked whenever it is found that the order of assessment was passed on incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous, non-application of mind and omission to follow natural justice are not beyond the scope of Section 263 of the Act. It was held that cases of assessment orders passed on wrong assumption of facts, on incorrect application of law, without due application of mind, or without following the principles of natural justice, were not beyond the scope of Section 263 of the Income Tax Act, 1961. The learned Senior Counsel also refers to the judgment of the Apex Court in **Commissioner of Income Tax vs. Amitabh Bachchan** reported in (2016) 11 SCC 748 in support of his contentions.

9] It is submitted that a satisfaction has to be arrived at by the Revisional Authority that the order passed by the Assessing Officer is erroneous and also

prejudicial to the interest of revenue. It is submitted that the Apex Court has held that these preconditions which are required to be present and once this twin satisfaction is arrived at by the Revisional Authority, they can invoke their jurisdiction to pass orders under Section 263 of the Income Tax Act. Learner Senior Counsel for the petitioner has also referred to the judgment of the Bombay High Court rendered in ***Commissioner of Income Tax vs. Gabriel India Limited***, reported in (1993) SCC Online Bom 526.

10] Referring to the judgments placed above, learned Senior Counsel submits that the impugned order passed by the Revisional Authority does not satisfy the twin preconditions necessary to invoke jurisdiction under Section 263 of the Income Tax Act. He submits that a plain reading of the impugned order dated 31.03.2021 reveals that there was no satisfaction arrived at by the Revisional Authority. That being the position, the preconditions required to be satisfied before invoking the jurisdiction under Section 263 are absent. Learned Senior Counsel submits that there is no finding in the impugned order dated 31.03.2021 that the assessment order of the Assessing Officer passed earlier is erroneous and that it is prejudicial to the interest of revenue and therefore, revision under Section 263 is required to be invoked. He reiterates his submissions that there is a categorical finding by the Revisional Authority that on examination of the matter it could not be confirmed accurately as to whether

the assessee had not claimed the deduction in the earlier years. The Revisional Authority, notwithstanding that it could not arrive at a finding that the order passed by the Assessing Officer was erroneous and prejudicial to the interest of revenue, invoked his jurisdiction under Section 263 of the Income Tax Act and directed the assessing officer to examine the matter in depth. Learned Senior Counsel submits there is no scope under Section 263 of the Act enabling the Revisional Authority to invoke his jurisdiction under the said Section to direct to examine in order to arrive at any conclusion that the order of the Assessing Officer is not only erroneous but also prejudicial to the interests of the Revenue. Referring to the judgment of the Apex Court rendered in the ***Commissioner of Income Tax, Bhopal vs. G.M Mittal Stainless Steel (P) Ltd.***, reported in (2003) 11 SCC 441, learned Senior Counsel submits that the satisfaction required to be arrived at by the Revisional Authority must be one which is objectively justifiable and cannot be the mere *ipse dixit* of the Commissioner. Referring to all the judgments above, the learned Senior Counsel submits that the law laid down by this Court as well as by the Apex Court clearly holds that in order to invoke the powers under Section 263 of the Income Tax Act, the Revisional Authority must be satisfied that the order passed by the Assessing Officer is not only erroneous but is also prejudicial to the interest of revenue. Accordingly, it is submitted that the finding of the Revisional Authority that the

order of the Assessing Officer is erroneous and prejudicial to the interest of revenue must be unjustifiable. He, therefore, submits that the impugned order dated 31.03.2021 be interfered with, set aside and quashed.

11] *Per contra*, the learned Standing Counsel for the respondents submits that an affidavit-in-opposition has been filed by disputing the contentions raised by the learned Senior Counsel for the petitioner. He submits that it is because the order of the Assessing Officer is found to be erroneous and prejudicial to the revenue that the Revisional Authority has invoked his jurisdiction under Section 263 of the Income Tax Act and has directed the Assessing Officer to make assessment of the assessee afresh by examining all the aspects after making detailed enquiry and affording a reasonable opportunity to the writ petitioner. He submits that the judgments referred to by the learned Senior Counsel for the petitioner are rendered by the Courts in the facts and circumstances of each case. He submits that in the facts of the present case, while there is no quarrel with the principle laid down by the Apex Court as well as by this Court, the fact remains that the Revisional Authority noticed certain anomalies which were not clarified by examination of the records and therefore, the Revisional Authority has correctly passed the order impugned in the present writ petition and directing the Assessing Officer to reassess the assessee after detailed examination and enquiry. He, therefore, submits that there is no merit in the

instant writ petition and the same should accordingly be dismissed.

