

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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*Reserved on: 3rd July, 2012
Date of Decision: 3rd August, 2012*

+ **W.P. (C) No.4684/2010**

THE COMMISSIONER OF INCOME TAX (CENTRAL-II)Petitioner
Through: Mr. A. S. Chandhiok, ASG with Mr.
Ritesh Kumar, Ms. Rashmi Chopra, Ms.
Shweta Gupta and Mr. Piyush Sanghi,
Advocates.
Versus

INCOME TAX APPELLATE TRIBUNAL & ORS.Respondent
Through: Mr. Ajay Vohra, Ms. Kavita Jha and Mr.
Somnath Shukla, Advocates.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

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

R.V. EASWAR, J.:

1. This writ petition under Article 226/ 227 of the Constitution of India has been filed by the Commissioner of Income Tax seeking the issuance of a writ of certiorari or any other appropriate writ, order or direction quashing the orders dated 21.05.2010 and 06.07.2010, both passed by the Income Tax Appellate Tribunal, Delhi Bench “F”, New Delhi (hereinafter referred to as ‘Tribunal’), passed in Stay Application Nos.24 to 30/Del/2010 (in ITA Nos.2057 to 2063/Del/2010) and in ITA Nos.2057 to 2063/Del/2010 respectively. These orders were passed by the Tribunal in the stay applications and in the appeals filed by the NIIT before the Tribunal. The petitioner has arraigned/ arrayed the Tribunal as the first respondent and NIIT Ltd. (hereinafter referred to as the ‘Assessee’) as the second respondent.

2. The events leading to filing of the present writ petition are somewhat longish and we shall try to refer briefly to them. The assessee is a public limited company engaged in the business of information technology education and export of software services. We are concerned with the assessment year 1999-2000, the relevant previous year being the financial year ended on 31.03.1999 and in this year the assessee, besides the above income, derived income from export business, capital gains and income from other sources. A search was conducted under Section 132 (1) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') in the office premises of the assessee and the residential premises of its Director on 10.11.2004. On 05.10.2005 the assessee filed its return for the assessment year under consideration, declaring an income of ₹10,11,66,660/-. An assessment order under Section 153A read with Section 143(3) of the Act was passed on 01.06.2006 determining the total income at ₹10,36,86,880/-, the only addition made being the disallowance of the technical know-how fees of ₹25,20,000/-.

3. On 23.07.2007 the CIT sought to revise the assessment order under Section 263 of the Act on the ground that it was erroneous and prejudicial to the interest of the Revenue and accordingly issued a show-cause notice to the assessee. After hearing the assessee, he passed an order under Section 263 on 19.06.2008 by which he set-aside the assessment order dated 01.06.2006 with directions to the Assessing Officer to frame the assessment afresh after affording an opportunity of being heard to the assessee and after making proper inquiries and verification. The assessee challenged the order passed by the CIT as above in W.P. (C) No.4722/2007, in which the principal contentions were that the order of the CIT was in violation of principles of natural justice, that the assessment order dated 01.06.2006 was passed after being monitored by the CIT/ Central Board of Direct Taxes (CBDT), that the proceedings under Section 263 were on the instructions of the authorities superior to the CIT and that no satisfaction was arrived at by the CIT independently to the effect that the assessment order was erroneous and prejudicial to the interest of the Revenue.

4. On 15.07.2009 this Court passed an interim order in the aforesaid writ petition allowing the assessee (petitioner in the writ petition No.4722/2007) to inspect the records of the CIT. It would appear that similar proceedings under Section 263 initiated for the assessment years 2000-01 to 2005-06 which were also challenged in separate writ petitions were stayed by the Court on 06.08.2009. The Court directed the CIT to produce the records of the assessment/ revisional proceedings and permitted the assessee to inspect them. As per the directions of the Court the records were shown to the representative of the assessee and its counsel on 11.08.2009.

