

Apollo Tyres Ltd. Vs. Assistant Commissioner of Income Tax.

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Court : Delhi

Decided On : Oct-27-1997

Reported in : (1998)61TTJ(Del)365

Appeal No. : ITA No. 774/Coch/1995; Asst. yr. 1992-93

Appellant : Apollo Tyres Ltd.

Respondent : Assistant Commissioner of Income Tax.

Judgement :

ORDER

B. M. KOTHARI, A.M. :

This appeal by the assessed is directed against the order under s. 263 of the IT Act, 1961, passed by the learned CIT, Delhi (Central)-I, New Delhi for asst. yr. 1992-93. The assessed has raised the following grounds in this appeal :

'1. That the order passed under s. 263 of the IT Act, 1961, by the learned CIT, Delhi (Central)-I, New Delhi, is bad on facts and in law and is null and void ab initio because it is based on a proposal from the Asstt. CIT, Central Circle-II, New Delhi, to initiate proceedings under s. 263 of the IT Act, 1961 on the ground that total income was underassessed.

2. Without prejudice to the above, the learned CIT erred in law and on facts and in the circumstances of the case in cancelling the assessment order and directing the

AO to make a fresh assessment. Further, the learned CIT erred in not restricting the cancellation of assessment only to the points covered by Notice under s. 263. (para 19, p. 9 of Order under s. 263).

3. Without prejudice to the above, the learned CIT, while cancelling the assessment order, erred in law and on facts and in the circumstances of the case in recording the findings that the undermentioned errors were committed by the AO while framing the assessment order :

(i) That the AO had omitted to include in the total income a sum of Rs. 19.5 crores being alleged dividend received on units of Unit Trust of India. (paras 13 & 14, p. 5, 6 & 7 of order under s. 263).

(ii) That the AO had erred in not disallowing in the computation of total income loss of Rs. 2,10,31,425 incurred on sale of units of Unit Trust of India. (para 17, p. 8 of order under s. 263).

(iii) That the AO had erred in not including the interest income amounting to Rs. 25,44,657 in the total income in financial year 1991-92 (asst. yr. 1992-93) notwithstanding that the same had correctly been returned by the assessed in the financial year 1992-93 (asst. yr. 1993-94) (para 18, p. 8 of order under s. 263).

4. That the findings of the learned CIT as recorded in ground No. 3 are contrary to the evidence on record and are also unsustainable in law.

5. That the learned CIT was consequently not justified in cancelling the assessment as a whole and directing the AO to make a fresh assessment. (para 19, p. 9 of order under s. 263).

6. That the learned CIT acted beyond the jurisdiction vested in him under s. 263 of the IT Act, 1961 while directing the AO that action under ss. 276C and 277 of the IT Act, 1961 may also be examined. (para 19, p. 9 of order under s. 263).

That the appellant seeks leave of the Honble Tribunal to add, amend, modify, alter the aforesaid grounds during the course of hearing of the appeal or at an earlier point of time.

Prayer

The appellant respectfully prays the Honble Tribunal to hold that the order passed by the learned CIT is illegal and liable to be quashed. It is further prayed that pending the disposal of this appeal by the Honble Tribunal, the AO may be refrained from making fresh assessment and the appeal may kindly be fixed for hearing out of turn.

2. Shri G. C. Sharma, the learned senior advocate contended that the order passed by the CIT under s. 263 is patently erroneous in law as well as on facts.

2.1 Shri Sharma contended that the opening para of the order under s. 263 clearly indicates that the proceedings under s. 263 were initiated pursuant to a proposal received from the Asstt. CIT, CC-II, New Delhi. He submitted that an order passed by the predecessor assessing authority cannot be revised under s. 263 at the instance of the successor AO. The provisions of s. 263 clearly prescribe that the CIT himself is required to be satisfied that the order passed by the AO is erroneous in so far as it is prejudicial to the interests of the Revenue. He cannot act on the basis of borrowed satisfaction of the AO. He submitted that the contents of show-cause notice issued by the CIT under s. 263 are similar to the proposal sent to him by the Asstt. CIT vide letter dt. 23rd June, 1995. The notice under s. 263 has been issued by the CIT simply on the basis of the contents of aforesaid letter dt. 23rd June, 1995 sent by the Asstt. CIT. The CIT has to act suo motu for assuming jurisdiction under s. 263. The order of the CIT under s. 263 deserves to be quashed on this ground alone.

2.2 Shri Sharma, learned lawyer then submitted that the points in relation to which action under s. 263 has been taken by the CIT relates to items of alleged income, which according to the CIT, had escaped assessment. The AO had himself jurisdiction under s. 147 of IT Act for bringing to tax the items of income which had escaped assessment provided the conditions prescribed in s. 147 are satisfied. The revisionary jurisdiction of the CIT does not extend to those items of income, which allegedly escaped tax altogether, as there is no order of the AO in respect of such income which allegedly escaped levy of tax. He, therefore, submitted that the income which has escaped assessment and which can be lawfully brought to

tax under s. 147 of the IT Act, does not come within the ambit of the revisionary jurisdiction of the CIT under s. 263. The learned counsel further submitted that in a case where the AO could resort to s. 147 of the Act, it is not permissible for the AO to request the CIT that you kindly exercise jurisdiction under s. 263 for bringing to tax the income which has escaped assessment in the original assessment order.

2.3 The learned counsel for the assessed placed heavy reliance of the judgment of Honble Supreme Court in the case of the State of Kerala vs. K. M. Charia Abdulla & Co. 16 STC 875 to support this contention. He also invited our attention towards the judgment of Honble Madras High Court in the case of Venkatakrishna Rice Co. vs. CIT (1967) 163 ITR 129 with a view to explain the scope of powers under s. 263.

