

**Case :-** INCOME TAX APPEAL No. - 143 of 2014

**Appellant :-** Commissioner Of Income Tax Meerut

**Respondent :-** Shri Anand Kumar Jain

**Counsel for Appellant :-** Dhananjay Awasthi

**Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, Chief Justice**

**Hon'ble Pradeep Kumar Singh Baghel, J.**

These appellate proceedings under Section 260A of the Income Tax Act, 1961<sup>1</sup> arise from an order of the Income Tax Appellate Tribunal<sup>2</sup> dated 22 November 2013. The assessment year to which the proceedings relate, is Assessment Year 2003-04. The revenue has framed the following substantial questions of law:

A. Whether the ITAT erred in law in interpreting the language of Section 263 in the context of the present case where no finding or enquiry has been done by the AO;

B. Whether the ITAT erred in law in interpreting the phrase 'erroneous insofar as prejudicial to the interest of the revenue' specially when the order under Section 263 highlighted the lacunae in the assessment order;

C. Whether the ITAT erred in law in curbing the legislative powers of the CIT under Section 263 when it concluded that inadequacy of enquiry cannot be a ground for invoking powers under Section 263; and

D. Whether in the facts and circumstances of the case, the learned ITAT has erred in law and in fact in holding that the Assessing Officer had conducted the

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1 the Act

2 the Tribunal

enquiry and was satisfied with the quality of evidence produced by the assessee during the course of assessment proceedings and, therefore, did not make any addition ignoring the fact that the Assessing Officer is not only an adjudicator but is also an investigator and it is his duty to ascertain the truth.

The appeal is admitted and, by consent, is taken up for hearing and final disposal at this stage.

The assessee filed a return of income on 29 March 2004 and disclosed a total income of Rs. 1,56,210/-. The return was initially processed under Section 143 (1) but, later on, the case was selected for scrutiny. The Assessing Officer completed the assessment under Section 143 (3) and accepted the income as returned in the amount of Rs. 1,56,210/-. The Commissioner of Income Tax, Meerut<sup>3</sup> passed an order under Section 263 on 19 March 2008, by which he came to the conclusion that the order of the Assessing Officer was erroneous and was prejudicial to the interest of the revenue. The assessee challenged the order under Section 263 before the Tribunal. The Tribunal by its impugned judgment dated 22 November 2013 came to the conclusion that the Assessing Officer had conducted an enquiry and had taken a possible view in law and was satisfied with the quality of evidence produced by the assessee. Hence, the order under Section 263 was quashed and set aside. The revenue is in appeal.

The heart of the controversy is that an amount of Rs 61,00,000/- was

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<sup>3</sup> the Commissioner

received by the assessee in the form of loans. The Commissioner noted that whereas on the one hand loans were advanced to the assessee at or about a proximate point in time, gifts in similar amounts had also been advanced. The Commissioner observed that these loans were unquestioningly accepted by the Assessing Officer despite the fact that the identity and capacity of the persons to whom the loans had been given had not been established. Letters which were addressed to the alleged lenders had been returned unserved and the assessee expressed his inability to furnish their current addresses. The Commissioner made a detailed enquiry and summarized the evidence which was gathered in the group of cases pertaining to the family of the assessee during the course of the order in the form of a tabulated statement. The Commissioner observed that the persons who were advancing the gifts or the interest free loans were individuals with a marginally taxable income, whereas the assesseees were persons with a high income and substantial assets. The ultimate conclusion was that the loans/gifts were orchestrated to deposit moneys in family concerns or for investment in property. The CIT made a reference to the entries in the bank accounts and noted that balances were built up mostly in the form of cash and were taken out instantaneously by cheques and drafts which was a symptom of a hawala transaction. Hence, it was held that the identity and capacity of as many as 12 lenders were not established and the Assessing Officer was directed to modify his order by adding an amount of Rs. 61,00,000/- obtained from the loans in question.