5. On 11.12.2009, this Court passed final orders in the writ petition. The operative part of the judgment reads as under: -

“23. The upshot of the aforesaid discussion is that WP (C) No.4722/2008 is allowed and the impugned order dated 19.6.2008 passed by the Commissioner of Income Tax (Central-II)/respondent No.4 is hereby set aside. However, liberty is granted to the respondent No.4 to appropriately deal with the matter and pass fresh order after giving opportunity of being heard to the petitioner on various points canvassed before us or which it intends to raise at the time of fresh hearing. We also make it clear that we have not authoritatively pronounced on the contentions raised by the petitioner, either way, and the Commissioner shall deal with such contentions objectively without being influenced by any observations in this judgments.

24. WP (C) Nos.172/2009, 173/2009, 174/2009, 175/2009, 176/2009 & 177/2009

Insofar as these writ petitions are concerned, no order under Section 263 of the Act has been passed so far and only showcause notice is given. Needless to mention, in these cases as well, which relate to different assessment years, the commissioner shall be governed by the same parameters delineated above and these petitions stand disposed of in these terms. It is specifically clarified that as the petitions were pending in this Court, issue of limitation would not be raised by the petitioners.

25. All pending applications in these cases stand disposed of.”

6. On 05.02.2010 fresh proceedings for the assessment years 1999-2000 to 2005-06 were initiated under Section 263 of the Act by the CIT. While these proceedings

were pending, the assessee filed SLP (C) No.7712/2010 before the Supreme Court on 22.03.2010 against the order passed by this Court on 11.12.2009 in WP(C) No.4722 of 2008. It appears that the Supreme Court in its interim order passed on 22.03.2010 directed the assessee to give a complete breakup of the world-wide income and allocation of expenses towards learning business and software business. While so, on 01.04.2010 the CIT passed orders under Section 263 for the assessment years 1999-2000 to 2005-06 setting-aside the assessment orders passed by the Assessing Officer on the ground that it was erroneous in so far as it was prejudicial to the interest of the Revenue. He directed the Assessing Officer to pass a fresh assessment orders in accordance with law and after giving the assessee adequate opportunity of being heard.

7. On 12.04.2010 the Supreme Court permitted the assessee to withdraw the Special Leave Petition. It would be better to reproduce the order passed by the Court: -

“Recently an order(s) has been passed by the Commissioner under Section 263 of the Income Tax Act, 1961 remanding the matter(s) to the Assessing Officer on all points, including the issue involved in these matter. He, accordingly, prays for withdrawal of these Special Leave Petitions. Permission granted. Special Leave Petitions are dismissed as withdrawn.

May be noted that we are expressing no opinion on the merits of the case (s).”

8. Thereafter on 04.05.2010 the assessee filed appeals before the Tribunal against the orders passed by the CIT under Section 263 on 01.04.2010 for the assessment years 1999-2000 to 2005-06. By applications it sought stay of proceedings under Section 143 (3) read with Section 263 of the Act which had by then been commenced by the Assessing Officer pursuant to the orders of the CIT on 1.4.2010. Its main submission before the Tribunal in support of the stay applications was that since appeals had been filed against the order (passed by the CIT under Section 263 on 01.4.2010) there would be multiplicity of proceedings if the Assessing Officer were permitted to complete fresh assessments and such an exercise on the part of the Assessing Officer would be rendered futile if the Tribunal accepted the appeals filed by the assessee against

the order passed under Section 263 and were to hold that the CIT had erroneously assumed jurisdiction to revise the assessments. Finding merit in this submission and possessing necessary powers to grant stay as prayed for, the Tribunal passed orders on 21.05.2010 granting stay of the assessment proceedings pending before the Assessing Officer pursuant to the order passed by the CIT under Section 263. The reasoning of the Tribunal for granting stay is as follows: -

