

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 408 OF 2014

The Commissioner of Income Tax-22,
Navi Mumbai

.. Appellant

v/s.

Mr. Jayeek Nag

.. Respondent

Ms. S.V. Bharucha a/w Ms. Padma Divakar for the appellant
Mr. Atul Jasani for the respondent

**CORAM : M.S. SANKLECHA &
S.C. GUPTE, J.J.**

DATED : 29th AUGUST, 2016.

PC.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 19th April, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2007-08.

2. The Revenue has urged following question of law for our consideration :-

(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in setting aside the order u/s 263 of the I.T. Act, 1961?

3. The respondent assessee is engaged in the activity of an Insurance Advisor and derives income from Insurance Commission. During the previous year relevant to the subject assessment year, the respondent assessee disclosed receipt of commission at Rs.73.55 lakhs and showed an amount of Rs.52.50 lakhs as Commission paid. Thus, crediting an amount of Rs.21.05 lakhs to his Profit and Loss account. Further, the respondent assessee also claimed an amount of Rs.15.38 lakhs as conveyance expenses and other expenses. During the course of assessment proceedings, both the above issues were examined and while passing an assessment order dated 28th October, 2009 under Section 143(3) of the Act, the Assessing Officer only disallowed 10% of conveyance allowance and other expenses on adhoc basis, determining the appellant assessee's total income at Rs.6.67 lakhs.

4. The Commissioner of Income Tax, in exercise of his powers under Section 263 of the Act by order dated 28th February, 2011, revised the assessment order dated 28th October, 2009 on the aforementioned two issues viz. amount of Rs.52.50 lakhs paid as commission and also conveyance expenses, on the ground that the same was erroneous and prejudicial to the interest of the Revenue. The order dated 28th February, 2011 proceeded on the basis that the

assessment order dated 28th October, 2009 was erroneous as both the above issues had not been examined. This resulted in disallowing payment of commission of Rs. 52.50 lakhs as well as conveyance expenses of Rs.5 lakhs on a lumpsum basis. This resulted in enhancement of the respondent assessee's income from Rs. 6.67 lakhs to Rs.62.88 lakhs.

5. Being aggrieved, the respondent assessee carried the issue in appeal to the Tribunal. The impugned order of the Tribunal records the fact that both the issues regarding commission of Rs.52.50 lakhs as well as the expenses claimed as conveyance allowance were subject matter of examination and consideration by the Assessing Officer during the course of the assessment proceedings leading to assessment order dated 28th October, 2003. Thus, the Tribunal notes that it is evident from the order of the CIT(A) dated 28th August, 2011 wherein he records the inquiry conducted by the Assessing Officer. Thus, the impugned order holds that the view taken by the Assessing Officer was on enquiry and on the basis of facts before him, and the view taken was a possible view. Therefore, the order dated 28th August, 2011 of the Commissioner of Income Tax in exercise of powers under Section 263 of the Act, was quashed and set aside.

6. The only grievance of the Revenue before us is that the order dated 28th August, 2011 of the Commissioner of Income Tax ought not to have been disturbed. However, no submissions are made to assail the impugned order of the Tribunal. The order dated 28th August, 2011 of the Commissioner of Income Tax is reiterated to impugn the order of the Tribunal.

7. It is a settled position of law that the Commissioner of Income Tax can exercise his power under Section 263 of the Act only on satisfaction of twin conditions i.e. the order being erroneous and also prejudicial to the interest of the Revenue. In the present facts, the view taken by the Assessing Officer on detailed examination of the issues, as is evident from the questionnaire posed to the respondent assessee and the response thereto during the assessment proceedings, on facts is a possible view. The view taken by the Assessing Officer does not become erroneous merely because the view of the Commissioner of Income Tax is different from the view taken by the Assessing Officer. This Court in ***Commissioner of Income Tax Vs. Gabriel India Ltd. 203 ITR 108*** while discussing the meaning of the word “erroneous” for the purposes of exercising powers under Section 263 of the Act *inter alia* observed as

under :-

“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 fact 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 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

interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of sou motu revision because the first requirement viz., that the order is erroneous, is absent.”

8. In this case, moreover it is evident from the order dated 28th August, 2011 of the Commissioner of Income Tax that enquiry into both the issues were conducted by the Assessing Officer before passing the assessment order dated 28th October, 2009. Thus, it is not a case of no enquiry which could make the order erroneous. An inadequate enquiry would not make the assessment order vulnerable as being erroneous. The view taken by the Assessing Officer is a possible view and nothing has been shown to us which would even remotely suggest that the conclusion reached by the Assessing Officer was perverse and / or arbitrary on the basis of the evidence available before him.

9. In the above view, the impugned order of the Tribunal does not give rise to any substantial question of law. Thus, not entertained.

10. The appeal is dismissed. No order as to costs.

(S.C. GUPTE, J.)

(M.S. SANKLECHA, J.)