12] Learned Standing Counsel for the respondent submits that in the assessment order dated 31.12.2018, an addition of Rs. 87,29,120/- was made and the assessment was made at a total loss of Rs.57,86,99,364/- against the total loss of Rs 58,74,28,484 declared by the assessee. He submits that during the assessment proceedings no enquiry or verification as to the assessee's claim on account of Rs.9,93,67,946/- which was claimed to be prior period expenses, was conducted by the Assessing Officer.

13] The total loss computed by the Assessing Officer was arrived at by allowing the claim of the writ petitioner to the tune of Rs.9,93,67,946/- as prior period expenses. It is submitted that since no enquiry was made by the Assessing Officer before allowing the claims of the assessee, the Revisional Authority rightly directed the Assessing Officer to make necessary enquiry and thereafter, they will make reassessment afresh.

14] Learned counsel for the parties have been heard. Pleadings on the record have been carefully perused. The judgments cited at the Bar are also been carefully noted.

15] At the outset it is necessary to refer to the Section 263 of the Income Tax Act. Section 263 of the Income Tax Act is extracted below:

“Revision of orders pre-judicial to revenue

263. (1) *The [Principal Commissioner or] 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 Income-tax Officer is erroneous in so far as it is prejudicial to the interests 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.”*

16] From perusal of Section 263 it is seen that the Principal- Chief- Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may call for and examine the record of any proceedings under the Act and if he considers that any order passed by the Assessing Officer was passed erroneously in so far as it is prejudicial to the interest of revenue, he may, after giving an opportunity of being heard and after making or causing such enquiry as he deems necessary, may pass the order thereon as the circumstances of the case justifies. From the plain reading of the Section, it is seen that the Revisional Authority must examine the record of the case by calling for it and upon due examination, if he considers that the order passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interest of revenue, then after giving an opportunity of being heard to the assessee and after making such enquiry or examination, it can pass such orders as the circumstances of the case may justify, including an order modifying or cancelling the assessment and directing a fresh assessment.

17] Since the issue which was examined by the Revisional Authority was as to whether the deduction of expenditure of the prior period was allowable to the assessee under section 37 of the Act, a reference to section 37 is also apposite. Section 37 reads as under:

“37. (1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession.”

18] In order to appreciate the powers of the Revisional Authority under Section 263 of the Income Tax Act and the circumstances under which such powers are to be exercised will require examination of the case laws referred to at the Bar. The Apex Court in the case of **Amitabh Bachchan** (supra), has held that in order to invoke the powers under section 263 by the Revisional Authority, there must be two preconditions which are required to be satisfied: (i) The Revisional Authority must come to a finding that the order passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interest of revenue and (ii) upon being so satisfied, he may upon giving a reasonable opportunity to the assessee, invoke his jurisdiction under Section 263 by passing

appropriate orders. In other words, the Revisional Authority must come to a conclusion and a satisfaction that that the order passed by the Assessing is not only erroneous, but the said order is prejudicial to the interests of revenue.

20] The term "*erroneous*" is not defined under the Income Tax Act. However, the meaning that may be ascribed to the term *erroneous* has been expounded by the Apex Court in ***Malabar Industrial Company Limited*** (supra). The Apex Court held that incorrect assumption of facts or incorrect application of law will satisfy the requirement of being erroneous. A reference to the judgment of Division Bench of this Court rendered in ***Rajendra Singh*** (supra), which was also considered and affirmed by judgment of the Full Bench of this Court rendered in ***Jawahar Bhattacharjee*** (supra). In the said judgment, the Division Bench of this Court examined the various definitions provided in Black's Law Dictionary to the term "*erroneous*" and "*erroneous assessment*".

21] The Apex Court held that Section 263 (1) of the Income Tax Act, cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer. It is only when an order is erroneous, then this Section will be attracted and an incorrect assumption of facts or incorrect application of law will satisfy the requirements of the order being erroneous. The phrase "prejudicial to the interests of Revenue" is not an expression of art and is not defined in the

Act. Understood in its ordinary meaning, it is of wide import and is not confined to loss of tax. The phrase “prejudicial to the interests of Revenue” has to be read in conjunction with the erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of revenue. Further, when two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order “prejudicial to the interests of Revenue” unless the view taken by the ITO is unsustainable in law. Relevant paragraphs of this Judgments are extracted below:

“6. A bare reading of this provision makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income-tax Officer is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i). the order of the Assessing Officer sought to be revised is erroneous; and

(ii) it is prejudicial to the interests of the revenue. If one of them is absent -- if the order of the Income-tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue

-- recourse cannot be had to [Section 263\(1\)](#) of the Act.