“13. We have carefully considered the rival contentions in the light of the material placed before us. It is the case of the assessee that Ld. CIT was wrong in exercising powers u/s 263, as the order is based on dictates of superior authorities. Not going into merits of such contention, it can be stated here that the assessee has made a prima facie case. Earlier assessment in the present case was framed u/s 143(3) read with Section 153A and it is the contention of the assessee that while framing such assessment, the monitoring was done by CIT and assessee is able to establish such fact. The last date of framing the assessment in pursuance to the order u/s 263 is stated to be 31.12.2011. The appeals filed by the assessee are fixed for hearing on 06.07.2010. The appeals against the order u/s 263 are considered to be priority appeals. The Ld. A. R. of the assessee has assured that he will not be taking any adjournment. Similarly, we expect from the revenue that they will also not seek any adjournment. Therefore, if the hearing of these appeals took place then these appeals can be disposed of prior to 30th September 2010. Keeping in view of all these facts, we are of the opinion that if the A.O. is allowed to proceed with the assessment proceedings already undertaken by him, then the prejudice will cause to the assessee as it has to go for multiplicity of proceedings. In case it is held that powers u/s 263 were wrongly exercised then consequential order will have no legs to stand. Therefore, we consider it just and proper to issue a direction to Ld. A.O. not to continue with the assessment proceedings in pursuance to the order u/s 263 up to 30th September 2010. Even after 30th September 2010 ample time will be available to the A.O. to frame the assessment in case the validity of 263 is upheld. Considering the entirety of facts we issue such direction to the A.O. not to proceed with the assessment proceedings up to 30th September 2010 or till the disposal of the present appeals, whichever is earlier. The situation thereafter can be reviewed according to the facts prevalent at that time. These directions were pronounced in the open court on the date of hearing i.e. 21.05.2010. Both the parties had taken note of these directions.

14. In the result, the stay applications Nos.24, 25, 26, 27, 28, 29 & 30/Del/2010 filed by the assessee are allowed in the manner aforesaid.”

9. It would appear that the Tribunal took up for hearing the appeals filed by the assessee against the order passed by the CIT under Section 263 immediately thereafter. An order was passed on 06.07.2010, which is annexed to the writ petition. This is actually an order sheet entry made by the Tribunal during the hearing of the appeals and it is reproduced below: -

“INCOME TAX APPELLATE TRIBUNAL, DELHI BENCHES,
NEW DELHI
F-BENCH

ITA NO.2057 TO 2063/DEL/2010
ASSTT. YEARS 1999-2000 TO 2005-2006
U/S 153 A/143(3)

NIIT LTD.	Vs.	COMMISSIONER OF INCOME-TAX
NEW DELHI		CENTRAL-II, NEW DELHI

EXTRACT OF THE ORDER SHEET ENTRY DATED 06/07/2010

Present for the assessee	:	Shri Ajay Vohra, Advocate.
Present for the revenue	:	Smt. S. Naasamma, Sr. D.R.

The Ld. D.R. is directed to produce all records pertaining to assessment completed U/s 153A/ 143 (3) of the act for assessment year 99-00 to 05-06 and record pertaining to initiation and completion proceeding U/s 263 of the act for the said assessment years. Hearing adj. to 19/07/10 at the request of the Ld. D. R. Both parties are informed in the open court. (A/W ITA No.2058 to 2063/10).

Sd/-
(A.K. Garodia)
AM

Sd/-
(C. L. Sethi)
JM

10. The present writ petition has been filed against the two orders passed by the Tribunal as aforesaid, one staying the assessment proceedings before the Assessing Officer and the other, directing the Revenue to produce all the records pertaining to the assessments completed under Section 153A/ 143 (3) and the record pertaining to the initiation and completion of the proceedings under Section 263 for all the assessment years. On 16.07.2010 the order passed by the Tribunal on 06.07.2010 and all other proceedings pending before the Tribunal forming the subject matter of ITA Nos.2057 to

2063/Del/2010 were stayed by this Court as an interim measure. The interim order was continued from time to time and on 27.04.2011 it was made absolute.

