

Section 263: Revision of orders prejudicial to revenue

Bare Act Summary

- (1) The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is *erroneous* in so far as it is *prejudicial to the interests of the revenue*, he may, after giving the assessee 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 1.—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

- (a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include—
- (i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;
- (ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf under section 120;
- (b) "record" shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Principal Commissioner or Commissioner;
- (c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as

it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

- (a) the order is passed without making inquiries or verification which should have been made;
 - (b) the order is passed allowing any relief without inquiring into the claim;
 - (c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or
 - (d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.
- (2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.
- (3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded.

Powers under section 263

The power under section 263 has been given to the Commissioner to revise the order of the Assessing Officer is introduced as Department has no right of appeal to the CIT (A) against any order passed by the Assessing Officer. It is for this reason, section 263 is enacted to empower the Commissioner with the authority of revising the order of Assessing Officer, where the order is erroneous and the error has resulted in prejudice to the interests of the Revenue. Thus, there has to be a proper application of mind by the Commissioner to come to a firm conclusion that the order of the Assessing Officer is erroneous and prejudicial to the interests of the Revenue.

The Supreme Court in CIT v. Shree Manjunathesware Packing Products and Camphor Works [1998] 231 ITR 53, held that the revisional powers conferred on the Commissioner of Income-tax under section 263 of the Act are of wide amplitude enabling the Commissioner to call for and examine the records under any proceeding of the Act and empowering the Commissioner to make or cause to make such enquiry as he deems necessary in order to find out whether any order passed by the Assessing Officer was erroneous and prejudicial to the interests of the Revenue. Therefore, when the powers conferred upon the Commissioner of Income-tax are of wide amplitude enabling the Commissioner to pass any order, it is not necessary for the Commissioner to record his final conclusion regarding the allowability of the claim of the assessee. It is sufficient if he comes to the conclusion on materials that the order of the Income-tax Officer was erroneous and prejudicial to the interests of the Revenue and if such a conclusion is arrived on the basis of materials on record. The order of the Appellate Tribunal that the Commissioner should record his final conclusion on the question, if accepted, would take away the powers conferred upon the Commissioner under section 263 of the Act to pass such order as the circumstances of the case would justify.

In the case of CIT v Amitabh Bacchan 2016 SCC Online SC 484 the Hon'ble Bombay High court upholds the power of the Commissioner to consider all aspects which were the subject matter of the AO's order, if in his opinion, they are erroneous, despite the assessee's appeal on that or some other aspect. The Court held that:

“Reverting to the specific provisions of Section 263 of the Act what has to be seen is that a satisfaction that an order passed by the Authority under the Act is erroneous and prejudicial to the interest of the Revenue is the basic pre-condition for exercise of jurisdiction under Section 263 of the Act. Both are twin conditions that have to be conjointly present. Once such satisfaction is reached, jurisdiction to exercise the power would be available subject to observance of the principles of natural justice which is implicit in the requirement cast by the Section to give the assessee an opportunity of being heard.

The power of revision under Section 263 is not contingent on the giving of a notice to show cause. In fact, Section 263 has been understood not to require any specific show cause notice to be served on the assessee. Rather, what is required under the said provision is an opportunity of hearing to the assessee. The two requirements are different; the first would comprehend a prior notice detailing the specific grounds on which revision of the assessment order is tentatively being proposed.

What is contemplated by Section 263, is an opportunity of hearing to be afforded to the assessee. Failure to give such an opportunity would render the revisional order legally fragile not on the ground of lack of jurisdiction but on the ground of violation of principles of natural justice”.

Essential Conditions under section 263

Thus, the two conditions which need to be satisfied for invoking the power under section 263 by the Commissioner are:

- (i) the order of the Assessing Officer sought to be revised is erroneous; and
- (ii) it is prejudicial to the interests of the Revenue.

If any one of these two conditions is absent, the Commissioner of Income Tax cannot take recourse to section 263 of the Act.

Erroneous

There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the assessing officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

The Bombay High Court in Commissioner of Income Tax v. Gabriel India Ltd., (1993) 203 ITR 108 held that “Erroneous” means “involving error’ or deviating from the law”. “Erroneous assessment” refers to an assessment that deviates from the law and is, therefore, invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the Assessing Officer in fixing the amount of valuation of the property. Similarly, “erroneous judgment” means “one rendered according to course and practice of court, but contrary to law, upon mistaken view of law, or upon erroneous application of legal principles”.

From the aforesaid definition it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualize a case

of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order, unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interest of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject matter of revision because the second requirement also must be fulfilled. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.”

Prejudicial to the interest of revenue

The phrase 'prejudicial to the interests of the revenue' is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide importance and is not conferred to only loss of tax.

The scope and purpose of section 263 has been well defined by Supreme Court in the case of Malabar Industrial Co. Ltd. v. CIT [(2000) 243 ITR 83] in the following words: “A bare reading of this provision makes it clear that the prerequisite to the exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income Tax Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. 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 interests of the Revenue. If one of them is absent if the order the Income Tax Officer is erroneous but is not prejudicial to the Revenue to if it is not erroneous but is prejudicial to the Revenue-recourse cannot be had to section 263(1) of the Act.