2.4 The learned counsel submitted that if a new source of income has to be discovered at the initiation of CIT after examination of record, it is not an order of revising the assessment under s. 263 but the CIT is assuming jurisdiction to assess or reassess the escaped income under s. 147 which falls within the exclusive jurisdiction of the AO under s. 147. The revisionary jurisdiction means revising an order, which suffers from an illegality and does not cover within its ambit the passing a fresh order of reassessment. He, therefore, urged that the order of CIT should be set aside.

2.5 The learned counsel for the assessed further submitted that the CIT has on the one hand given a firm finding holding that the ITO should have disallowed the entire loss of Rs. 4,06,93,010 instead of Rs. 1,96,61,585 only added back by the AO. The CIT has given a finding that total income has been underassessed by a sum of Rs. 2,10,31,425 on this account.

2.6 Likewise, the CIT has also given a firm finding that an income of Rs. 19.05 crores is liable to be assessed on account of alleged dividend on units of UTI purchased by the assessee.

2.7 After giving these firm findings relating to alleged underassessment of Rs. 2,10,31,425 and Rs. 19.05 crores, the CIT in the concluding para has set aside the entire assessment with a direction to AO to make a fresh assessment after proper

investigation and after providing reasonable opportunity to the assessee.

2.8 The learned counsel submitted that after giving firm finding about such underassessment of income, there was no justification on the part of the CIT setting aside the entire assessment order and directing the AO to make a fresh assessment after proper investigation. He submitted that such wholesale cancellation of the assessment is clearly contrary to the firm finding given with regard to alleged underassessment of certain income and it is also contrary to the show-cause notice issued under s. 263, which related only to certain specific items of income alleged to have escaped tax in the original assessment.

2.9 The learned counsel also submitted that the question of levying tax on hypothetical income, on the income of units of UTI in the hands of the assessed cannot validly arise. He submitted that the assessed had entered into various contracts for purchase of units of UTI (1964 Scheme) with various recognised brokers in the month of April, 1991. The copies of brokers note submitted before the AO clearly indicate that delivery of those 1,000 lac units of UTI was agreed to be taken against payment on 31st July, 1991. The scheduled date of delivery of 31st July, 1991 was clearly mentioned in the respective brokers note. The assessed further entered into contract for sale of those 1,000 lacs units through recognised brokers on 30th and 31st July, 1991. therefore, the question of taking delivery of units of UTI did not arise because these units of UTI had been sold prior to the stipulated date. The assessed was not the registered member of the said units of UTI. The dividend income can be taxed only in the hands of registered owner. In the case of the assessee, the units of UTI were never registered in favor of the assessee. therefore, no addition of hypothetical income of 19.5 crores can be validly made in the hands of the assessee.

2.10 The learned counsel also submitted that the entire loss of Rs. 4,06,93,010 on the sale of units of UTI (1964 Scheme) and IRFC Bond had been claimed by the assessee. But the AO in the original assessment has not fully allowed the same but disallowed the loss to the extent of Rs. 1,96,61,585 on the ground that such loss is a speculation loss covered under s. 43(5) of IT Act. The AO has given such findings after complete inquiry and investigation. The disallowance of the said loss

made in the original assessment, is a subject-matter of the pending appeal against the original assessment order. The CIT has erred in holding that the entire loss of Rs. 4,06,93,010 ought to have been disallowed by the AO. The entire amount of loss is supported by brokers notes in support of purchase and sale of all such units of UTI. The findings given by the CIT in this regard are patently wrong. The learned counsel also invited our attention towards the brokers, note submitted in the compilation from pp. 6 to 18 to support this contention.

3. As regards the third item relating to taxability of accrued interest amount amounting to Rs. 25,44,657 on sale proceeds of bonds, the CIT in para 18 of his order has not pointed out any error in the original assessment order. He has simply noted the assessee's contention that the same has been shown in the return of the next assessment year and has directed the AO to verify this point and decide the matter accordingly. The order passed by the CIT under s. 263 in relation to this item is patently wrong as no error or prejudice to the interest of Revenue has been pointed out by the CIT in relation to this item.

3.1 The learned counsel for the assessed thus strongly urged that the order of the CIT under s. 263 should be cancelled.

3.2 The learned senior Departmental Representative strongly supported the orders of the CIT.

3.3 The learned senior Departmental Representative submitted that the CIT could validly act on the basis of the facts reported to him by the AO vide his letter dt. 23rd June, 1995. It is not necessary for the CIT that he should suo motu call for the records and examine it with a view to find out whether the order of the AO was erroneous and prejudicial to the interest of the Revenue. The CIT is entitled to initiate proceedings under s. 263 either suo moto or on the basis of information as may be given to him by the Departmental authorities or by the internal auditor or Audit Officer of the CAG Department or on the basis of information received from any other sources. To the extent the CIT receives information from any of these sources, it is purely an administrative action. The quasi-judicial function of the CIT under s. 263 starts from the stage when he makes up his mind and issues a show-cause notice to the assessed under s. 263. Thereafter, the CIT is required to give

an opportunity of hearing to the assessed before arriving at a conclusion that an order passed by the AO was erroneous and prejudicial to the interest of the Revenue. In the present case, the CIT has given adequate and reasonable opportunity to the assessed and has also given convincing reasons in the order passed by him which fully support the order of the CIT.