12. This is how the matter is now before us and was finally heard on 03.07.2012. The contention of the petitioner is that it is not open to the assessee, the second respondent herein, to question the order passed by the CIT on 01.04.2010 on the ground that he did not validly assume jurisdiction to revise the assessment orders. Particularly, it is contended, it is not open to the assessee to take up the contention that the CIT did not independently apply his mind before taking action under Section 263 and had acted on the dictates or instructions of his superiors, viz., CBDT. It is further contended that the stay granted by the Tribunal on the assessment proceedings was barred by the principle of *res judicata*. It is pointed out that the challenge to the jurisdiction of the CIT to revise the assessment orders was already adjudicated upon by this Court in W.P. (C) No.4722/2007 dated 11.12.2009 and thereafter the assessee itself had submitted before the Supreme Court that all issues were remitted back to the Assessing Officer by the CIT and, therefore, the SLP may be dismissed as withdrawn. The contention of the learned Additional Solicitor General appearing for the petitioner, is that the assessee agreed before this Court that the CIT may look into the assessment orders on merits which implies that there was no objection to the CIT assuming jurisdiction under Section 263. It is further contended that the assessee is merely trying to delay the assessment proceedings by taking up frivolous and untenable claims. Strong reliance is placed on the order passed by this Court on 11.12.2009 in the assessee's writ petition and it is contended that the observations of this Court, properly understood, would clearly show that once the order passed by the CIT on 19.06.2008 was quashed by the High Court all objections to the assumption of jurisdiction by the CIT vanished or came to an end and thereafter his order could be objected to only on merits. It was contended that this was the true consequence of the order passed by this Court on 11.12.2009 and therefore the assessee cannot be permitted to take up the point that the second order passed by the CIT on 01.04.2010 under Section 263 also suffers from the same vice namely, that he did not apply his independent mind and merely acted on the dictates or instructions of the CBDT. Support for the contention is taken from the fact that this

Court has itself observed that since there was change in the incumbent of the office of the CIT, the very basis of the assessee's submission that the order was passed by the CIT on the dictates of the CBDT vanished.

13. On the other hand the learned counsel for the assessee strongly contended that the petitioner has misunderstood and mis-appreciated the scope and tenor of the order passed by this Court on 11.12.2009. According to him, the operative part of the order of this Court clearly showed that the assessee was granted the liberty of raising all points before the CIT which were canvassed before the Court and also the further points which the assessee intended to urge at the time of fresh hearing. This Court, according to the learned counsel clarified that it had not authoritatively pronounced on the contentions raised by the assessee (petitioner before the Court) either way and the CIT had to deal with such contentions objectively without being influenced by any observations in the judgment. It is the contention of the learned counsel for the petitioner that these observations read in proper perspective were a complete answer to the contentions of the learned Additional Solicitor General.

14. It was further contended by the learned counsel for the assessee that in any event the question of assumption of jurisdiction by any statutory authority and its validity can be set up by the aggrieved party at any point or at any stage of the proceedings and can even be taken during collateral proceedings. In support of this submission, which was made without prejudice to the main contention noted in the preceding paragraph, our attention was drawn to the judgment of the Gujarat High Court in *P. V. Doshi v. CIT*, (1978) 113 ITR 22.

15. In *Kiran Singh & Ors. v. Chaman Paswan & Ors.*, AIR 1954 SC 340 it was observed by T. L. Venkatarama Ayyar, J. speaking for a Bench of four Judges as follows: -

“It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it

is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties.”

