

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

ITA No.764 of 2008 (O&M)

Date of decision: 20.10.2015

Commissioner of Income Tax, Ludhiana II

.....Appellant

vs.

Smt. Savita Goyal, Prop.Shree Sudharma Inds.GT Road, Khanna

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN**

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

Present: Mr. Zora Singh Klar, Advocate, Advocate for the appellant-revenue.

Mr. S.K.Mukhi, Advocate for the respondent-assessee.

Ajay Kumar Mittal,J.

1. This order shall dispose of ITA Nos.764 of 2008 and 899 of 2010 as both the appeals relate to the same assessee in respect of the same assessment year i.e. 2002-03. However, the facts are being extracted from ITA No.764 of 2008.

2. ITA No. 764 of 2008 has been filed by the revenue under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 8.1.2008, Annexure A.2 passed by the Income Tax Appellate Tribunal, Chandigarh Bench 'A' in ITA No.438/Chandi/2007, for the assessment year 2002-03, claiming following substantial question of law:-

“Whether on the facts and in the circumstances of the case, the ITAT was right in law in setting aside the order passed by the

Commissioner of Income Tax II, Ludhiana under Section 263 of the Act on 27.3.2007?

In ITA No.899 of 2010, the substantial questions of law claimed by the revenue are as under:-

- i) Whether on the facts and in the circumstances of the case, the Tribunal was legally justified in dismissing the appeal of the department and confirming the order of CIT(Appeals) vide which additions made by the AO on account of suppression of closing stock and on account of addition under section 68 of the Act were deleted by observing that since the order under section 263 has been held to be unjustified by ITAT, there is no question for sustaining the additions made to give effect to the same order under section 263 of the Act and without discussing the merits of the additions made?
- ii) Whether on the facts and in the circumstances of the case, the Tribunal was legally justified in dismissing the appeal of the department and confirming the order of CIT(Appeals) though an appeal under section 260A of the Act has been filed against the order of the ITAT holding order under section 263 of the Act as unjustified?

3. A few facts relevant for the decision of the controversy involved as narrated in ITA No.764 of 2008 may be noticed. Original assessment in this case was completed under section 143(3) of the Act on 29.12.2004 at an income of ₹ 4,15,017/- which was cancelled by the Commissioner of Income Tax II, Ludhiana (CIT) by his order under section 263 of the Act dated 27.3.2007, Annexure A.1 as he found that the order of the Assessing Officer was erroneous and prejudicial to the interest of the revenue and directed the Assessing Officer to re-examine the following

issues:-

1. Calculation of Long Term Capital Gain on plot allotted by Ghaziabad Development Authority.
2. Ratio of stock in trade to turn over.
3. Shortage during manufacturing process claimed at the rate of 9.1% was abnormal.
4. Investment in purchase of shopping complex in GTB Market, Khanna.
5. Gifts to Shri Akshit Goyal, minor son of the assessee.

Pursuant to the order under Section 263 of the Act, the assessment under section 143(3)/263 of the Act was again completed on 26.12.2007 on the total income of ₹ 22,73,430/- after making an addition of ₹ 18,58,416/- on account of alleged gift received by the assessee and her minor sons etc. Not satisfied with the order passed by the CIT, the assessee preferred appeal before the Tribunal on 14.5.2007. Vide order dated 8.1.2008, Annexure A.2, the Tribunal set aside the order passed by the CIT holding that the Commissioner was not justified in imposing his own views in the garb of section 263 of the Act unless and until some malafide and prejudice caused to the revenue was pointed out. According to the revenue, even during the reassessment proceedings, the assessee could not produce all the donors who made gifts to Akshit Goyal, minor son of the assessee to the tune of ₹ 9,09,500/-(the correct figure is ₹ 9,95,000/-). Only one donor Shri J.K.Goyal was produced who had only salary income and he could not explain as to what was the source of gift which was three times his annual salary income. The other two donors were also not produced. Thus, the assessment order dated 29.12.2004 was erroneous and prejudicial to the interest of the revenue. Hence the instant appeals by the revenue.