7. There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

8. The phrase prejudicial to the interests of the revenue is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in [Dawjee Dadabhoy & Co. Vs. S.P. Jain and Another](#) [31 ITR 872], the High Court of Karnataka in Commissioner of Income-

tax, Mysore Vs. T. Narayana Pai [98 ITR 422], the High Court of Bombay in Commissioner of Income-tax Vs. Gabriel India Ltd. [203 ITR 108] and the High Court of Gujarat in Commissioner of Income-tax Vs. Smt. Minalben S. Parikh [215 ITR 81] treated loss of tax as prejudicial to the interests of the revenue.

9. Mr. Abaramham relied on the judgment of the Division Bench of the High Court of Madras in Venkatakrishna Rice Company Vs. Commissioner of Income-tax [163 ITR 129] interpreting prejudicial to the interests of the revenue. The High Court held, In this context, it must be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the Order passed by the Income-tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue Administration. In our view this interpretation is too narrow to merit acceptance. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income-tax Officer, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue.

10. The phrase prejudicial to the interests of the revenue has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue. Rampyari Devi Saraogi Vs. Commissioner of Income-tax [67 ITR 84] and in Smt. Tara Devi Aggarwal Vs. Commissioner of Income-tax, West Bengal [88 ITR 323]. ”

22] In *Rajendra Singh vs. the Superintendent of Taxes & Others*, a Division Bench of this Court held that “erroneous assessment” refers to an assessment that deviates from law and is therefore invalid and is a defect that is jurisdictional in nature. It does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Erroneous judgment means one rendered contrary to law, upon mistaken view of law or upon

erroneous application of legal principles. An order cannot be treated to be erroneous unless it is not in accordance with law. If an officer acting in accordance with law, makes certain assessment, the same cannot be termed to be erroneous by the Commissioner simply because according to him, the order should have been written more elaborately. This Section (Section 263 of the Income Tax Act), does not visualise a case of substitution of judgment of the Commissioner for that of the Officer who passed the order unless the decision of the subordinate officer is held to be erroneous. Any difference of opinion by the Commissioner with regard to the form or the manner in which the order was issued by the assessing officer, would not make such an order erroneous. Relevant paragraphs of the Judgment are quoted below:

“9. The power of suo motu revision under Sub-section (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of suo motu revision under this sub-section, (i) the order is erroneous ; (ii) by virtue of the order being erroneous prejudice has been caused to the interest of the revenue. It is not sufficient that the order is erroneous. It must be erroneous and also prejudicial to the interest of the revenue. If an order is erroneous but not prejudicial to the revenue, the Commissioner cannot exercise power under this sub-section. Likewise, it is not sufficient to exercise power under [Section 21\(1\)](#) that the order in question is prejudicial to the interest of the revenue. It must be erroneous first and if it is so then it can be revised in so far as it is prejudicial to the interest of the revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. We find that the expressions "erroneous", "erroneous assessment" and "erroneous judgment" have been defined in Black's Law Dictionary. According to definition "erroneous" means "involving error ; deviating from the law". "Erroneous assessment" refers to an assessment that deviates from the law and is therefore invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the assessing officer in fixing the amount of valuation of the property. Similarly "erroneous judgment" means : "One rendered according to course and practice of court, but contrary to law, upon mistaken view of law, or upon erroneous

application of legal principles".

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 officer acting in accordance with law makes certain assessment and determines the turnover of a dealer, 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 judgment of the Commissioner for that of the officer, who passed the order, unless the decision of the subordinate officer is held to be erroneous. Cases may be visualised where assessing officer while making an assessment examines the accounts, makes his enquiries, applies his mind to the facts and circumstances of the case and determines the turnover either by accepting the accounts or by making some estimates 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 turnover at a higher figure than the one determined by the assessing officer. That would not vest the Commissioner with power to re-examine the accounts and determine the turnover himself at a higher figure. It is because the 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 termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interest of the revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, namely, that the order is erroneous, is absent. Similarly if an order is erroneous but not prejudicial to the interest of the revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be subject-matter of revision because the second requirement also must be fulfilled. 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."

The above view held by the Division Bench in **Rajendra Singh** (supra) was also accepted subsequently by Full Bench of this Court in **Jawahar Bhattacharjee** (supra). The Full Bench held that the ratio of Rajendra Singh (supra) is not in conflict with the subsequent judgment of the Division Bench of this Court in **Daga Entrade (P) Limited** (supra).