3.4 The learned senior Departmental Representative invited our attention towards the following Judgments to support the correctness and validity of the order passed by the CIT under s. 263 of the IT Act :

(a) Thalibai F. Jain & Ors. vs . ITO : [1975]101ITR1(KAR) .

In this case, it was held that the assessment made without inquiry and evidence in undue haste was held to be erroneous and prejudicial to the Revenue.

(b) CIT vs. M. M. Khambhatwala (1992) 198 ITR 144 .

In this case, it was held by the Honble Gujarat High Court that the CIT can exercise the powers under s. 263 of the Act even in a case where the issue is debatable. The revisional powers under s. 263 are not comparable with powers of rectification of mistakes under s. 154 of IT Act, 1961.

(c) CIT vs . Emery Stone Manufacturing Co.

In this case, it was held that even in a case where the facts have been disclosed by the assessed to the assessing authority, if the correct provisions of law have not been examined by the assessing authority, the power under s. 263 of the Act can be invoked. On the facts of that case, it was held that the IAC had not applied his mind at all and there was no finding in the assessment order regarding the applicability or otherwise of Explan. III to s. 43(1). Since the IAC did not apply his mind at all while allowing depreciation on the enhanced value without considering Explan. III, the order was prejudicial to the interest of Revenue.

(d) Smt. Tara Devi Aggarwal vs . CIT : [1973]88ITR323(SC) .

In this case, it was held by the Honble Supreme Court that where the income has not been earned and is not assessable, merely because the assessed wants it to

be assessed in his or her hands in order to assist someone else who would have been assessed to a larger amount, the assessment so made will be erroneous and prejudicial to the Revenue and the CIT has jurisdiction under s. 33B of IT Act, 1922 to cancel the assessment and may direct that assessment proceedings.

It may be initiated under the provisions of the Act against some other assessed who according to the IT authorities would be liable for tax on that income.

(e) *Gee Vee Enterprises vs . Addl. CIT* : [1975]99ITR375(Delhi) .

In this case, the Honble Delhi High Court has held that the CIT can regard the order as erroneous on the ground that in the circumstances of the case, the ITO should make further inquiries before accepting the statements made by the assessed in his return. It is the duty of the ITO to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry. It is incumbent on the ITO to further investigate the facts stated in the return when circumstances would make such an inquiry prudent. The word erroneous in s. 263 includes the failure to make such an inquiry.

(f) *CIT vs . Pushpa Devi* : [1987]164ITR639(Patna) .

In this case, the Honble Patna High Court observed that there had been no inquiry regarding the sources of funds for business claimed to have been invested by the lady. The CIT was justified in holding that the order of assessment was erroneous and prejudicial to the Revenue.

(g) *Indian Textiles vs . CIT* : [1986]157ITR112(Mad) .

The Honble High Court held that the ITO had given relief under s. 35B without any proper verification and such an order being an order prejudicial to the Revenue, it could properly form the subject-matter of revision.

3.5 The learned senior Departmental Representative submitted that there is no bar in the exercise of powers under s. 263 by the CIT in relation to income escaping assessment. Moreover, the items of income, which are subject-matter of decision by the CIT are not new sources of income but those relate to the assessee's claim

for loss on sales of units of UTI, dividend income on units of UTI which were admittedly purchased by the assessed in the month of April, 1991, on which the UTI declares dividend in the month of June every year. There was a clear failure on the part of the AO to make proper inquiries relating to these items and the order of the AO was, therefore, clearly erroneous and prejudicial in the interest of Revenue. He further submitted that the jurisdiction of the CIT under s. 263 extends to items of income which have been under-assessed or which have escaped assessment. There is no limitation on the powers of the CIT under s. 263 prohibiting him to direct the AO to charge tax on incomes which have escaped assessment. The facts in the case of State of Kerala vs. K. M. Cheria Abdulla & Co. (supra) relied upon by the learned counsel are clearly distinguishable as the said judgment relate to interpretation of the provisions of Madras General Sales-tax Act which are not similar to the relevant provisions of s. 263 of IT Act, 1961. Likewise, the judgment of Honble Madras High Court also does not in any manner supports the assessee's content. In that case, it was held by the Honble Madras High Court that s. 263 is not meant merely for setting aside unfavourable orders or to get at sheer escapement of Revenue, which is taken care of by other provisions in the Act. It was further held by the Honble Madras High Court that the prejudice contemplated under s. 263 is prejudice to the IT administration as a whole. The revisional jurisdiction can be invoked and employed for the purpose of setting right distortions and prejudice to the Revenue which has to be understood in the context of and in the interest of Revenue administration. This judgment does not in any manner supports the assessee's contention.

3.6 The learned senior Departmental Representative also submitted that the Expln. (b) inserted below s. 263, which defines records includes all records relating to any proceedings under the Act available at the time of examination by the CIT. The proposal sent by the Asstt. CIT vide letter dt. 23rd June, 1995 to the CIT was a part of record and the CIT could take into consideration the said proposal at the time of initiating action under s. 263.

3.7 The learned senior Departmental Representative further submitted that s. 263 provides that where the CIT considers that any order passed by the AO is erroneous in so far as it is prejudicial to the interest of the Revenue, he may after

giving an opportunity to the assessee, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying assessment or cancelling the assessment and directing a fresh assessment. In the event of enhancing or modifying or cancelling the assessment, the net result is that a fresh assessment is required to be made. The CIT was, therefore, fully, justified in giving firm finding about the underassessment of the items of income in question and was also right in directing the AO to make a fresh assessment after making necessary investigation.