4. We have heard learned counsel for the parties.

5. It was noticed by the CIT that the assessment was found to be wanting on five counts as mentioned above on the basis of which re-examination was ordered. The action of the CIT was affirmed by the Tribunal in so far as points No.1, 3 and 4 were concerned which were adjudicated on reassessment and the same were accepted by the assessee.

The relevant observations of the Tribunal read thus:-

“As far as points No. 1 3, 4 are concerned, the same were adjudicated upon in re-assessment proceedings and the same were accepted by the assessee, therefore, without commenting upon these three discrepancies on merits, we affirm the action of the learned CIT as the same has now remained for academic interest only.”

Once that is so, it could not be said that the order under Section 263 of the Act was without jurisdiction. The Tribunal was not justified in holding partially that invoking of revisional jurisdiction under Section 263 of the Act with regard to Issues No.2 and 5 relating to Stock trade turnover and gift to Shri Akshit Goyal was without jurisdiction.

6. In ***Malabar Industrial Co. Limited vs. CIT***, (2000) 243 ITR 83, relied upon by the learned counsel for the revenue, while considering the scope of Section 263 of the Act, the Apex Court held as under:-

“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.

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.

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* (1957) 31 ITR 872, the High Court of Karnataka in *Commissioner of Income-tax, Mysore Vs. T. Narayana Pai* (1975) 98 ITR 422, the High Court of Bombay in *Commissioner of Income-tax Vs. Gabriel India Ltd.* (1993) 203 ITR 108 and the High Court of Gujarat in *Commissioner of Income-tax Vs. Smt. Minalben S. Parikh* (1995) 215 ITR 81 treated loss of tax as prejudicial to the interests of the revenue.

Mr. Abaraham relied on the judgment of the Division Bench of the High Court of Madras in *Venkatakrishna Rice Company Vs. Commissioner of Income-tax* (1987) 163 ITR 129 interpreting prejudicial to the interests of the revenue. The High Court held (Page 138):

“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.

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 (1968) 67 ITR 84 and in Smt. Tara Devi Aggarwal Vs. Commissioner of Income-tax, West Bengal (1973) 88 ITR 323.”

7. On examination of order of CIT passed under Section 263 of the Act and also the assessment order dated 29.12.2004, we find that the CIT had rightly assumed jurisdiction under Section 263 of the Act as the assessment order dated 29.12.2004 was erroneous and prejudicial to the interest of the revenue.

In view of the above, the substantial question of law is

answered in favour of the revenue and against the assessee and ITA No.764 of 2008 is allowed. Consequently, the impugned order passed by the Tribunal is set aside.

ITA No.899 of 2010

9. This appeal arises from assessment proceedings taken by the Assessing Officer in pursuance to revisional order passed by CIT under Section 263 of the Act. The Tribunal had adjudicated the issue in favour of the assessee by holding that the order passed by CIT under Section 263 of the Act has been held to be unjustified, therefore, the assessment order passed in pursuance thereto equally cannot sustain. In view of our order of even date passed in ITA No.764 of 2008 where the revisional order dated 27.3.2007 passed under Section 263 of the Act has been held to be valid and the order of the Tribunal has been set aside, the order of the Tribunal impugned in the present appeal cannot be maintained. Accordingly, the order of the Tribunal is set aside and the matter is remitted back to the Tribunal to decide it afresh after giving its record-based findings in accordance with law after hearing learned counsel for the parties. As a result, ITA No.899 of 2010 is disposed of.

10. Consequently, ITA No.764 of 2008 is allowed whereas ITA No.899 of 2010 is disposed of as the matter is remanded back to the Tribunal to decide it afresh after giving detailed reasons.

(Ajay Kumar Mittal)
Judge

October 20, 2015
'gs'

(Ramendra Jain)
Judge