

No sec. 263 revision if AO had allowed exp. after making reasonable enquiry : ITAT

Summary – The Delhi ITAT in a recent case of Sanspareils Greenlands (P.) Ltd., (the Assessee) held that where assessee company claimed expenditure towards payments made to cricket players under head 'advertisement and publicity' and Assessing Officer after making enquiry and considering explanation furnished by assessee allowed such expenditure, Commissioner was unjustified in disallowing claim of assessee by invoking section 263 on grounds that Assessing Officer had not made proper enquiries

Facts

- The assessee-company engaged in the manufacture, purchase, sale and export of sports goods, claimed expenditure in respect of amount paid to cricket players under head 'advertisement and publicity'. The Assessing Officer allowed same.
- Subsequently, the Commissioner, issued a show cause notice under section 263 on the ground that the amount paid to cricket players was not of any value to the business of the assessee and further the Assessing Officer had failed to make an inquiry in this regard. The Commissioner partly set aside the assessment order with the direction to consider the admissibility and reasonableness of these expenses. Consequent to the order passed under section 263, the Assessing Officer passed the assessment order after making a disallowance of certain amount paid to cricketers by treating 4/5th of the same as deferred revenue expenditure.
- On appeal, the Commissioner (Appeals) also upheld the additions made by the Assessing Officer.
- In instant appeal before the Tribunal against the order, under section 263, the assessee submitted that the allegation of the Commissioner that the Assessing Officer had not carried out any inquiry in respect of payments made to sports persons was incorrect because the Assessing Officer had made inquiry about the same and the assessee had duly responded to the queries raised by the Assessing Officer in this regard. Copy of the reply to the query raised by the Assessing Officer with reference to the payments made to the cricket players was placed on record. It was also submitted that tax had duly been deducted at source on the payments made to the six cricket players. It was further submitted that the genuineness of the payments made were not doubted by the Commissioner also and it was only a case of difference of opinion inasmuch as the Commissioner felt that the payments made to the various cricketers was to be treated as deferred revenue expenditure whereas the Assessing Officer had allowed the same as revenue expenditure. It was also submitted that similar expenses were being allowed without any adverse inference until the immediately preceding year.

Held

- It will be expedient to reiterate the governing principles laid down by the Courts with regard to the exercise of power by the Commissioner under the provisions of section 263. The power of *suo moto* revision exercisable by the Commissioner is undoubtedly supervisory in nature. The opening words of section 263 empower the Commissioner to call for and examine the record of any proceedings

under the Act. A bare reading of section 263 also makes it clear that 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 interest of the revenue. If one of them is absent- if the order of the Assessing Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but it is prejudicial to the revenue - recourse cannot be had to section 263(1).

- If Assessing 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 differently or more elaborately. The section does not visualize the substitution of the judgment of the Commissioner for that of the Assessing Officer, who passed the order unless the decision is not in accordance with law. Then again, any and every erroneous order cannot be the subject matter of revision because the second requirement also must be fulfilled. There must be material on record to show that tax which was lawfully exigible has not been imposed. However, the expression 'prejudicial to the interest of the revenue' is not an expression of art and is not defined in the Act and, therefore, must be understood in its ordinary meaning. It is of wide import and is not confined to the loss of tax.
- At the same time, the words 'prejudicial to the interest of the revenue', can only mean that '*the orders of assessment challenged are such as are not in accordance with law, in consequence whereof the lawful revenue due to the State has not been realized or cannot be realized.*' Thus, the Commissioner's exercise of revisional jurisdiction under the provisions of section 263 cannot be based on whims or caprice. It is trite law that it is a quasi judicial power hedged in with limitation and not an unbridled and unchartered arbitrary power. The exercise of the power is limited to cases where the Commissioner on examining the records comes to the conclusion that the earlier finding of the Assessing Officer was erroneous and prejudicial to the interest of the revenue and that a fresh determination of the case is warranted. There must be material to justify the Commissioner's finding that the order of the assessment was erroneous insofar as it was prejudicial to the interest of the revenue.
- It is also trite that there is a fine, though subtle distinction, between '*lack of inquiry*' and '*inadequate inquiry*'. It is only in cases of '*lack of inquiry*' that the Commissioner is empowered to exercise his revisional powers by calling for and examining the records of any proceedings under the Act and passing orders thereon.
- From the above it is clear that in the ultimate analysis it is a pre-requisite that the Commissioner must give reasons to justify the exercise of *suo moto* revisional powers by him to re-open a concluded assessment. A bare reiteration by him that the order of the Income-tax Officer is erroneous insofar as it is prejudicial to the interest of the revenue, will not suffice. The exercise of the power being quasi-judicial in nature, the reasons must be such as to show that the enhancement or modification of the assessment or cancellation of the assessment or directions issued for a fresh assessment were called for, and must irresistibly lead to the conclusion that the order of the Income-tax Officer was not only erroneous but was prejudicial to the interest of the revenue. Thus,

while the Assessing Officer is not called upon to write an elaborate judgment giving detailed reasons in respect of each and every disallowance, deduction, etc., it is incumbent upon the Commissioner not to exercise his *suo moto* revisional powers unless supported by adequate reasons for doing so.

- The Commissioner cannot re-examine accounts and substitute his judgment for that of the Assessing Officer. An order cannot be termed as erroneous unless it is not in accordance with law. If Assessing Officer makes assessment in accordance with law, 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 263 does not visualize a case of substitution of the judgment of the commissioner for that of the Assessing Officer unless the decision is held to be erroneous. Cases may be visualized where the Assessing Officer examines the accounts, makes enquires, applies his mind to the facts and circumstances of the case and determines the income either by making 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 was on lower side and, left to the commissioner, he would have estimated the income at a higher figure than the one determined by the Assessing Officer. That would not vest the Commissioner with the power to re-examine the accounts and determine the income himself at a higher figure. It may be that in the opinion of the Commissioner, the order in question is prejudicial to the interests of the revenue. But that by itself would not be enough to vest the commissioner with the powers of *suo motu* revision because the first requirement, namely, that the order is erroneous, is lacking.
- In the instant appeal, it is not the department's case that no information regarding the payments made to the cricketers was called for by the Assessing Officer. Relevant details and documents were furnished by the assessee during the assessment proceedings and forms part of the record. Hence, no inference can be drawn that the Assessing Officer has not examined the issue although he has not expressed it in as many terms as may be considered appropriate by his superior authority and even if the same is found to be inadequate the same cannot be a ground for revision. It is clear that an order cannot be termed as erroneous unless it is not in accordance with law. This section does not visualize a case of substitution of the judgment of the Commissioner for that of the Assessing Officer. Therefore, it cannot be held that in the instant case the Assessing Officer's order was erroneous and prejudicial to the interest of the revenue within the terms of section 263. Once the impugned issue was considered and examined by the Assessing Officer, Commissioner cannot set aside the order without recording a contrary finding. This will be contrary to section 263. Therefore, in view of the factual matrix of the case the impugned action of Commissioner under section 263 was patently illegal and is liable to be quashed. The proceedings under section 263 are accordingly quashed.