16. The aforesaid principle was reiterated by the Supreme Court in *Superintendent of Taxes v. Onkarmal Nathmal Trust* (AIR 1975 SC 2065) and *Dasa Muni Reddy v. Appa Rao* (AIR 1974 SC 2089). In the first of these decisions it was pointed out that revenue statutes protect the public on the one hand and confer power upon the State on the other, and the fetter on the jurisdiction is one meant to protect the public on the broader ground of public policy and, therefore, jurisdiction to assess or reassess a person can never be waived or created by consent. This decision shows that the basic principle recognized in *Kiran Singh* (*supra*) is applicable even to revenue statutes such as the Income Tax Act. *Dasa Muni Reddy* (*supra*) is a judgment where the principle of *coram non iudice* was applied to rent control law. It was held that neither the rule of estoppel nor the principle of *res judicata* can confer the Court jurisdiction where none exists. Here also the principle that was put into operation was that jurisdiction cannot be conferred by consent or agreement where it did not exist, nor can the lack of jurisdiction be waived. These two later judgments were noticed by the Gujarat High Court in the case of *P. V. Doshi* (*supra*). This case arose under the Income Tax Act with reference to the provisions of Section 147 dealing with re-assessment. The facts make interesting reading. There the assessment was sought to be reopened under Section 147 and notice under Section 148 was issued. On the completion of the reassessment, the assessee filed an appeal before the Appellate Assistant Commissioner (“AAC”) challenging the jurisdiction to reopen the assessment as also the merits of the additions made in the reassessment order. However, before the AAC the contention against the validity of the assumption of jurisdiction was given up and the challenge was confined to the merits of the additions made. The AAC dismissed the appeal. The assessee carried the matter in further appeal before the Tribunal where the only controversy was with regard to the merits of the addition made in the reassessment order. The Tribunal restored the matter to the Assessing Officer with the directions to permit the assessee to cross-examine the witness, who had filed an affidavit implicating

the assessee, and thereafter to complete the reassessment in accordance with law. When the matter came back to the assessing officer the assessee specifically raised the point of jurisdiction to reopen the assessment, contending that the notice of reopening was prompted by a mere change of opinion. This plea was rejected. Even on merits the addition was repeated in the reassessment order. The assessee again carried the reassessment order before the AAC. In this appeal the assessee again took up the point of jurisdiction. The AAC found from the assessment record that no reasons had been recorded by the Income Tax Officer before issuing notice under Section 148 (1) of the Act. According to him, Section 148 (2) which requires the Assessing Officer to record reasons for reopening the assessment was mandatory and failure to obey the mandate was fatal to the jurisdiction of the Assessing Officer to reopen the assessment. The AAC, therefore, accepted this ground and also held the reassessment to be bad on the further ground that in the original assessment proceedings themselves the assessee had explained the investments and, therefore, the reopening of the assessment was the result of a mere change of opinion. Thus, on both the grounds he annulled the reassessment order. Against the order of the AAC the Revenue went in appeal before the Tribunal and specifically raised the plea that the question of jurisdiction to reopen the assessment having been expressly given up by the assessee in the appeal against the reassessment order in the first round, the assessee was debarred from raising that point again before the AAC and the AAC was equally wrong in permitting the assessee to raise that point which had become final in the first round and in adjudicating upon the same. The plea of the Revenue impressed the Tribunal which took the view that after its earlier order in the first round of proceedings the matter attained finality with regard to the point of jurisdiction which was given up before the AAC and not agitated further and that in the remand proceedings what was open before the Assessing Officer was only the question whether the addition was justified on merits and the point regarding the jurisdictional aspect was not open before the Assessing Officer. According to the Tribunal, the assessee having raised the point in the first round and having given it up could not revive it in the second round of proceedings where the issue was limited to the merits of the additions. In this view, the Tribunal accepted the Revenue's plea. The assessee