3.8 The learned senior Departmental Representative also invited our attention towards para 3 of the order passed by the CIT in which it has been observed that the assessee's counsel did not contest the validity of action initiated under s. 263 of the Act for asst. yr. 1992-93. The assessed did not challenge the assumption of jurisdiction by the CIT under s. 263 but had submitted his objections on the merits of the various points in issue.

3.9 The learned senior Departmental Representative further submitted that the CIT has given detailed facts to support his conclusion that dividend income of Rs. 19.5 crore is liable to tax in the hands of the assessee. He has given complete details of the units of UTI purchased by the assessed 'cum dividend' as well as the sale of units of UTI 'ex-dividend'. Since the assessed acquired title and interest over the units of UTI purchased by him in the month of April, 1991, the assessed was the real and beneficial owner of the dividend income. He placed reliance over the judgment of Honble Supreme Court in the case of Seth R. Dalmia vs . CIT 0043/1977 : [1977]110ITR644(SC) , which has been referred to in para 14 of the order passed by the CIT.

3.10 The learned senior Departmental Representative also submitted that the aggregate loss of Rs. 4,06,93,010 had to be carefully considered by the AO and he ought to have made detailed investigation and inquiries in relation to the aforesaid claim of loss. The order of the AO holding loss of only Rs. 1,96,61,585 as speculative loss covered under s. 43(5) was clearly erroneous order. He ought to have disallowed the entire amount of loss of Rs. 4,06,93,010 claimed by the assessed in view of the elaborate reasons given in the order of CIT.

3.11 The learned senior Departmental Representative further submitted that the CIT was well within his power to give a finding regarding verification of interest income of Rs. 25,44,657. The learned senior Departmental Representative thus strongly supported the order of the CIT.

4. We have carefully considered the submissions made by the learned representatives of the parties and have gone through the order of the learned CIT as well as all other documents to which our attention was drawn during the course of hearing. We have also carefully gone through all the judgments which were cited by the learned representatives of both sides.

4.1 The provision of s. 263(1) and the relevant Expln. (b) are reproduced hereunder :

'263. (1) The CIT may call for an examine the record of any proceedings under this Act, and if he considers that any order passed therein by the AO is erroneous in so far as it is prejudicial to the interest of the Revenue, he may, after giving the assessed an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

Explanation. - For the removal of doubts, it is hereby declared that, for the purposes of this sub-section, :

(a) xx xx xx xx

(b) record shall include and shall be deemed always to have include all records relating to any proceeding under this Act available at the time of examination by the CIT.'

A plain reading of the aforesaid section clearly indicates that the CIT may call for and examine the records of any proceedings under the Act. For this purpose, he is not required to show as to what reasons prompted him to call for and examine the record of any proceeding under this Act. The provisions also do not prescribe any limitation that the CIT should suo motu call for and examine the record and he

cannot take into consideration or rely upon any report or information which may be supplied to him by the other officers of his Department or on the basis of any information which he may obtain from any other sources. The authority of the CIT to call for and examine the record on the basis of any information from any source or suo motu is purely an administrative matter. Thereafter, the CIT has to consider as to whether any order passed under the Act by the AO is erroneous in so far as it is prejudicial to the interest of the Revenue. This consideration, having regard to the language of s. 263, is a consideration which he exercises by calling for and examining the records. If after calling for and examining the records, the CIT considers that the order of the AO is erroneous in so far as it is prejudicial to the interest of the Revenue, then subsequent proceeding acquires quasi-judicial character. Thereafter, he has to give the assessed an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, he may pass such orders thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment. It will be worthwhile to compare the language of s. 263 with the language used in s. 264 of the Act. In s. 264, the CIT may, either of his own motion or on an application by the assessed for revision, call for the records of any proceeding under this Act. However, in s. 263 the expression 'on his own motion' is absent. It is nowhere provided as to under what circumstances and on the basis of what type of information and source, the CIT may call for and examine the record of any proceedings for the purposes of s. 263. In the absence of any express provision in s. 263, providing that CIT can act under s. 263 only on his own motion or suo moto and also in view of the fact that there is no restrictions or limitations on the power of the CIT to call for and examine the record of any proceeding pursuant to the report given by the AO or by other Departmental officer, we are of the view that the CIT could validly call for and examine the record of the assessed for the relevant year under consideration pursuant to a letter received from the AO containing a proposal under s. 263 of the Act. We, therefore, do not find any merit in the contention of the learned counsel for the assessed that the CIT could not assume jurisdiction under s. 263 on the basis of the letter sent by the Asstt. CIT containing the proposal under s. 263. After receiving the report from the Asstt. CIT, the CIT decided to call for and examine

the relevant records and proceeded to consider whether the assessment order passed by the AO is erroneous and prejudicial to the interest of the Revenue. After such consideration, the CIT gave a show-cause notice under s. 263 to the assessee and afforded an proper and reasonable opportunity before passing the impugned order. The order of the CIT cannot, therefore, be cancelled or treated as invalid simply because the CIT called for and examined the records pursuant to a letter sent by the Asstt. CIT for this purpose.

4.2 We will now consider an important question of law argued by the learned counsel for the assessee, namely, that the CIT cannot exercise revisionary jurisdiction in relation to items of income which escaped levy of tax in the original assessment for which the AO could take action under s. 147 of the Act. The learned counsel vehemently contended that a new source of income, which had escaped assessment in the original assessment cannot be brought to tax by exercising revisional jurisdiction under s. 263 because the CIT can only revise an assessment but cannot reassess an income which had altogether escaped taxation. The escapement of income is covered by s. 147 and not by s. 263.