The Tribunal has set aside the order of the Commissioner principally

on the basis of the order sheet entries of the Assessing Officer which, according to the Tribunal, indicate an application of mind. This finding is seriously contested on behalf of the revenue and learned counsel submitted that the conclusion of the Tribunal that the Assessing Officer had taken a view which was possible in law, suffers from a perversity. It was urged that there was no application of mind by the Assessing Officer as would be apparent on a plain reading of the order under Section 143 (3) of the Act. On the other hand, the learned counsel appearing on behalf of the assessee has supported the order of the Tribunal and has urged that the order of assessment was made after a detailed enquiry by the Assessing Officer and hence there was no occasion to exercise the jurisdiction under Section 263 (3).

Under Section 263, the test is whether the Commissioner has any material on the basis of which he considers that an order passed by an Assessing Officer is 'erroneous insofar as it is prejudicial to the interests of the revenue'. In **Malabar Industrial Co Ltd Vs Commissioner of Income Tax**<sup>4</sup>, the Supreme Court has interpreted these provisions in the following observations:

“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

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4 (2000) 109 Taxman 66 (SC)

erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.”

Hence, it is well settled that every loss of revenue in consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue. For example, when an Assessing Officer adopts one of the courses permissible in law or where two views are possible of which the Assessing Officer has taken one view, the Commissioner cannot exercise jurisdiction under Section 263 merely because he does not agree with the view of the Assessing Officer unless the view which is taken by the Assessing Officer is unsustainable in law. On the other hand, where an order has been passed by the Assessing Officer without application of mind or where the Assessing Officer has made an incorrect assessment of facts or an incorrect application of law, that would satisfy the requirement of the order being erroneous. As regards the words 'prejudicial to the interests of the revenue', the Supreme Court has held that if due to an erroneous order of the Assessing Officer the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue. In the present case, the order of the Assessing Officer was to the following effect:

“Assessee filed his return of income on 29/3/2004 on a total income of Rs 1,56,210/-. The same was processed under Section 143 (1) on the income returned on 8/7/2004. A refund of Rs 5,545/- was issued to the assessee accordingly. Later on, the case was picked up for

scrutiny and therefore statutory notices were issued from time to time. In response thereof, Shri R K Garg & Nitin Garg Advocates had attended the proceedings and filed required details and documents relevant to the assessment proceedings. The case was discussed with them at length.

2) Assessee derives income from salary, property and partnership business with M/s New Marble Home and M/s Jain Marble Centre. After discussion with the assessee's counsels, the income returned, as declared at Rs 1,56,210/- is accepted. Assessed accordingly. Issue notice of demand.”

A plain reading of the order would indicate that there has been no application of mind by the Assessing Officer. There is nothing to indicate from the order that the Assessing Officer had brought his mind to bear upon the identity and capacity of the alleged lenders who had furnished loans to the assessee in the amount of Rs 61,00,000/-. This, indeed, is a material circumstance which would have a bearing on the applicability of the provisions of Section 68 of the Act.

In the present case, it could not be deduced merely on the basis of the order sheets of the Assessing Officer that there was a due and proper application of mind to the fundamental issue which has been raised while exercising jurisdiction under Section 263. Evidently, therefore, the requirement of Section 263 has been established and the Commissioner was justified in coming to the conclusion that the order passed by the Assessing Officer without application of mind was both erroneous and prejudicial to

the interests of the revenue. The Tribunal has manifestly acted in excess of its jurisdiction in interfering with the order of the Commissioner. The Commissioner has, while exercising jurisdiction under Section 263, directed the Assessing Officer to modify his order by adding a sum of Rs 61,00,000/- obtained through the loans in question. We are of the view that the interest of justice would be met if the proceedings are restored again to the file of the Assessing Officer so as to enable him to scrutinize the nature and source of the alleged loans so as to furnish the assessee a proper opportunity in consonance with the principles of natural justice for establishing the identity of the lenders and their capacity. In the circumstances and to facilitate this exercise, the proceedings shall stand restored back to the file of the Assessing Officer. The questions of law are, accordingly, answered in favour of the revenue and against the assessee.

The appeal is, accordingly, disposed of. There shall be no order as to costs.

**Order Date :-** 3.11.2014  
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(Dr D Y Chandrachud, CJ)

(P K S Baghel, J)