thereafter carried order of the Tribunal in reference before the Gujarat High Court. The High Court after considering various judgments of the Supreme Court on the point of jurisdiction to reopen the assessment and also after specifically discussing the judgment of the Supreme Court in *Onkarmal Nathmal Trust (supra)* and *Dasa Muni Reddy (supra)* held that the Tribunal was in error in holding that the question of jurisdiction became final when it passed the earlier remand order. It was held that neither the question of *res judicata* nor the rule of estoppel could be invoked where the jurisdiction of an authority was under challenge. According to the Gujarat High Court, the rule of *res judicata* cannot be invoked where the question involved is the competence of the Court to assume jurisdiction, either pecuniary or territorial or over the subject matter of the dispute. The Court further held that since neither consent or waiver can confer jurisdiction upon the Assessing Officer where it did not exist, no importance could be attached to the fact that the assessee, in the first round of proceedings, expressly gave up the plea against the erroneous assumption of jurisdiction by the assessing authority. According to the Court, the “*finality or conclusiveness could only arise in respect of orders which are competent orders with jurisdiction and if the proceedings of reassessment are not validly initiated at all, the order would be a void order as per the settled legal position which could never have any finality or conclusiveness. If the original order is without jurisdiction, it would be only a nullity confirmed in further appeals*”. In this view of the matter, the Court finally answered the reference in favour of the assessee.

17. A learned Single Judge of this Court in the case of *Must. Shahaba Begum v. Must. Pukhraj Begum & Ors.*, AIR 1973 (Del.) 154 held that where the final decree was not engrossed a proper stamp paper, it was not a decree that could be acted upon until proper stamp was supplied and if on the basis of the decree, the executing Court directs sale of property and distribution of the sale proceeds, it is open to the judgment debtor to take up the claim for the first time before the executing Court that the decree which was insufficiently stamped was a nullity and, therefore, the sale pursuant to the decree was also a nullity and possession of the property cannot be delivered. In coming to the conclusion, the learned Judge applied the rule in *Kiran Singh (supra)*.

18. If the aforesaid principles are borne in mind – and there is no reason why they should not be – there should be no difficulty in rejecting the writ petition. The learned ASG, however, drew our attention to the following observations of this Court in its order dated 11.12.2009: -

“20. The legal position that cannot be disputed is that when a particular authority is vested with the power of discharge statutory function, like the commissioner who is empowered to pass orders under section 263 of the act, it is that the authority which is to apply its independent mind and arrive at it shown conclusion without being influenced by any other authority, much less the higher authority. Unfettered discretion lies in the commissioner of the income tax to pass orders under section 263 of the act. He is supposed to Examine the records produced before him to arrive at conclusion Whether the assessment order passed by the AO suffers from infirmities and needs to be revised under section 263 of the act the parameter which are laid down in section 263 of the act need to be fulfilled in the exercising such a discretion. It is the commissioner who has to satisfy himself, on the basis of available records, that in the given case the condition stipulated under section 263 of the act are satisfied. In arriving at this conclusion, he is not to be controlled even by a higher authority. Likewise, the higher authority is not to interfere with the independence of his unfettered discretion which is statutorily conferred upon the commissioner, if it is found that the order is passed at the dictates of the higher authority, such an order can be set aside. In the present case, various correspondence and documents which are referred to by the learned senior counsel appearing for the petitioner indicate that M. A.L. Mehta had been writing time and again that income had escaped assessment, therefore, the matter should be looked in to, such communications were addressed to the CBDT as well. The CBDT, in turn, forwarded those communications to the respondent No.4 and wanted the respondent No.4 to decide as to whether the allegations of Mr. Mehta are correct and whether income had escaped assessment or not in the relevant assessment years in which the AO had already passed the assessment orders. No doubt, some anxiety is shown by the CBDT in this behalf. However the argument of the respondents is that the CBDT had wanted the matter to be examined and never intended that the orders are to be passed in one particular manner only. It was pointed out that no such directions were given by the CBDT to the respondent No.4 directing him to pass an order under section 263 of the Act, necessarily reopening the assessments. He was called upon to examine the matter. The Commissioner passed detailed order under section 263 of the Act, which depicts his independent mind, and various observations made in this order are not at the dictates of any authority. It was for this

reason that submission of learned senior counsel for the petitioner was not that any such specific direction was given. Attempt was to demonstrate that the CBDT had “almost dictated the line of action” to the respondent No.4 making him virtually impossible to exercise independent judgment and unfettered discretion in discharge of his statutory function under section 263 of the act. It is not necessary for us to give any authoritative pronouncement on this aspect in the acts of this case. Reason is simple and obvious.