4.3 The learned counsel had placed heavy reliance on the following observations made by the Honble Supreme Court in the case of State of Kerala vs. K. M. Cheria Abdulla & Co. (supra) at pp. 886-887 :

'... It would not invest the revising authority with power to launch upon enquiries at large so as either to trench upon the powers which are expressly reserved by the Act or by the Rules to other authorities or to ignore the limitations inherent in the exercise of those powers. For instance, the power to reassess escaped turnover is primarily vested by r. 17 in the AO and is to be exercised subject to certain limitations, and the revising authority will not be competent to make an enquiry for reassessing a taxpayer. Similarly, the power to make a best judgment assessment is vested by s. 9(2)(b) in the assessing authority and has to be exercised in the manner provided. It would not be open to the revising authority to assume that power. The revisional power has to be exercised for ascertaining whether the order passed is illegal or improper or the proceeding recorded is irregular and it is in aid of that power that such orders may be passed as the authority may think fit

...'

4.4 The Honble Supreme Court in the aforesaid judgment examined the scope of s. 12(2) of the Madras General Sales-tax Act, 1939. The provisions of s. 12(2) of Madras General Sales-tax Act, 1939 as reproduced at p. 82 of the said report is reproduced hereunder :

'(2) The Dy. CIT may :

(i) suo motu, or

(ii) in respect of any order passed or proceeding recorded by CTO under sub-s. (1) or any other provision of this Act and against which no appeal has been preferred to the Tribunal under s. 12A, on application, call for and examine the record of any order passed or proceeding recorded under the provisions of this Act by any officer subordinate to him for the purposes of satisfying himself as to the legality or propriety of such order, or as to the regularity of such proceeding, and may pass such order with respect thereto as he thinks fit.'

4.5 The Honble Supreme Court at pp. 878-879 of the said report has inter alia, observed as under :

'Under s. 12(2) of the Act, the revisional authority may suo motu 'call for and examine the record of any order passed or proceeding recorded under the provisions of this Act by an officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such order, or as to the regularity of such proceeding, and may pass, such order with respect thereto as he thinks fit.' When the legislature confers a right of appeal in one case and a discretionary remedy of revision in another, it must be deemed to have created two jurisdictions different in scope and content. When it introduced the familiar concepts of appeal and revision, it is also reasonable to assume that the well-known distinction between these two jurisdictions was also accepted by the legislature. There is an essential distinction between an appeal and a revision. The distinction is based on differences implicit in the said two expressions. An appeal is a continuation of the proceedings; in effect the entire proceedings are before the appellate authority and

it has power to review the evidence subject to the statutory limitations prescribed. But in the case of a revision, whatever powers the revisional authority may or may not have, it has not the power to review the evidence unless the statute expressly confers on it that power. That limitation is implicit in the concept of revision. Sec. 12(2) is no doubt wider in scope than s. 115 of the CPC. Even so the revisional authority jurisdiction is confined to the question of legality or propriety of the order or the regularity of the proceedings. The further limitation on that jurisdiction is that it can only exercise the same on the examination of the record of any order passed or proceedings taken by any authority. The section, therefore, not only limits the scope of its jurisdiction but also defines the material on the basis of which the said jurisdiction is exercised. The general expression that the authority 'may pass such order as he thinks fit' must necessarily be confined to the scope of the jurisdiction. The revisional authority, therefore, cannot travel beyond the order passed or proceedings recorded by the inferior authority and make fresh enquiry and pass orders or merits on the basis of the said enquiry. It is not construed in this manner, the distinction between appeal and revision would be effaced.'

It is clear from the aforesaid finding given by the Honble Supreme Court that the said decision related to the scope of powers of the revisional authority under s. 12 of Madras General Sales-tax Act, which is not pari materia with the provisions of s. 263. The provisions of s. 12(2) of the said Act do not authorise the revisional authority to consider as to whether the order of the AO is erroneous in so far as it is prejudicial to the interest of Revenue. It does not also authorise the revisional authority to make or cause to make such inquiry as he deems necessary. It also does not specifically authorises the revisional authority to enhance or cancel the assessment or direct a fresh assessment. The said provision authorises the revisional authority to pass such order as he thinks fit. The Honble Supreme Court, therefore, held that the expression 'may pass such orders with respect thereto as he thinks fit' must necessarily be confined to the scope of the jurisdiction conferred upon the revisional authority under s. 12(2). The revisional authority cannot, therefore, travel beyond the order passed by the inferior authority and also cannot make fresh inquiry and pass orders on merits on the basis of the said inquiry. In s. 263, the legislature has itself expressly conferred an authority on the CIT to make such inquiry as he may deem necessary and pass such orders

thereon as the circumstances of the case justify, including order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment in a case where he considers that any order passed by the AO is erroneous and prejudicial to the interest of the Revenue. The aforesaid judgment of the Honble Supreme Court in relation to interpretation of s. 12(2) of the Madras General Sales-tax Act, 1939, therefore, does not in any manner support the contention of the learned counsel for the assessee.

4.6 The learned counsel for the assessed had placed reliance on the judgment of the Honble Madras High Court in the case of Venkatakrishna Rice Co. vs. CIT (supra), in which an observation was made that escapement of revenue is taken care of by the other provisions in the Act. The aforesaid observations made by the Honble Madras High Court have to be read in the context in which such observations were made. It was held in the aforesaid judgment that order of assessment of the ITO was in accordance with law and, therefore, it could not be held to be erroneous in law and consequently, it could not be prejudicial to the interest of Revenue. After arriving at such conclusion based on the facts of that case, the Honble Madras High Court observed that the scope of interference under s. 263 is not to set aside merely unfavourable order or the section is not meant to get at sheer escapement of revenue, which is taken care of by other provisions in the Act. It nowhere lays down that escapement of income liable to tax in the original assessment will not render the order of the AO to be an erroneous order, which is prejudicial to the interest of Revenue. The Honble Madras High Court after holding that the prejudice that is contemplated under s. 263 is prejudice to the IT Administration as a whole. This judgment does not, in any manner, support the contention of the learned counsel for the assessee.