23] It was held that an order cannot be held to be erroneous unless it is not in accordance with law. It was held that if an order is passed making certain

assessments, the same cannot be branded as erroneous by higher authority, namely, the Commissioner herein, simply because according to him, the order should have been written more elaborately. Therefore, what can be understood from the findings of the Apex Court as well as the High Court is that for an order to be erroneous, it must be contrary to the provisions of law and only then it can be held to be an erroneous assessment. Further referring again to the judgment of the Apex Court in **Amitabh Bachchan** (supra), it has to be held that for invoking a jurisdiction under the provisions of Section 263 of the Income Tax Act, the parameters required to be maintained by the Revisional Authority are that the assessment order must be erroneous and that it must also be found to be prejudicial to the interests of the revenue. Unless these two conditions are simultaneously satisfied, the jurisdiction under Section 263 of the Income Tax Act cannot be invoked.

24] From the impugned order dated 31.03.2021 it is clear that there is no specific finding by the Revisional Authority that the benefit claimed by the assessee under Section 37 of the Income Tax Act was wrongly allowed by the Assessing Officer. Rather, the impugned order dated 31.03.2021 categorically holds that it is not clear as to whether assessee was permitted the benefit after making the proper enquiry. The powers under Section 263 of the Income Tax Act are to be invoked for reopening an assessment already concluded.

Therefore, such powers cannot be invoked without proper enquiry and a satisfaction arrived at by the Revisional Authority that such powers under Section 263 Income Tax Act are required to be invoked in any given case. Any power under any fiscal statute which empowers an Authority to reopen concluded assessment cannot be invoked without proper application of mind. The Section 263 of the Income Tax Act specifically provides that the Authority will call for and examine the record of the proceedings and upon giving the assessee an opportunity of being heard and after making or causing any such enquiry to be made as it deems necessary, pass such orders as the circumstances of the case may justify. Therefore, it is the mandate of the statute that the Revisional Authority will call for and examine the proceedings of the case and besides giving an opportunity to the assessee of being heard, he may make necessary enquiries or cause any such enquiries to be made, and thereafter pass orders as deemed fit and proper only after his satisfaction.

25] From the impugned order dated 31.03.2021 it is apparent that the Revisional Authority has reopened the assessment by setting aside the assessment order passed earlier and directing the Assessing Officer to cause proper and detailed enquiry and thereafter, make the assessment a fresh. Such power to reopen or order for fresh assessments cannot be *de hors* the prescription of the statute. Reopening of assessments already concluded cannot

be ordered in a casual or whimsical manner. That apart, the prescription in a fiscal statute has to be rigorously followed and any power exercised under any such fiscal statute cannot be exercised by the authority prescribed therein without satisfying the requirement of the prescriptions in the statute.

26] In the present case, the Revisional Authority in the impugned order did not come to a specific conclusion as to whether the benefit was claimed by the assessee under section 37 of the Act. A plain reading of the impugned order reveals that the matter requires examination. The order of the Revisional Authority under section 263 of the Income Tax Act was issued, remanding the matter to the Assessing Officer to cause a proper enquiry and verification and thereafter, pass fresh assessment order. A finding that the assessee is not entitled to claim the benefits of a prior period has not been arrived at by the Revisional Authority while passing the impugned order. There is no finding as to whether the records were called for and examined by the Revisional Authority. The Revisional Authority merely concluded that it could not be confirmed accurately as to whether the assessee had not claimed the deduction in the earlier years. Further, the assessee would not be disentitled to claim any benefit which may have accrued to the assessee for the earlier period at a later stage when any enforceable demand is made, unless the same is specifically prohibited in the statute as had been held in CIT vs. Nathmal Tolaram reported

in 88 ITR 234. Under such circumstances, if any benefit had accrued to the assessee for the earlier period which by oversight or other bonafide reasons was not claimed by the assessee, then the assessee cannot be precluded from claiming such a benefit in the later assessments unless the same is specifically prohibited under the provisions of the Act.

27] Under such circumstances, it is evident that there was no satisfaction reached by the Revisional Authority that there was an error in the assessment order passed earlier by the Assessing Officer and that erroneous order is also prejudicial to the interests of revenue. Unless such specific findings, as required under law, are arrived at by the Revisional Authority, in view of the law laid down by the Apex Court as discussed above, the Revisional Authority is not empowered to invoke its jurisdiction by passing orders and reopening concluded assessments.

28] In view of all the above discussions, this Court is of the considered opinion that the impugned order dated 31.03.2021 was issued in total contravention of the requirements specified under Section 263 of the Income Tax Act, 1961 and in violation of the law laid down by this Court as well as by the Apex Court in the judgments discussed above.

29] The impugned order dated 31.03.2021 is, therefore, set aside and

quashed. The writ petition is, therefore, allowed. No order as to cost.

JUDGE

Comparing Assistant