21. *The learned ASG, as noted above, as conceded that an opportunity shall be granted to the petitioner for making its submissions on the merits of the case by the commissioner and thereafter fresh order would be passed. For this reason alone, Once we proceed to set aside the impugned order, the effect would be that the concerned commissioner will have to go into this issue afresh for considering the submissions of the petitioner, which would necessarily involved application of his independent mind. This, coupled with the fact that the commissioner who passed the order is no more the concerned officer, i.e. the respondent no for the matter will have to go to another office discharging the duties in the capacity of respondent No.4. In these circumstances, the very basis of the submission that the impugned order was passed on the dictated lines of CBDT vanishes. At the same time, we make it clear that the present commissioner/ respondent No.4, while exercising his powers under Section 263 of the Act, shall look in to the matter with independent mind without being influenced by the observations made in the impugned order. While doing so, he shall have regard to the submissions that would be made by the petitioner pleading that it is not a case of exercising powers under Section 263 of the Act. We also permit the petitioner to raise the plea that Mr. Mehta is not whistleblower, but is a disgruntled person being an ex-employee of the petitioner, who has been fabricating and filing raise and frivolous complaints against the petitioner.”*

It was, therefore, contended that in the light of the aforesaid observations the challenge to the jurisdiction of the CIT on the ground that he did not exercise his independent mind must be taken to have been ruled upon and negated by this Court and, therefore, the assessee could be permitted to urge the same again before the Tribunal and that the Tribunal committed an error in granting stay of the proceedings before the Assessing Officer and in directing the Revenue to produce the assessment records and the records pertaining to the initiation and completion of proceeding under Section 263. Reliance

was also placed on the order of the Supreme Court dismissing the assessee's SLP (extracted earlier).

19. The contention of the learned ASG certainly deserves deep consideration. However, there is difficulty in accepting the same as it would run counter to the established legal position adumbrated in the judgments of the Supreme Court to which we have referred earlier. This Court no doubt observed that the CIT passed a detailed order under Section 263 of the Act depicting his independent mind and not at the dictates of any higher authority and it was only after realising this position that the learned senior counsel for the petitioner did not put forth any submission to the effect that specific directions were given by the higher authority to the CIT and that the attempt was only to demonstrate that the CBDT had “almost dictated the line of action” to the CIT making him virtually impossible to exercise his independent judgment and unfettered discretion. Having made these observations this Court, however, also observed that it was not necessary for it to give any authoritative pronouncement in the facts of the case, the reason being that once the order of the CIT was set-aside, then the effect would be that the CIT will have to go into the issue afresh for considering the submissions of the assessee, which would necessarily involve application of his independent mind and that because of this fact, coupled with the fact that the CIT who passed the order on 19.06.2008 was no longer in charge and a new incumbent has taken over, the very basis of the submission that the impugned order was passed on the dictates of the CBDT vanished. The crucial direction of this Court at paragraph 21 of its order dated 11.12.2009 was that the CIT “*shall look into the matter with independent mind without being influenced by the observations made in the impugned order*”. The other crucial direction is at paragraph 23 of the order where liberty was granted to the CIT “*to properly deal with the matter and pass fresh order after giving opportunity of being heard to the petitioner on various points canvassed before us or which it intends to raise at the time of fresh hearing. We also make it clear that we have not authoritatively pronounced on the contentions raised by the petitioner, either way, and the Commissioner shall deal with such contentions objectively without being influenced by any observations in this judgment*”.