4.7/4.8 The contention of the learned counsel for the assessed that the multiplicity of the statutory remedies provided under ss. 147 and 263 has given rise to baffling controversial situation has to be dealt with in accordance with the provisions of law. If the legislature in its wisdom has provided such statutory remedies empowering the CIT to exercise his jurisdiction under s. 263 in a case where he considers that the order passed by the AO is erroneous in so far as it is prejudicial to the interest of the Revenue and also empowers the AO under s. 147 of the Act

to initiate proceedings for bringing to tax the income which has escaped assessment, it cannot place limitations and restrictions on the powers of the CIT to exercise revisional jurisdiction under s. 263 where income as under assessed or some income escaped the tax in the original assessment due to failure on the part of the AO to conduct necessary and proper investigation, which the facts and circumstances of the case warrant. The various Courts have held that simultaneous initiation of proceedings under s. 263 as well as proceedings under s. 147 are legally possible.

4.9 In this regard it will be imperative to go through the judgment of the Honble Delhi High Court in the case of Sharda Trading Co. vs . CIT : [1984]149ITR19(Delhi) . In that case also the question before the Honble Delhi High Court was that whether after issue of notice of reassessment by the ITO under ss. 147/148 of IT Act, 1961, the CIT has jurisdiction under s. 263 to revise the earlier order of assessment. The Honble High Court has held as under as reported at p. 23 of the said report :

'Arguments were made that if the two proceedings are allowed to go on simultaneously, there would be a conflict of judicial opinion. We have considered the two provisions and do not see any such possibility. The scope of jurisdiction of the CIT under s. 263 empowers him to make an order enhancing or modifying the order of assessment or cancelling an assessment and making a fresh assessment. When that is done, the original order of assessment made by the ITO ceases to exist and would merge in the order of the CIT in case of enhancement or modification. Once the CIT revises an order of assessment, the reassessment proceedings started under s. 147 would come to an end as there is no (subsisting) order of the ITO. If the reassessment is made by the ITO in pursuance of the proceedings initiated under ss. 147 and 148, then on reassessment the entire original assessment is set aside and ceases to exist with the result that the original order of assessment which the CIT was seeking to revise becomes non est.'

4.10 The Honble Gujarat High Court in the case of Orient Trading Co. vs . CIT : [1985]152ITR26(Guj) has also held as under :

'However, till a reassessment order is made by the ITO, it is open to the CIT to revise the assessment order. In the present case, admittedly, no reassessment was made by the ITO in pursuance of the proceedings initiated under ss. 147 and 148 of the Act when the CIT in exercise of his revisional power under s. 263 set aside the original assessment order. thereforee, as held by the Delhi High Court, it was open to the CIT to revise the assessment order under s. 263 of the Act. To this extent, we are in agreement with the Delhi High Court. However, with respect, we do not agree with the view of the Delhi High Court that if reassessment is made by the ITO in pursuance of a proceeding initiated under s. 147 and/or s. 148, then on reassessment, the entire original assessment is set aside and ceases to exist with the result that the original order of assessment which the CIT was seeking to revise becomes non est.'

4.11 The words 'prejudicial to the interest of Revenue used in s. 263 of the Act are of wide import and they will certainly cover within its ambit the cases where income liable to tax had been underassessed or income which had escaped assessment on account of the failure on the part of the AO to conduct necessary and proper investigation. In view of the plain language of s. 263 where no limitations or restrictions have been provided for, the CIT is clearly entitled to invoke jurisdiction under s. 263 in cases where he considers that the order by the AO is erroneous and prejudicial to the interest of Revenue regardless of the fact that action could also be taken by the AO under s. 147 for bringing to tax the income which had escaped assessment within the meaning of s. 147 of IT Act, 1961. Such a view is clearly fortified by the aforesaid judgment of the Honble Delhi High Court and Gujarat High Court. We, thereforee, do not find any merit in the aforesaid contention of the learned counsel for the assessee.

4.12 It is a well settled law that where the AO fails to make proper inquiries and investigation, such failure on the part of the AO will result in prejudice to interest of Revenue and initiation of action under s. 263 by the CIT under such circumstances will be perfectly valid and justified. Such a view is fully fortified by the judgment of Honble Gujarat High Court in the case of Addl. CIT vs . Mukur Corpn. : [1978]111ITR312(Guj) . The Honble Kerala High Court in the case of Malabar Industries Co. vs . CIT : [1992]198ITR611(Ker) has also held that in a case where