There can be no doubt that the provisions cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirements of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

The phrase '**prejudicial to the interests of the Revenue**' is not an expression of art and is not defined in the Act. It is of wide importance and is not confined to loss of tax.”

“The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this is entrusted to the Revenue. If due to an erroneous order of the Income Tax Officer, the Revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the Revenue. The phrase 'prejudicial to the interests of the Revenue' has to be read in conjunction with an erroneous order passed as a consequence of an order of the interests of the Revenue. For example, when an Income Tax and it has resulted in loss of Revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income Tax Officer is unsustainable in law.”

The High Court of Gujarat *in CIT v. Smt. Minalben S. Parikh, (1995) 215 ITR 81, as under:-*

“The words ‘prejudicial to the interests of the Revenue’ has not been defined. However, giving the ordinary meaning to the words used in the statute, they must mean that the orders under consideration are such as are not in accordance with law and, in consequence whereof, the lawful revenue due to the State has not been realized or cannot be realized. The well settled principle in considering the question as to whether an order is prejudicial to the interests of the Revenue or not is to address oneself to the question whether the legitimate

revenue due to the exchequer has been realized or not or can be realized or not if the orders under consideration are allowed to stand. For arriving at this conclusion, it becomes necessary and relevant to consider whether the income in respect of which tax is to be realized has been subjected to tax or not or if it is subjected to tax, whether it has been subjected to tax at the rate at which it could yield the maximum revenue in accordance with law or not. If the income in question has been taxed and legitimate revenue due in respect of that income had been realized, though as a result of an erroneous order having been made in that respect, the Commissioner cannot exercise the powers for revising the order under section 263 merely on the basis that the order under consideration is erroneous. If the material in that regard is available on the record of the assessee concerned the Commissioner cannot exercise his power by ignoring that material which links the income concerned with the tax realization made thereon. The two questions are inter-linked and the authority exercising the powers under section 263 is under an obligation to consider the entire material about existence of income and the tax which is realizable in accordance with law and further what tax has in fact been realized under the assessment order.”

When two views are inherently possible, the provision of section 263 would not attract.

It is trite that the power of revision does not extend to a debatable issue. In other words, if two possible views exist and the AO takes one of such possible views in the assessment order, the revision is ousted.

The principle laid down therein was followed in **Commissioner of Income-Tax vs. Max India Ltd.** [(2007) 295 ITR 282 (SC)], stating:

"In our view at the relevant time two views were possible on the word "profits" in the proviso to Section 80HHC(3). It is true that vide the 2005 amendment the law has been clarified with retrospective effect by insertion of the word "loss" in the new proviso. We express no opinion on the scope of the said amendment of 2005. Suffice it to state that in this particular *case* when the order of the Commissioner was passed under Section 263 of the Income Tax Act, 1961, two views on the said word "profits" existed."

Lack of Inquiry

The Hon'ble Delhi High Court in *CIT v. Sunbeam Auto Ltd* 332 ITR 167 held that the Assessing Officer in his order is not required to give detailed reason in

respect of each and every item of deduction, etc. Therefore, one has to see from the record as to whether there was application of mind before allowing the expenditure in question as revenue expenditure. It was held that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the CIT to pass orders under s. 263, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open. It was further held that if the AO had called for explanation on the very item from the assessee and the assessee had furnished his explanation, then it clearly shows that the AO had undertaken the exercise of examining as to whether the expenditure incurred by the assessee is to be treated as taxable or not. If the AO is satisfied with the explanation, and accepted the same. Then the CIT cannot hold that the AO should have made further inquiries rather than accepting the explanation. Therefore, it cannot be said that it is a case of 'lack of inquiry'.

In the case CIT v. Ganpat Ram Bishnoi (2008) 296 ITR 0292 the Rajasthan High Court held that "Undoubtedly, the jurisdiction under Section 263 is wide and is meant to ensure that due revenue ought to reach the public treasury and if it does not reach on account of some mistake of law or fact committed by the AO, the CIT can cancel that order and require the concerned AO to pass a fresh order in accordance with law after holding a detailed enquiry. But when enquiry in fact has been conducted and the AO has reached a particular conclusion, though reference to such enquiries has not been made in the order of the assessment, but the same is apparent from the record of the proceedings, in the present case, without anything to say how and why the enquiry conducted by the AO was not in accordance with law, the invocation of jurisdiction by the CIT was unsustainable. As the exercise of jurisdiction by the CIT is founded on no material, it was liable to be set aside. Jurisdiction under Section 263 cannot be invoked for making short enquiries or to go into the process of assessment again and again merely on the basis that more enquiry ought to have been conducted to find something."

Conclusion

In the view of the aforesaid judgements it is clear that the powers of the commissioner under section 263 of the Income Tax act should not to be exercised lightly and orders of subordinate authorities should

not be cancelled or set aside by him on the basis mere whims and fancies. Thus, for exercising his jurisdiction, there must be compelling reasons permitting CIT to interfere by exercising powers under section 263 of the Act.