20. We have to read and understand this Court's order dated 11.12.2009 as a whole and taking all the observations made therein together in order to appreciate the true scope and tenor of the order. To understand the order as barring the assessee from questioning the order passed by the CIT on 01.04.2010 on the ground that he did not exercise his independent mind but merely proceeded on the lines as dictated by the CBDT would not be proper, for no Court can plausibly lay down the grounds on which an order, which is to be passed, can be challenged by the aggrieved party. At the time when this Court passed the order, the order of the CIT was not in existence. It was yet to be passed. Neither the petitioner, nor the respondent in the writ proceedings nor even this Court could have delved into the mind of the CIT and attempt to anticipate the grounds on which he would rest his order. That apart, there is ample authority for the proposition, as we have earlier referred to, that neither consent or waiver can confer jurisdiction upon the authority. Moreover, the rule of estoppel and the principle of *res judicata* have been held to be inapplicable where the question involved is the competence or the jurisdiction of an authority or Court over the subject matter. The observations of this Court can, therefore, only be understood in the context of the order of the CIT that was before it. It cannot be understood as placing an embargo on the assessee from raising the plea, when the authority considered the matter afresh, that that order suffers from the same jurisdictional defect, namely, that it did not show an independent application of mind and was authorised by the dictates of some other authority. In any event, even if the plea of the petitioner to the effect that the objection to the jurisdiction of the CIT to initiate proceedings under Section 263 vanished after the order of this Court, either by consent or waiver is accepted, since these acts on the part of the assessee have been held insufficient in law to clothe the CIT with jurisdiction to pass orders under Section 263, the assessee cannot be estopped from putting forth that plea before the CIT in the fresh round of proceedings. The assessee cannot also be prevented from taking up the plea in the appeals filed before the Tribunal against the orders passed by the CIT on 01.04.2010. Consequently, the Tribunal cannot be faulted for directing, by its order dated 06.07.2010, the Revenue to produce the assessment records and the records relating to the proceedings under Section 263 for the relevant

assessment years. Unless these records are made available to the Tribunal, it will not be able to take a view on the assessee's challenge that the CIT did not exercise his independent mind while initiating proceedings under Section 263.

21. So far as the order of the Tribunal passed on 21.05.2010 is concerned, it is well settled by the judgment of the Supreme court in *ITO v. Mohd. Kunhi*, (1969) 71 ITR 815 that the Tribunal, while exercising its appellate powers under the Income Tax Act has also the power to ensure that the fruits of success are not rendered futile or nugatory and for this purpose it is empowered, to pass appropriate orders including orders of stay. In *ITO v. Khalid Mehdi Khan*, (1977) 110 ITR 79 the Andhra Pradesh High Court, applying the rule laid down in *Mohd. Kunhi (supra)*, stayed the assessment proceedings pending before the Assessing Officer consequent to the directions of the CIT given in orders passed under Section 263 of the Act. The stay order passed by the Tribunal on 21.05.2010 is, therefore, supported by ample authority. It is part of the exercise of the appellate power of the Tribunal under Section 254 (1). The object of the order is twofold: the first is to prevent multiplicity of proceedings and harassment to the assessee, with the possibility of the proceedings before the Assessing Officer becoming meaningless if ultimately the order passed by the CIT is found to be invalid on grounds of jurisdiction or on merits and, second, to ensure that the fruits of success in the appeals are not rendered meaningless or nugatory. It has not been shown before us by the petitioner as to what error was committed by the Tribunal in passing the stay orders, nor was it argued that the Tribunal did not exercise its discretion on the basis of settled parameters for granting stay of proceedings.

22. For the above reasons we dismiss the writ petition. All interim orders are vacated. It will be open to the Tribunal to proceed with the hearing of the appeals. It is desirable that the appeals are disposed of as expeditiously as possible (and in any case within three months from today). In the circumstances, there will be no order as to costs.

R.V.EASWAR, J

S. RAVINDRA BHAT, J

August 03, 2012
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