the ITO failed to apply his mind to the case in all its perspective, the order passed by the ITO was erroneous in so far as it was prejudicial to the interest of the Revenue and, therefore, the assumption of jurisdiction by the CIT under s. 263 of IT Act, 1961, was legal, valid and justified. The Honble Kerala High Court while giving such findings had followed the judgment of the Honble Supreme Court in the case of Tara Devi Aggarwal vs . CIT : [1973]88ITR323(SC) . The Honble Supreme Court in the case of Smt. Tara Devi Aggarwal (supra) has also held that the words 'prejudicial to the interest of Revenue' are of wide import and they should not be limited to a case where the order passed by the ITO can be considered to be one prejudicial to the revenue administration as such. It was held that even where an income has not been earned and is not assessable, merely because the assessed wants it to be assessed in his or her hands simply to assist someone else who would have been assessed to a larger amount, an assessment so made can certainly be erroneous and prejudicial to the interest of Revenue. The Honble Supreme Court further held that the CIT under s. 33B of IT Act, 1922 (equivalent to s. 263 of IT Act, 1961) has ample jurisdiction to cancel the assessment and may initiate proceedings for assessment under the provisions of the Act against some other assessed who according to the IT authorities, is liable for tax on such income. The Honble Supreme Court found support for this proposition from their decision in the case of Ram Pyari Sarawagi vs . CIT : [1968]67ITR84(SC) . The question whether an order of the ITO is prejudicial to the interest of Revenue and whether the ITO failed to apply his mind to the case in all its perspective and whether there was a failure on the part of the ITO to make proper and necessary inquiries or whether the facts and circumstances of the case warrant and justify further inquiries and deep investigation would depend upon the facts of each case. It will, therefore, be imperative to examine the facts of the present case in so far as it relates to the disputed items of income which are the subject-matter of order passed by the CIT under s. 263.

4.13 The details of transactions resulting in a loss of Rs. 4,06,93,010 referred by the CIT in his notice as well as order under s. 263 has been given by the assessed at p. 18 of the paper-book. A photo-copy of the said statement furnished at p. 18 of the paper-book is enclosed herewith. (Annexure)

4.14 The transactions of purchase and sales mentioned at S. No. 2 resulting in a loss of Rs. 1,91,25,000 were made through broker, Shri Harshad S. Mehta. Some of the other transactions mentioned in the aforesaid chart were made through broker, Jayantilal Khandwala & Sons. The photo-copies of brokers note submitted in support of the various contracts of purchase and sale of units of UTI referred in the aforesaid chart do not give any distinctive number of units of UTI purchased or sold by the assessee. The AO failed to make proper and necessary investigation. The least which the AO should have ascertained in that who were the persons who sold the concerned units of UTI through these brokers to the assessee. The loss of Rs. 4,06,93,010 alleged to have been suffered by the assessed must have given rise to substantial profits assessable to tax in the hands of the corresponding sellers. He has also not ascertained as to whether those sellers really owned and possessed the requisite number of units of UTI, which are claimed to have been sold by them through these brokers to the assessee. Likewise, the names of the buyers to whom the assessed has sold these units of UTI of a substantial amount through these brokers have not been ascertained. We also cannot ignore the fact that some of these transactions have been entered into by the assessed through the brokers, such as Shri Harshad S. Mehta who are the parties involved in the notorious share scam. It was necessary on the part of the AO to have conducted a deep investigation into all these transactions with a view to verify the reality and genuineness of the entire amount of loss claimed by the assessee. The AO has thus clearly failed to conduct necessary and proper inquiries and investigations in all its perspective which were absolutely necessary on the facts and circumstances of the present case.

4.15 The AO has not made necessary inquiries to ascertain the names and all other particulars of the sellers from whom the assessed had purchased the entire lot of units of UTI (1964 Scheme). The distinctive numbers of the various units of UTI purchased and sold by the assessed have also not been ascertained. It is not even known whether the sellers of the units of UTI really owned and possessed such large number of units of UTI in the month of April, 1991, when they entered into transactions of their sale to the assessed through such brokers. It is also not known whether the sellers of such units of UTI had received the dividend from UTI in respect of such units sold by them to the assessed and whether such dividend

income was shown by them as taxable income in their hands. The facts of the present case amply demonstrate that the AO failed to make proper and necessary inquiries from all possible angles which were necessary in view of the peculiar facts and circumstances of the present case. The AO had totally failed to apply his mind in relation to the various aspects arising out of such transactions of purchase and sale of units of UTI by the assessee. We are, therefore, of the considered opinion that the CIT has validly assumed jurisdiction under s. 263 and was right in arriving at the conclusion that the order passed by the AO was erroneous and prejudicial to the interest of Revenue with regard to the entire claim of loss of Rs. 4,06,93,010 claimed in the transactions of purchase and sale of units of UTI and IRFC Bonds shown in the aforesaid chart and also in relation to the question relating to assessability of dividend income on such units of UTI, which have been estimated by the CIT at Rs. 19.5 crores in the order passed by him under s. 263. We are, however, of the opinion that the learned CIT should have simply set aside the order of the AO in relation to the aforesaid two points and ought to have directed the AO to decide the aforesaid two points after conducting necessary investigation and inquiries and after providing reasonable opportunity to the assessed instead of giving a firm finding that total income has been underassessed by a sum of Rs. 2,10,31,425 in respect of loss on purchase and sale of units of UTI and also in relation to the firm finding given with regard to underassessment of income by a sum of Rs. 19.5 crores on account of dividend on such units of UTI. The firm findings given by the CIT in the order under s. 263 for inclusion of the said income of Rs. 2,10,31,425 and Rs. 19.5 crores are, therefore, cancelled and the order of the CIT in relation to these two items is modified to the extent that the CIT was rightly held that the order of the AO was erroneous and prejudicial to the interest of the Revenue as the same was passed without making proper and necessary inquiries in relation to the aforesaid two points and consequently the order of the CIT directing the AO to make fresh assessment after proper investigation and after giving due opportunity to the assessed in relation to the aforesaid two items, is upheld. The AO will not be influenced by the firm findings of underassessment of income given by the CIT while making the fresh assessment. The AO should make a fresh assessment in respect of these two items after making necessary inquiries and proper

investigation in accordance with the provisions of law and after providing reasonable opportunity to the assessee.

5. As regards third item involving the issue relating to taxability of accrued interest amounting to Rs. 25,44,657 is concerned, the assessed had submitted the following Explanation before the CIT :

'It may be mentioned that the interest of Rs. 25,44,657 as per cost memo [p. 521 of assessment records (refer p. 66 of the paper-book)] is the interest for 12 days, i.e., from 1st April, 1992 to 12th April, 1992 as apparent from the cost memo. This interest, therefore, pertains to the financial year ended 31st March, 1993, i.e., asst. yr. 1993-94. The assessed has duly accounted for this interest in its P&L; a/c relevant for the asst. yr. 1993-94. A copy of the annual audited accounts of the company for the financial year 1992-93 (please refer Sch. 8 - other income) along with the details of income from investments in which such interest has duly been considered is enclosed for ready reference at pp. 3 & 4.'

The details of interest income pertaining to asst. yr. 1993-94 was also produced before the learned CIT and a copy thereof has been submitted in the compilation at pp. 3 & 4. A perusal of the said detail of interest pertaining to the period from 1st April, 1992 to 31st March, 1993 clearly indicates that interest income of Rs. 25,44,657 on IRFC Bonds has duly been accounted for by the assessed in asst. yr. 1993-94 as its income in asst. yr. 1993-94. The CIT in para 18 of the impugned order has not challenged the correctness of the facts so explained before him. He has simply observed that the AO may verify this point and decide the matter accordingly. The CIT has not pointed out any facts or material on the basis of which it can be held that the order of the AO was erroneous and prejudicial to the interest of Revenue in relation to the aforesaid item of income by way of accrued interest amounting to Rs. 25,44,657. The order passed by CIT in relation to the aforesaid item of alleged accrued interest amounting to Rs. 25,44,657 cannot, therefore, be sustained.

6. One of the arguments advanced by the learned counsel for the assessed was that wholesale cancellation of the assessment order by the CIT was not valid and he should have directed the ITO to make a fresh assessment only with regard to

the specific items of income for which the show-cause notice was given under s. 263. We agree with the submissions made by the learned counsel for the assessed and modify the order of the CIT to the extent that the ITO will make a fresh assessment after making necessary and proper investigation only in respect of the two items of income - (i) relating to the loss of Rs. 4,06,93,010 claimed by the assessed in the purchase and sale of units of UTI, 1964, etc., as per details discussed herein before; and (ii) with regard to the dividend income on such units of UTI as discussed and decided in earlier paragraphs of this order.

7. The assessed has also raised a ground relating to directions given by the CIT in the order under s. 263 asking the AO that action under ss. 276C and 277 of IT Act, 1961 may also be examined. Such directions given by the CIT are clearly beyond the scope of s. 263 of IT Act, 1961. No such findings can be validly given while considering the question as to whether the assessment order passed by the AO was erroneous and prejudicial to the interest of the Revenue. The directions so given by the CIT are, therefore, directed to be deleted.

8. In the result, the order passed by the CIT under s. 263 is modified to the extent indicated in the various paras of this order.

ANNEX. - DETAILS OF TRANSACTION REFERRED TO BY THE CIT, DELHI (CENTRAL)-I, NEW DELHI IN HIS NOTICE UNDER S. 263 OF IT ACT, DT. 10TH JULY, 1995

S. No.

Particulars

Purchase Particulars

Date of Contract

Date of delivery by broker

Quantity

(Lacs)

Rate

(Rs.)

Value

(Rs.)

1.

Units of UTI

08-04-91

31-07-91

100

13.680

13,68.00,000

(p. 17)

(1964 Scheme)

09-04-91

31-07-91

100

13.725

13,72,50,000

(p. 16)

10-04-91

31-07-91

100

13.740

13,74,00,000

(p. 15)

10-04-91

31-07-91

100

13.740

13,74,00,000

(p. 14)

18-04-91

31-07-91

100

13.695

13,69,50,000

(p. 13)

Avg. Rate

13.716

68,58,00,000

2.

Units of UTI

19-04-91

31-07-91

100

13.692

13,69,25,000

(p. 9)

(1964 Scheme)

22-04-91

31-07-91

400

13.692

54,77,00,000

(p. 8)

68,46,29,000

*(1,91,25,000)

(27,97,500)

20,29,490

(1,98,93,010)

Other Transactions

3.

Units of UTI

500

13.35,549

66,77,97,500

(1964 Scheme)

4.

8% Tax Free

10

10,12,38,265

IRFC Bonds

(F.V. 10 Crores)

Sales Particulars

Profit/Loss

Date of Contract

Date of delivery by the company

Quantit

(Lacs)

Rate

(Rs.)

Value

(Rs.)

(Rs.)

30-07-91

31-07-91

200

13.30

26,60,00,000

(p. 12)

30-07-91

31-07-91

150

13.30

19,95,00,000

(p. 11)

30-07-91

31-07-91

150

13.30

19,95,00,000

(p. 10)

66,50,00,000

(2,08,00,000)

31-07-91

31-07-91

100

13.31

13,31,00,000

(p. 6)

31-07-91

31-07-91

400

13.31

53,24,00,000

(p. 7)

66,55,00,000

(1,91.25,000)

(3,99,25,000)

500

13.30

66,50,00,000

(27,97,500)*

10

10,32,67,755

20,29,490*

(F.V. 10 Crores)

4,06,93,010

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